BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF CONSOLIDATED EDISON COMPANY HUDSON AVENUE GENERATING STATION Permit ID: 2-6101-00042/00011 Facility DEC ID: 2610100042 Issued by the New York State Department of Environmental Conservation Region 2	)	ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT Petition No.: II-2002-10

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR OBJECTION TO PERMIT

On September 27, 2002, the Environmental Protection Agency ("EPA" or "Agency") received a petition from the New York Public Interest Research Group ("NYPIRG" or "Petitioner") requesting that EPA object to the issuance of a state operating permit to Consolidated Edison Company for its Hudson Avenue Generating Station ("Hudson Avenue") located in Brooklyn, New York.

The Hudson Avenue permit was issued by the New York State Department of Environmental Conservation, Region 2 ("DEC") on August 13, 2002, pursuant to title V of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7661-7661f, CAA §§ 501-507, the federal implementing regulations, 40 CFR part 70, and the New York State implementing regulations, 6 NYCRR Parts 200, 201, 621 and 624.

The Hudson Avenue facility is an electricity and steam generating facility operating five boilers ranging in size from 644 mmBtu/hr to 1,956 mmBtu/hr and three combustion turbines.

The boilers, divided into two emission units, combust residual oil and the turbines combust distillate oil.

The petition alleges that the Hudson Avenue permit, proposed by DEC, does not comply with 40 CFR part 70 in that: (1) the permit was issued in violation of the requirements of the New Source Review program; (2) the permit is deficient because it fails to incorporate the requirements from pre-existing permits issued to the facility; (3) the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5); (4) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B); (5) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR § 70.1(b) and 40 CFR § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions; (6) the permit does not assure compliance with all applicable requirements as mandated by 40 CFR § 70.1(b) and 40 CFR § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable; (7) the permit is based upon an inadequate permit application; and, (8) the final permit improperly limits the dates during which the permit conditions apply. NYPIRG requests that EPA object to the issuance of the Hudson Avenue permit pursuant to CAA § 505(b)(2) and 40 CFR § 70.8(d) for any or all of these reasons.

EPA has reviewed these allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which places the burden on the petitioner to "demonstrate to the Administrator that the permit is not in compliance" with the applicable requirements of the Act or the requirements of 40 CFR part 70. *See also* 40 CFR § 70.8(c)(1); *New York Public Interest Research Group v.*

Whitman, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

Based on a review of all the information before me, including the petition; the Hudson Avenue permit application and supplements to that application; NYPIRG's comments to the DEC on the Draft title V Operating Permit; DEC's Responsiveness Summary to NYPIRG's comments, dated June 12, 2002 ("Responsiveness Summary"); the Hudson Avenue permit of August 13, 2002; relevant statutory and regulatory authorities and guidance; and, two letters dated July 18, 2000 and July 19, 2000 from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection, EPA Region 2, to Robert Warland, Director, Division of Air Resources, DEC; I deny the Petitioner's request in part and grant it in part for the reasons set forth in this Order.

A. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act calls upon each State to develop and submit to EPA an operating permit program to meet the requirements of title V. EPA granted full approval to New York's title V operating permit program on February 5, 2002 . 67 *Fed. Reg.* 5216. Major stationary sources of air pollution and other sources covered by title V are required to apply for an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. *See* CAA §§ 502(a) and 504(a).

The title V operating permit program does not generally impose new substantive air quality control requirements (which are referred to as "applicable requirements") but does require permits to contain monitoring, record keeping, reporting, and other compliance requirements when not adequately required by existing applicable requirements to assure compliance by

sources with existing applicable emission control requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to enable the source, EPA, States, and the public to better understand the applicable requirements to which the source is subject and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under § 505(a) of the Act and 40 CFR §§ 70.8(a), States are required to submit all proposed operating permits to EPA for review. Section 505(b)(1) of the Act authorizes EPA to object if a title V permit contains provisions not in compliance with applicable requirements, including the requirements of the applicable SIP. This petition objection requirement is also reflected in the corresponding regulations at 40 CFR § 70.8(c)(1).

Section 505(b)(2) of the Act states that if EPA does not object to a permit, any member of the public may petition EPA to take such action, and the petition shall be based on objections that were raised during the public comment period[1] unless it was impracticable to do so. This provision of the CAA is reiterated in the implementing regulations at 40 CFR § 70.8(d). If EPA objects to a permit in response to a petition and the permit has been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue such a permit consistent with the procedures in 40 CFR §§ 70.7(g)(4) or (5)(i) and (ii) for reopening a permit for cause.

B. ISSUES RAISED BY THE PETITIONER

[1] *See* CAA § 505(b)(2); 40 CFR § 70.8(d). Petitioner commented during the public comment period, raising concerns with the draft operating permit that are the basis for this petition. *See* Letter from Keri N. Powell, Esq. of NYPIRG to DEC (February 22, 2002) ("NYPIRG Comment Letter").

On April 13, 1999, NYPIRG sent a petition to EPA which brought programmatic problems concerning DEC's application form and instructions to our attention. NYPIRG raised those issues and additional program implementation issues in individual permit petitions, including the instant petition, and in a citizen comment letter, dated, March 11, 2001 that was submitted as part of the settlement of litigation arising from EPA's action extending title V program interim approvals. *Sierra Club and the New York Public Interest Research Group v. EPA*, No. 00-1262 (D.C. Cir.).[2]

I. New Source Review Program

Petitioner alleges that the Hudson Avenue part 70 permit was issued in violation of the New Source Review ("NSR") Program requirements. Petition at 2. Petitioner's concerns regarding the NSR Program are summarized as follows:

- The reactivation of Boiler 100 triggered the applicability of the Prevention of Significant Deterioration ("PSD") requirements;
- The reactivation of Boiler 100 triggered the applicability of current non-attainment NSR requirements;
- The reactivation of Boiler 100 triggered the applicability of SIP approved version of 6 NYCRR Part 231; and

[2] EPA responded to NYPIRG's March 11, 2001 comment letter by letter dated December 12, 2001 from George Pavlou, Director, Division of Environmental Planning and Protection to Keri Powell, Esq., New York Public Interest Group, Inc (December 12 Letter). The response letter is available on the internet at http://www.epa.gov/air/oaqps/permits/response/.

- DEC's response to NYPIRG's title V comments fails to address NYPIRG's comments and concerns regarding the applicability of NSR. Further, Petitioner alleges DEC allowed Hudson Avenue to use more VOC emission reduction credits than granted.

(a) PSD Applicability

The Petitioner contends that the reactivation of a boiler, referred to as Boiler 100, at the Hudson Avenue facility should have been subject to PSD review. Petitioner observes that the Hudson Avenue facility is a major stationary source located in an attainment area for NOx, SO_2, and $PM_{10.}$ Boiler 100 was shut down in August, 1997 and reactivated in July, 2001. The Petitioner alleges that any emission decrease that Consolidated Edison achieved due to the shutdown of Boiler 100 in 1997 was invalidated by the reactivation of the boiler. NYPIRG alleges that because Boiler 100 has been reactivated, the emission decrease from its shutdown cannot be considered "creditable" under 40 CFR § 52.21(b)(3)(vi). Petition at pp 3-5.

A major modification at a major stationary source may "net out" of PSD review if the source identifies and quantifies any other prior increases and decreases in actual emissions that are contemporaneous with the particular change at issue and these emissions are otherwise creditable. Emission decreases are contemporaneous if they occur five years prior to when construction of the new source commences. *See* 40 CFR 52.21(b)(3)(ii)(incorporated by reference into the applicable implementation plan, 40 CFR 52.1689). Because the shutdown of Boiler 100 occurred within five years of the reactivation, the emission decreases are considered contemporaneous with the emissions increases associated with the reactivation. Reductions are creditable if the Administrator has not relied on them in issuing a PSD permit and that permit

remains in effect at the time of the proposed change. *See* 40 CFR 52.21(b)(3)(iii). In this case, Consolidated Edison applied for and received emission reduction credits for NOx, CO, and VOC following the shutdown of Boiler 100. None of these credits were sold, traded, or otherwise used by Consolidated Edison. EPA, therefore, disagrees with the Petitioner's assertion that the decreases associated with the shutdown of Boiler 100 in 1997 were invalidated by the reactivation and cannot be considered creditable. Neither the PSD regulations nor EPA guidance supports a rationale that allows the use of contemporaneous emissions decreases to offset and emissions increases resulting from a newly constructed boiler, but not from an existing boiler that has been reactivated and considered as a new source for PSD purposes. Therefore, EPA denies the petition on this issue.

(b) Non-Attainment NSR Applicability

The Petitioner identifies three main issues with respect to non-attainment NSR applicability: (1) the decreases associated with the shutdown of Boiler 100 cannot be considered creditable and Hudson Avenue cannot net out of NSR applicability under the current Part 231 regulations; (2) the reactivation of Boiler 100 is subject to the SIP approved version of 6 NYCRR Part 231 which does not allow for netting, and (3) DEC did not adequately address NYPIRG's comments and concerns as to the applicability of NSR. Petition at pp. 5-7.

The Petitioner further asserts that the current Part 231 requirements should be moved to the State-only section of the permit, while the SIP approved Part 231 requirements should be incorporated in the federally enforceable section. The Petitioner also claims that there is a discrepancy between the amount of VOC ERC's available to the facility versus the amount of

offsets that the facility's title V permit allows. Petition at pp. 7-9.

In its comments on the draft permit, the Petitioner brought to DEC's notice many of the issues raised here; DEC, however, provided only a cursory response to NYPIRG's comments regarding the applicability of non-attainment NSR. It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for public comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."); *see also*, *Action on Smoking & Health v. CAB*, 699 F.2d 1209 (D.C. Cir. 1983), citing *Alabama Power*, 636 F.2d 323, 384 (DC Cir. 1980). Accordingly, DEC has an obligation to respond to significant public comments and adequately explain the basis of its decision.

Petitioner's comments were significant comments, especially in light of the fact that DEC established a permit shield for NSR. DEC failed to provide a sufficient explanation of the computation of the emission increases and decreases or the source(s) of emission increases and/or decreases to allow EPA to conclude that non-attainment NSR requirements are not applicable to this facility. Therefore, EPA grants the petition on this issue and orders DEC to adequately address NYPIRG's comments regarding Part 231 and provide a detailed explanation, including the availability of netting, in the statement of basis.

III.[3] Pre-existing Permit Conditions

[3] Petition document skips from Section I to Section III and makes no reference to Section II. In keeping with the petition, the sections in the EPA's response corresponds to section numbers as they appear in the petition.

Petitioner alleges that DEC failed to incorporate permit conditions from pre-existing permits that are applicable requirements for the Hudson Avenue part 70 permit. Petitioner notes that existing air permits issued to Hudson Avenue establish overall emission limits for each boiler and are expressed as "permissible" emission rates. Petitioner asserts the SIP makes it clear that the "permissible emission rate" included in permits previously issued by DEC under a SIP-approved permit program pursuant to 6 NYCRR Part 201 is an enforceable requirement. Therefore, petitioner requests that EPA object to the Hudson Avenue permit because it fails to include federally enforceable emission limits from permits previously issued by DEC under a SIP-approved permit program. Petition at 10.

The Petitioner is correct that federally-enforceable conditions from permits issued pursuant to requirements approved into the New York SIP must be included in title V permits. *See* 40 CFR § 70.2; 6 NYCRR § 201-2.1. In its petition, however, NYPIRG makes a general claim and fails to identify any specific pre-existing permits or conditions that have not been incorporated into the title V permit. As such, the Petitioner has not demonstrated, in accordance with CAA § 505(b)(2), that the permit is not in compliance with the Act. Therefore, the petition is being denied with respect to this issue.

IV. Prompt Reporting of Deviations

Petitioner alleges the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B).[4] Petition at 11. NYPIRG

[4] 40 CFR § 70.6(a)(3)(iii)(B) states: "[t]he permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirement.

asserts that Condition 5, the primary condition governing prompt reporting, is flawed because DEC's language in this condition states that deviations will be reported according to time frames specified in the applicable requirement. Petitioner also charges that the reporting scheme in Condition 5 sets up arbitrary distinctions between different kinds of violation and creates a category for certain requirements that requires reporting of deviations only every six months.

Title V permits must include requirements for the prompt reporting of deviations. 40 CFR § 70.6(a)(3)(iii)(B). States may adopt prompt reporting requirements for each permit condition on a case-by-case basis, or may adopt general requirements by rule, or both. Whether the DEC has sufficiently addressed prompt reporting in a specific permit is a case-by-case determination under the rules applicable to the approved program, although a general provision applicable to various situations may also be applied to specific permits as EPA has done in 40 CFR § 71.6(a)(3)(iii)(B).[5]

As explained below, the Petitioner's allegation that the Hudson Avenue permit does not contain prompt reporting requirements is without merit. In issuing the Hudson Avenue permit, DEC included several provisions that report deviations promptly. The Petitioner has not demonstrated that the various reporting requirements contained in the permit fail to meet the standard set forth in part 70.

Condition 5 includes a general provision that if an applicable requirement includes a

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[5] EPA's rules governing the administration of the federal operating permit program require, *inter alia*, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. *See* 40 CFR § 71.(a)(3)(iii)(B)(1)-(4). Under this rule deviation reporting is governed by the time frame specified in the underlying applicable requirement unless that requirement does not include a requirement for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous air pollutant or toxic air pollutant that continue for more than an hour in excess of permit requirements, must be reported to the permitting authority within 24 hours of the occurrence.

definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame governs. Condition 5, as Petitioner notes, is "rather lengthy and sets up a variety of different reporting obligations depending on a variety of factors." Petition at 11. Aside from the general language of Condition 5 that petitioner references, the balance of Condition 5 contains clear provisions which describe reporting requirements for deviations based on the type of pollutant emitted.

The Hudson Avenue permit also has several provisions that require prompt reports of deviations to DEC based on the degree and type of deviation likely to occur. *See e.g.,* Conditions 23, 25, 26, 32, and 35. These conditions require that reports, including information on any deviations, be submitted more frequently than the semiannual reporting stipulated under the compliance certification requirements of title V and 40 CFR § 70.6(c)(5). These reports (including reports of deviations) are required to be submitted at time frames ranging from monthly to semiannually. For example, Conditions 25 and 26 prescribe that the sulfur-in-fuel content be reported monthly. This monthly reporting requirement includes reports of deviations and is more frequent than the semiannual reporting required by 40 CFR § 70.6(c)(5) and serves as prompt reporting consistent with 40 CFR § 70.6(a)(3)(iii)(B). DEC has properly used its discretion to require more frequent or prompt reporting.[6] Petitioner has not shown that DEC failed to exercise its discretion reasonably in defining "prompt" in relation to the degree and type

[6] Similarly, the permit requires quarterly reporting for NOx emissions as specified at Conditions 23, 32 and 35. Condition 32 requires continuous monitoring for NOx emissions. In this instance, the underlying rule at 40 CFR 75.64 establishes quarterly reporting which also serves as prompt reporting of deviations. Hudson Avenue's NOx emissions are monitored by CEMs and the collected data are averaged with other NOx emission data at other facilities under the NOx RACT plan which is a system-wide averaging plan. In this particular case, a deviation of NOx emissions at Hudson Avenue alone, or at any of the other facilities that are part of the plan, may be of no significance to the system-wide averaging plan. For this reason, quarterly reporting of the NOx emissions data is sufficiently prompt in light of the applicable requirement and the deviation likely to occur.

of deviation likely to occur or that the underlying requirements are deficient in prescribing reporting that is less than "prompt"as defined under 40 CFR § 70.6(a)(3)(iii)(B). Therefore, the petition is denied on this issue.

The Petitioner argues that Condition 5 sets up arbitrary distinctions between violations because there is no rational basis to require that a sixty-one minute violation of a hazardous air pollutant ("HAP") or toxic air pollutant ("TAP") is subject to the prompt reporting requirement while a sixty minute violation is not subject to that prompt reporting requirement. Petitioner suggests revising the reporting schemes so that the reporting times get progressively longer as the duration of the violation gets smaller. Although DEC includes this general language in Condition 5, the pollutants of concern at power plants, such as the Hudson Avenue station, are criteria pollutants such as NOx, SO_2, and CO not HAPs or TAPs. Because the Hudson Avenue permit does not contain permit requirements for HAPs and TAPs, this issue is not applicable in this instance. EPA denies the petition on this issue.

Petitioner also argues that the current scheme for monitoring opacity from the small combustion sources at the facility is meaningless in that it is unlikely a Method 9 test would ever be performed. Generally small combustion sources such as those at Hudson Avenue do not have opacity exceedances because as explained in greater detail at Section VIII.C., *infra*, they burn low sulfur distillate oil. Therefore, requiring a Method 9 test after visible emissions have been observed for two consecutive days and, in addition, requiring that DEC be notified within one business day if the Method 9 test indicates violations of opacity is adequate for these small combustion sources. EPA, therefore, denies the petition on this issue.

V. Reporting Requirements

Petitioner alleges that the excuse provision in New York's SIP is more restrictive than the provision in current New York regulations because it does not cover violations due to shutdowns or during upsets. Petition at 14. Petitioner's concerns regarding DEC's application form are summarized as follows: (a) the federally-enforceable section of the title V permit does not include the SIP version of the excuse provision; (b) the permit does not describe what constitutes Reasonably Available Control Technology ("RACT") during conditions that are covered by the excuse provision; and, (c) the permit fails to require prompt written reports of deviations from permit requirements due to startup, shutdown, malfunction and maintenance as required under 40 CFR § 70.6(a)(3)(iii)(B).

NYPIRG notes that the federally enforceable section of the permit does not include the "excuse" provision that is in New York's SIP approved by EPA at 6 NYCRR § 201.5(e) and specifically petitions the Agency to include this provision in the federally enforceable section of the permit. Petition at 15. [7]

EPA has previously addressed NYPIRG's concerns on a very similar issue regarding the state's excuse provision in prior petitions and in comments received from NYPIRG concerning DEC's title V permit program. *See* December 12, 2001 Letter. In summary, NYPIRG was concerned that the permits did not make it clear that violations of federal requirements cannot be excused unless the federal requirement itself provides for an affirmative defense. As a result,

[7] Petitioner has not raised this specific issue in other petitions requesting that the Administrator veto a title V permit(e.g., *In the Matter of Consolidated Edison Co. of NY, Inc. Ravenswood Steam Plant*, Petition No. II-2001-08 (September 30, 2003), *In the Matter of the Huntley Generating Station*, Petition No. II-2002-01 (July 31, 2003), *In the Matter of Dunkirk Power LLC*, Petition No. II-2002-02 (July 31, 2003)).

DEC committed to revise future permits to include language stating that the excuse provision of 6 NYCRR § 201-1.4 is not available to title V permittees for violations of federal regulations. Condition 5 references this excuse provision to inform permit holders that any reports made to claim an excuse are in addition to, but do not replace, the federally enforceable reporting requirements of the permit. DEC also committed to incorporate 6 NYCRR § 201-1.4, the state version of the excuse provision, on the state enforceable side of the permit which DEC has done in this permit. *See* Condition 68.

An excuse provision (somewhat different from that which the DEC is including in the state side of the permit) is applicable to approved SIP requirements. 40 CFR § 52.1679. Petitioner notes that because this provision is approved into New York's SIP, it should be included in the federally enforceable part of the permit. EPA grants on this issue and will work with the DEC to include appropriate language in the permits. The current language of the permit requires that any reporting necessary to effectuate a request that a violation be excused is in addition to all other reports, including the deviation reports, semiannual reports and annual compliance certification reports. Therefore, no additional reports from the permit holder are required other than those necessary to seek the excuse as specified in the rule.

EPA disagrees with the Petitioner's second point that the permit must define RACT as it applies during maintenance, startup, or malfunction conditions. Petition at 15-16. The SIP requirements at 6 NYCRR § 201.5 require facilities to use RACT during any maintenance, startup, or malfunction condition. The term "RACT" is defined in the New York SIP at 6 NYCRR § 200.1(bp) as the: "lowest emission limit that a particular source is capable of meeting by application of control technology that is reasonably available, considering technological and

economical feasibility." In those instances where a facility has requested that the DEC Commissioner excuse an exceedance during times of startup, malfunction or maintenance, RACT is determined by the DEC on a case-specific basis.

As a practical matter, it is not possible to set forth in advance a detailed definition of RACT that will address all possible startup, shutdown or malfunction events throughout the life of the permit. The specific technology that will constitute RACT will depend on both the nature of the violation and the technology available when the violation occurs. The "excuse" provision allows that determination to be made on a case-by-case basis by the DEC Commissioner if and when she chooses to exercise her authority to excuse a violation. The applicable requirement associated with the emission unit at which the deviation occurred would be incorporated elsewhere in the permit, and this requirement would apply at all times. The purpose of this case-by-case RACT determination is to mitigate the violation or exceedance of the applicable requirement until such time as compliance can once again be achieved. Therefore, EPA denies the petition on this issue.

The Petitioner also raises an issue with regard to prompt written reports of deviations from permit requirements due to startup, shutdown, malfunction, and maintenance. Petition at 16. The Hudson Avenue title V permit requires the permittee to inform DEC of an exceedance when seeking the DEC Commissioner's discretion to excuse such exceedance under 6 NYCRR § 201-1.4. This "excuse" provision is in the state-only section and is not applicable to the federal section of the permit.

Reporting in order to preserve the claim that the deviation should be excused is not a required report. The "excuse" reports are in addition to all the other deviation reports. Any

deviation for which an excuse is sought will be reported as a deviation or violation in the six-month report and, if required, in the prompt report of a deviation. The prompt reporting requirement is discussed in detail in Section IV. Deviations from an applicable requirement are required to be reported regardless of the cause of the deviation and these reports are required by other provisions of the permit. *See* discussion in Section IV, *supra*, for a more detailed discussion on prompt reporting of deviations. EPA denies the petition on this issue.

VI. Annual Compliance Certification

Petitioner alleges that the permit distorts the annual compliance certification requirement of CAA § 114(a)(3) and 40 CFR § 70.6(c)(5) by not requiring the facility to certify compliance with all permit conditions. Petitioner raises three issues with regard to the annual compliance certification. First, the Petitioner claims that because the Hudson Avenue permit labels certain terms "compliance certification", only these terms are included in the annual certification requirement. Petition at 17. Second, the Petitioner is concerned that the language in the permit suggests some conditions are not subject to certification because the permit, under the "General Permittee Obligation" heading, states "[t]he items listed below are not subject to the annual compliance certification requirements under Title V." Third, Petitioner alleges that the permit is vague with regard to the deadline to submit the annual compliance certification.

The language in the permit that labels certain terms as "compliance certification" conditions does not mean that the Hudson Avenue facility is only required to certify compliance with the permit terms containing this language. "Compliance certification" is a data element in New York's computer system that is used to identify terms that are related to monitoring

methods used to assure compliance with specific permit conditions. Condition 6 of the permit delineates the requirements of 40 CFR §§ 70.6(c)(5) and 6 NYCRR § 201-6.5(e), which require annual compliance certification with the terms and conditions contained in the permit. Condition 6 further clearly states that "the provisions labeled herein as "Compliance Certification" are not the only provisions of this permit for which annual certification is required."

The language in the Hudson Avenue permit follows directly the language in 6 NYCRR § 201-6.5(e) which, in turn, mirrors the language of 40 CFR §§ 70.6(c)(5) and (6). 6 NYCRR § 201-6.5(e) requires certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. 6 NYCRR § 201-6.5(e)(3) requires the following in annual certifications: (i) the identification of each term or condition of the permit that is the basis of the certification; (ii) the compliance status; (iii) whether the compliance was continuous or intermittent; (iv) the methods used for determining the compliance status of the facility, currently and over the reporting period; (v) such other facts the department shall require to determine the compliance status; and (vi) all compliance certifications shall be submitted to the department and to the Administrator and shall contain other provisions as the department may require to ensure compliance with all applicable requirements. The Hudson Avenue permit includes this language at Condition 6. Therefore, the references to "compliance certification" do not negate DEC's general requirement for compliance certification of terms and conditions contained in the permit. EPA is denying the petition on this point.

NYPIRG objects to the fact that items listed as "General Permittee Obligations" in the Hudson Avenue permit are not subject to annual certification. NYPIRG alleges that DEC's revised title V format for the Hudson Avenue permit does not meet the annual compliance

certification requirements of 40 CFR § 70.6(b)(5). NYPIRG notes that DEC lists certain items under "General Permittee Obligations" which the permit states "are not subject to the annual compliance certification requirements under Title V.

As a general matter, EPA does not object to a permitting authority's inclusion of a list of general advisory items that do not require certification. However, the "Notification of General Permittee Obligations" section in this permit appears under the heading "Federally Enforceable Conditions." Federal regulations require annual certification for "terms and conditions" contained in the permit. 40 CFR § 70.6(c)(5). As such, the items in the "Notification of General Permittee Obligations" section are subject to certification. EPA, therefore, objects to this permit because it attempts to exclude what are represented to be "Federally Enforceable Conditions" from the certification requirement.

DEC's Letter of Commitment outlined that DEC would "[o]n a case-by-case basis, . . . exclude from the certification terms that do not create an obligation on the permittee." Letter from Carl Johnson, Deputy Commissioner, DEC to George Pavlou, Director, EPA, Region 2, dated November 16, 2001 at 7. EPA will work with DEC during the permit re-opening process to identify items on this list that may be excluded from the annual certification requirement based on whether these items are purely advisory in nature and are not obligations of the permittee. EPA grants the petition on this issue.

In addition, Petitioner alleges that the permit violates 40 CFR § 70.6 because it fails to clarify the deadline for submittal of the annual compliance certification. The permit states that the annual certification is "due 30 days after the anniversary date of four consecutive calendar quarters. The first report is due 30 days after the calendar quarter that occurs just prior to the

permit anniversary date, unless another quarter has been acceptable by the Department." *See* Condition 6. Petitioner cites a number of problems with this language. First, Petitioner states, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. Second, by adding "unless another quarter has been acceptable by the Department," Petitioner believes that the permit is rendered unenforceable by the public because it is unclear how the Department will revise the date that the certification is due. Specifically, Petitioner is concerned that the DEC can change the due date through an oral conversation with the permittee, without the public knowing that the deadline has been changed. Also, Petitioner finds the phrase "calendar quarter that occurs just prior to the permit anniversary date" vague because it is unclear when quarters begin and end. Petitioner concludes that the annual compliance certification is unenforceable as a practical matter and requests EPA to object to this permit.

Under the "Reporting Requirements" section of Condition 6, the permit states that "[t]he initial report is due 7/30/2003" and that "[s]ubsequent reports are due on the same day each year." As such, EPA does not agree with Petitioner's argument since the permit clearly identifies an enforceable deadline for the initial compliance certification report as well as subsequent annual compliance reports. EPA therefore denies the petition on this point.

VII. Permit Application

Petitioner alleges that the applicant did not submit a complete permit application in accordance with the requirements of the Clean Air Act, 40 CFR § 70.5(c) and 6 NYCRR § 201-6.3(d), especially as these provisions incorporate provisions of CAA § 114(a)(3)(C). Petition at

18. Petitioner's concerns regarding DEC's application form are summarized as follows:

a. The application form lacks an initial compliance certification with respect to all applicable requirements. Without such a certification, it is unclear whether Hudson Avenue is in compliance with every applicable requirement;

b. The application form lacks a statement of the methods for determining compliance with each applicable requirement upon which the compliance certification is based;

c. The application form lacks a description of all applicable requirements that apply to the facility; and

d. The application lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement.

a. Initial Compliance Certification

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims that Hudson Avenue's permit application failed to submit a proper initial compliance certification, EPA considers whether the petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* CAA § 505(b)(2) (objection required "if the petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); 40 CFR § 70.8(c)(1). As explained below, EPA believes that the petitioner has failed to demonstrate that the lack of a proper initial compliance certification, certifying compliance with all applicable requirements at the time of application submission in this instance resulted in, or may have resulted in, a deficiency in the permit.

Although the application form used by Hudson Avenue did not clearly require that it certify compliance with all applicable requirements at the time of application submission,[8] it is reasonable to infer that, in this case, by acknowledging non-compliance with certain applicable requirements the source effectively certified that it was in compliance with the remainder of the requirements applicable to it at the time of application submission. Hudson Avenue certified that it would be in compliance with all applicable requirements, with the exception of opacity requirements for its five boilers. The application submitted by Hudson Avenue included a Compliance Plan section (section IV), where the applicant may certify non-compliance with applicable requirements as well as provide information regarding the details of any compliance schedule. Hudson Avenue certified non-compliance with 6 NYCRR Part 227 regulations and referenced an Order on Consent between the State of New York Department of Environmental Conservation and Consolidated Edison Company, dated September 16, 1997 ("Consent Order") to address the opacity exceedances at the facility.

Under the terms of the Consent Order, Hudson Avenue installed Continuous Emission Monitoring Systems to monitor opacity from each stack venting the steam and electric generating unit boilers. The Consent Order is referenced in the title V permit at conditions 47 and 51.[9] A review of the annual certification report for August 13, 2002 through June 30, 2003, indicates an

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[8] In accordance with the DEC's November 16, 2001 letter, the permit application form was changed to clearly require the applicant to certify compliance with all applicable requirements at the time of application submission. The application form and instructions were also changed to clearly require the applicant to describe the methods used to determine initial compliance status. With respect to the citation issue, the application instructions were revised to require the applicant to attach to the application copies of all documents (other than published statutes, rules and regulations) that contain applicable requirements.

[9] Since the consent order is referenced in the permit, the Permit Review Report must explain that the order is available in the permit file.

occasional opacity deviation and shows compliance with the remaining applicable requirements. EPA concludes that the Petitioner has not adequately demonstrated that the failure, in this instance, to submit a different initial compliance certification resulted in a deficiency in the final Hudson Avenue permit, and for this reason, EPA denies the petition on this issue.

b. Statement of Methods for Determining Initial Compliance

Petitioner alleges that the application of the facility to include "a statement of methods used for determining compliance," as required by 40 CFR § 70.5(c)(9)(ii). Although the initial application form completed by Hudson Avenue did not specifically require the facility to include a statement of methods used to determine initial compliance, the application was supplemented on March 20, 2002 to include the compliance methods for all of the listed applicable requirements. Hudson Avenue's Title V application, dated March 20, 2003 ("March Supplement"). Thus, the permit application references each method that is used at the facility for assuring compliance. For this reason, EPA denies the petition on this point.

c. Description of Applicable Requirements

The Petitioner claims that Consolidated Edison's permit application lacked a description of all applicable requirements that apply to the Hudson Avenue facility which makes it difficult for a member of the public to determine whether the draft permit contains all applicable requirements and to evaluate the adequacy of the monitoring. As explained in the White Paper for Streamlined Development of Part 70 Permit Applications (July 10, 1995) at 20-21, citations may be used to streamline how applicable requirements are described in the application, provided the cited requirement is made available as part of the public docket on the permit action or is otherwise readily available. In addition, a permitting authority may allow an applicant to cross-

reference previously issued preconstruction and part 70 permits, state or local rules and regulations, state laws, federal rules and regulations, and other documents that affect the applicable requirements to which the source is subject, provided the citations are current, clear and unambiguous, and all referenced materials are currently applicable and available to the public. Documents available to the public include regulations printed in the Code of Federal Regulations or its state equivalent. *id.*

In describing applicable requirements, the Hudson Avenue permit application (both in the original application and in the supplements) refers to state and federal regulations. These regulations are publicly available and are also available on the internet. *See e.g.,* DEC's regulations at *www.dec.state.ny.us/website/regs/.* The Hudson Avenue permit also contains references to applicable requirements that, as a general matter, are not as readily available such as the NO_x RACT plan and the Consent Order. These documents were referenced in the supporting documentation and are part of DEC's permit record files for Hudson Avenue. The Petitioner has not shown that any of the citations were in error or that the referenced material is not available to the public. Therefore, EPA denies the petition on this point.

d. Statement of Methods for Determining Ongoing Compliance

Petitioner alleges that the application form lacks a description of or reference to any applicable test method for determining compliance with each applicable requirement. EPA disagrees with Petitioner that the application failed to describe the methods Hudson Avenue will use to determine its compliance status relative to each applicable requirement. Hudson Avenue provided supplemental information on March 20, 2003 which includes for each emission point a description of the methods for determining compliance with each applicable rule/requirement.

See March Supplement. For example, page 3 of the March Supplement prescribes stack testing per Method 5 to assure compliance with the 6 NYCRR § 227-1.2(a)(1) particulate matter emission limit for the boilers. Further, the March Supplement indicates that it will determine the NOx emissions rate from the combustion turbines by performing a Method 20 stack test. March Supplement at 4. Some additional examples include, prescribing the use of COMS on the boilers to comply with the opacity standards and the use of a certified 40 CFR Part 75 monitoring system to comply with the NOx Budget requirements. Also, the final permit contains descriptions of, or reference to, applicable testing/monitoring methods for determining compliance with each applicable requirements. Thus, EPA denies the petition on this issue.

VIII. Monitoring

Petitioner alleges that the Hudson Avenue permit contains permit conditions that have either no or insufficient monitoring and that permit conditions are not practicably enforceable. Petition at 19. Petitioner's allegations regarding the adequacy of monitoring are addressed below.

a. Ongoing Compliance with Particulate Matter Emission Limits

Petitioner observes that the combustion turbines at Hudson Avenue burn distillate oil and are subject to the 0.10 lb/mmBtu particulate matter emission limitation included the approved SIP at 6 NYCRR § 227.2(b)(1). Petitioner alleges that a single stack test every three years does not assure a plant's day-to-day compliance and believes DEC should require a stack test each year-supplementing this with some form of surrogate monitoring. Further, Petitioner alleges that the permit must include annual stack testing for Boiler 100 to ensure compliance with the

particulate limit on an annual basis. Petition at 21.

While more frequent stack testing, as recommended by NYPIRG might enhance monitoring at the source, the regulations at 40 CFR § 70.6(a)(3)(i)(B) call for "monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit . . ." Particulate emissions from combustion sources such as the turbines and boilers at Hudson Avenue depend predominantly on the quality of the fuel fired and the combustion efficiency of the source. For small combustion sources, such as the combustion turbines at Hudson Avenue that fire only distillate oil, particulate emissions are generally low. *See* Condition 2. Because the emissions are typically small and the source monitors the fuel quality per shipment as prescribed in Condition 25, EPA believes a stack test once every three years is sufficient to assure compliance with the particulate matter emissions for these small sources.

For Boiler 100, however, which burns residual oil (which results in higher particulate emissions than distillate oil) a stack test every three years in the absence of additional parametric monitoring and other maintenance procedures for Boiler 100 is inadequate to assure compliance with PM emission limits for the relevant time period, nor would such monitoring yield data representative of the source's compliance with its permit conditions. As such, EPA is partially granting the petition with respect to the PM monitoring for Boiler 100 and requiring DEC to supplement the stack testing requirement for Boiler 100 with a requirement to monitor the combustion efficiency of the boiler. Such combustion efficiency monitoring can be in the form of annual tune-ups. The annual tune-up shall consist of preventative and corrective measures to optimize the combustion efficiency of the unit and shall include appropriate record keeping.

Because the particulate emissions are a result of the completeness of combustion as well as fuel quality, when the permit is reopened to include a requirement for annual tune-ups, EPA believes this along with the fuel certifications would be sufficient to assure compliance with the PM standard between emission tests. As such, annual emission tests are not necessary. DEC is ordered to reopen the permit to include a requirement such as annual tune-ups to monitor the combustion efficiency of the boiler in addition to the existing requirement for stack testing every three years. Therefore, EPA grants in part and denies in part the petition on this issue.

b. Episode Action Plan

Petitioner alleges that although Permit Condition 24 makes the Hudson Avenue facility subject to 6 NYCRR § 207, it fails to require record keeping that demonstrates compliance with its episode action plan whenever an air pollution episode occurs. Additionally, the Petitioner believes that the permit should set out the factors that the Commissioner uses to make a determination that an air pollution episode exists. Petition at 21.

EPA agrees with Petitioner that the title V permit must include a record keeping requirement to assure Hudson Avenue's compliance with its episode action plan. However, it is necessary to include in the title V permit the criteria that the Commissioner uses to determine what constitutes an air pollution episode. These criteria are on file with the Commissioner and are available to the public. *See* 6 NYCRR § 207.3 (a). The source does not decree what constitutes an air pollution episode and has no role in determining and notifying the public of an air pollution episode. Such functions are the DEC's prerogatives. Therefore, EPA is granting the petition in part and requires DEC to include record keeping requirements, for the episode action plan, consistent with 6 NYCRR § 207, to ensure the facility has taken all necessary steps

as outlined in their approved plan. In addition, EPA notes that the permit cites an outdated version of the plan. When DEC incorporates the record keeping requirement, they should also update the permit cite to the most current plan (October 28, 1997). EPA denies the petition on the issue of including in the title V permit, factors for the Commissioner's determination that an air pollution episode exists.

c. Compliance with Opacity Limitations

Petitioner asserts that the permit lacks any kind of monitoring to assure compliance with the applicable opacity standards at 6 NYCRR § 211.3, limits the opacity from any air contamination source to less than 20% (six-minute average) except for one continuous six-minute period per hour of not more than 57% opacity. Petition at page 21.

Condition Z mirrors the requirements of 6 NYCRR § 211.3 and is a general condition that applies to the facility as a whole but is monitored and enforced at the permit's "Emission Unit Level" section, where specific emission units are regulated. Except for emissions units that are subject to particulate matter or opacity limits established by rule, permittees may not know how to apply specific monitoring to a facility-wide condition because different emissions units can create opacity through different processes (combustion, material storage) and reach the atmosphere in different ways (stacks, fugitive). Indeed, an operator may be unable to conduct the same kind of monitoring at each opacity-emitting emissions unit at a facility. Thus, it is more appropriate to include unit specific monitoring in the Emission Unit Level section of the permit, as was done in the Hudson Avenue permit at Conditions 46, 50, 64, 65, and 66. All of these conditions impose an opacity limit of 20% which cover all of the opacity emitting units at the facility including the boilers and combustion turbines. In addition, these conditions contain the

appropriate record keeping and reporting and are subject to the annual certification requirement. Accordingly, EPA denies the petition with respect to this issue.

Petitioner notes that 6 NYCRR § 227-1.3 applies to the boilers and the combustion turbines. While agreeing that COMS is the most effective way to monitor opacity of boiler emissions, Petitioner alleges that the permit does not contain clear, enforceable requirements that pertain to the operation and maintenance of the COMS. Petition at 21. The permit states that the owner shall "operate in accordance with manufacturer's instructions, and properly maintain" the COMS. Petitioner asserts that to assure that opacity is monitored properly, the permit must contain specific requirements with respect to the operation and maintenance of the COMS.

The manufacturer's recommendations are only one of the monitoring requirements for the boiler COMS. The permit requires the opacity monitors to be maintained to satisfy the criteria of 40 CFR Part 60, Appendix B. *See* Permit Conditions 46 and 50. Further the Consent Order, which is referenced into the permit at Conditions 47 and 51, requires the opacity monitors to be operated in accordance with the requirements of 40 CFR Part 75 that includes extensive QA/QC procedures and are publicly available. EPA believes that the monitoring requirements with respect to the COMS are adequate to assure compliance with the opacity requirements.

Petitioner also contends that the opacity monitoring established at Conditions 61-63, for the combustion turbines is unsatisfactory. The permit requires daily observation of visible emissions. If visible emissions are observed for two consecutive days, a Method 9 test must be performed within the next two business days. The Petitioner asserts that the permit should require Hudson Avenue to take immediate corrective action whenever visible emissions are observed, keep records of corrective action taken in addition to records of daily observations,

and submit a report to DEC whenever visible emissions are observed from the combustion turbines. Petition at 21-22.

The combustion turbines burn low sulfur distillate oil which results in particulate emissions well below the emission limit. Therefore, such combustion turbines generally do not have opacity exceedances. As such, EPA believes that a two-day time frame of observing visible emissions before requiring a Method 9 test is reasonable and appropriate because of the size of the unit and the type of fuel combusted. Hudson Avenue is already required to keep records and submit reports. *See* Permit Conditions 58, 64, 65 and 66 requiring daily entries in a bound logbook and semiannual reporting of visible emissions. EPA disagrees that reports need to be submitted to DEC after every observance of visible emissions as this information is maintained in the logbook and is available for DEC to review. In addition, the permit requires the source to notify DEC within one business day after performing a Method 9 analysis if there is a violation of the opacity standard. This notification is in addition to the semiannual reports that the facility must submit to the DEC. Therefore, the record keeping and reporting structure established in the permit is sufficient to assure compliance with the opacity limits.

The Petitioner alleges that the permit is deficient because it fails to set a date by which the COMS/CEMS must be installed or if they have already been installed, fails to remove the language calling for installation. Also, NYPIRG asserts that all emissions must be reported, not just excess emissions. Furthermore, the permit must be revised to specify the exact amount of time in which the COMS are required to record data.

Hudson Avenue has already installed all required COMS/CEMS and is in compliance with its 1997 Consent Order. *See* Responsiveness Summary at 7. EPA disagrees that this

language needs to be removed from the permit as it is general language taken directly from 6 NYCRR § 227-1. The COMS record data continuously. The data is maintained at the site and is available for DEC to review. EPA sees no reason, and NYPIRG has not demonstrated a need, to require the facility to submit in addition to the excess emission reports, all emissions data to DEC. Furthermore, Appendix A, Item 2 of the Consent Order requires the COMS to be operated in accordance with 40 CFR part 75. Part 75 requires the monitors to be operated at all times when the source combusts fuel except for certain specified periods such as during calibration or preventive maintenance. While in operation, COMS record data continuously indicating when and how long the COMS are in use. EPA believes that there is no need to revise the permit to further specify the exact amount of time the COMS are required to record data.

The Petitioner also claims that permit Condition 58 is deficient because it fails to explain whether either continuous opacity monitors or opacity monitoring by Method 9 are applicable. Petition at 22. Petitioner comments that the Condition 58 should be revised to state that Method 9 testing must be performed when COMS are inoperable and that Method 9 testing must be conducted by an employee trained in Method 9 Petitioner asserts that Condition 58 should include daily monitoring of visible emissions and require quarterly reporting of these emissions.

Condition 58 clearly identifies that monitoring of visible emissions must be conducted once a day, followed by a Method 9 test if visible emissions are observed for any two consecutive days. To conduct a Method 9 test, a facility must follow the procedures prescribed at 40 CFR part 60,[10] Appendix A, which also includes the requirements for the training and

[10] Elsewhere in this permit (*See* Conditions 64, 65, 66), when Method 9 is referenced, the full citation to 40 CFR Part 60 Appendix A is included. In the interest of clarify and consistency, the full citation should also be included here.

certification of Method 9 observers. Further, any variances in visible emissions will be included in the semi-annual excess emissions report. Therefore, EPA finds no merit to this particular issue.

d. Risk Management Plans

The Petitioner alleges that the permit fails to assure the plant's compliance with its risk management plan and should state whether Hudson Avenue is subject to CAA § 112(r) and provide plan details. Petition at page 22.

While EPA agrees with the Petitioner that this condition is very general and does not provide information regarding the applicability of § 112(r) to this particular source, EPA does not believe that the absence of such a determination provides a basis for EPA to object to this permit. DEC did not take delegation of § 112(r); therefore EPA is responsible for implementing such requirements in New York. Whether or not a specific source is subject to § 112(r) is determined by EPA, not the State. Because all applicable requirements must be included in title V permits, during the early stages of implementation of New York's title V program, EPA asked DEC to include a general requirement regarding § 112(r) in all permits (based on language prepared by EPA). New York has included such general language in all title V permits as requested by EPA. Although we agree that this condition is not optimal, the circumstances do not warrant objecting to the permit on this issue. Therefore, EPA denies the petition on this issue.

e. NOx Budget Obligations

The Petitioner alleges that the permit fails to explain how the NOx Budget Rule applies to the facility and that the Hudson Avenue permit merely restates the general language from the NOx Budget rule. Petitioner objects to the fact that Condition 48, which requires a source that is

not subject to 40 CFR part 75 to submit a monitoring plan, does not indicate whether Hudson Avenue is subject to it. The Petitioner asserts that the permit must be revised to include more specific information, such as whether the facility is subject to 40 CFR part 75 and whether the facility has submitted an alternative monitoring plan and that the content of any such plan must be the subject to public review.

The Hudson Avenue permit at Conditions 48 and 60 reference 6 NYCRR Part 227-3. Part 227-3 applies to the pre-2003 NOx Budget program which has subsequently been replaced by 6 NYCRR Part 204. *See* 6 NYCRR Part 227-3.3(b)(5) which clearly identifies the allocation period as "the time period encompassing the calendar years 1999 through 2002. As such, all sources are now required to comply with Part 204 which is part of the approved SIP. *See* Conditions 10 through 23. However, at the time of permit issuance Hudson Avenue was still subject to the pre-2003 NOx Budget program (Part 227-3). Under Part 204, all NOx Budget sources are subject to 40 CFR part 75. There are no alternative monitoring plans, other than certain compliance options, under Part 204. The Petitioner's allegation is no longer on point and EPA denies the petition on this issue.

f. Compliance with NOx RACT

The Petitioner notes that Hudson Avenue complies with New York's NOx RACT rule, 6 NYCRR § 227-2, by averaging the NOx emissions of all its facilities in New York City. Petition at 23. The Petitioner alleges that since the NOx RACT rule establishes emission limits for the Hudson Avenue boilers, they must be included in the title V permit; however, the permit may explain that the plant is complying through system-wide averaging. Petitioner further alleges that the permit must state which version of Con Edison's NOx RACT plan is being incorporated by

reference into the permit and include a copy of such on DEC's website. *Id.*

Consolidated Edison operates under a system-wide NOx RACT plan which is part of the approved SIP. 6 NYCRR § 227-2 *et. seq.* Under this plan, the Hudson Avenue facility complies with NOx RACT requirements through a system-wide averaging plan across several other Consolidated Edison facilities located in New York City. 6 NYCRR § 227-2.5 enables permit holders to comply with the applicable NOx RACT emission limits through this system-wide averaging plan by meeting a "weighted-average allowable emission rate" from units that are operating. See 6 NYCRR Part 227-2.2(b)(2). Generally speaking, under a NO_X RACT plan that meets the regulatory criteria, although the emission point-specific emission limits contained in the SIP regulations are used to establish a system-wide limit, that system-wide limit is the enforceable limit, enforced through an emissions averaging concept (i.e., installing more stringent controls on some units in exchange for lesser control on others). *See* 92 Fed. Reg. 55625 (Nov. 25, 1992). And, when a NO_x RACT system-wide plan is applicable, emission limits formerly required under the regulations are replaced by a system-wide averaging plan. 6 NYCRR § 227-2.5(b). The requirements that normally would be applied to a specific unit are subsumed and, instead are applied through a weighted average as defined in 6 NYCRR § 227-2.2(b)(19). As such, individual boiler limits are not included in the permit because the NOx RACT requirements are enforced under the NOx RACT system-wide plan rather than at an emission unit level. Although the Hudson Avenue permit record contains all the information regarding its NOx RACT plan and its method of compliance with the plan, when Hudson Avenue reopens the permit, EPA believes it should include a detailed description of the NOx RACT plan, including the emission units, presumptive emission limits and facilities which are subject to

system-wide averaging and an explanation of how Hudson Avenue is complying in its statement of basis.

Issues regarding citations and appropriate cross-referencing in title V permits were addressed in detail in the July 18, 2000, letter from Kathleen C. Callahan, Director, Division of Environmental Planning and Protection to Robert Warland, Director, Division of Air Resources, DEC. ("July 18, 2000 letter"). The letter explained that the DEC application form and/or instructions for its operating permits program should be clarified with respect to the "non-codified" documents that include applicable requirements such as NO_X RACT plans. EPA pointed out that the application and instructions should make it clear that all supporting information is required in the application with clear cross-referencing to the emission point and applicable requirement cited in the printed form. Accordingly, in its November 16 commitment letter the DEC agreed to amend the application instructions to ensure that applicants include all documents that contain applicable requirements (other than published statutes, rules and regulations), with appropriate cross-referencing.[11] Hudson Avenue appropriately attached the NO_X RACT plan, pursuant to the procedures outlined in the two letters above and the plan is an enforceable element of the permit. The current version of the NOx RACT Compliance Plan, which includes the emission averaging plan, is located in DEC's files and is available to the public for review.[12] Because the Hudson Avenue NOx RACT plan was attached to the

[11] As previously discussed, DEC amended its application form and instructions in accordance with the November 16 commitment letter.

[12] Since the NOx RACT plan is an enforceable part of the permit, if it is not included as part of the permit that is available on DEC's website, DEC must explain in the Permit Review Report that the plan is available upon request.

application and is available for review from DEC, EPA denies the petition on this issue.

g. Compliance with LAER and BACT for Control of Sulfur Dioxide

The Petitioner alleges that the permit should include a condition requiring Hudson Avenue to burn natural gas or at a minimum burn low sulfur fuel, such as kerosene instead of residual oil, to ensure compliance with LAER and BACT for sulfur dioxide. The Petitioner also asserts that although there are conditions in the permit which require monitoring and reporting for the fuel, the permit does not specify the units to which these conditions are applicable. Petition at 24.

When a modification of an existing major source located in an attainment area for any criteria pollutant results in a significant increase in potential to emit and a significant net emissions increase, that modification would be subject to PSD and, therefore, required to install Best Available Control Technology (BACT). *See* 40 CFR § 52.21(j). (Note: if the modification qualifies as major for a pollutant in an area that is designated non-attainment, the facility would be required to comply with Lowest Achievable Emission Rate (LAER). *See* 6 NYCRR § 231-2.5). The Hudson Avenue Station is located in an area which is designated as attainment or unclassifiable for SO_2. Because, according to DEC, the reactivation of Boiler 100 was able to net out of PSD review for SO_2, the facility would not be required to use BACT. (LAER would not be applicable since the area is not designated as non-attainment for SO_2).

The Petitioner claims that although the permit includes conditions that require monitoring and reporting for the use of Number 1 and Number 2 fuel oil, it does not specify the units to which these conditions apply. The Petitioner's statement is incorrect because the permit

identifies the emission units and describes the type of fuel used in each unit. *See* Permit Condition 2. In addition, Conditions 25, 26, 28, and 29 limit the sulfur content of each fuel and include monitoring, record keeping and reporting requirements for the entire facility. EPA, therefore, denies the petition on these two points.

IX. Compliance Schedule

The Petitioner asserts that the Hudson Avenue title V permit does not contain an adequate compliance schedule for the plant's violation of the opacity standard in 6 NYCRR 227-1.3. Petition at 24. Petitioner alleges that Conditions 47 and 51 simply reference the consent order which is insufficient as a compliance schedule because it does not include enforceable steps necessary to bring the source into compliance. Also, the Petitioner claims that the conditions of a state consent order are not enforceable by the public. Petitioner asserts that DEC must include a compliance schedule for Hudson Avenue that meets the requirements of 40 CFR § 70.5(c)(8)(iii)(C).

When Hudson Avenue submitted its application in 1997, the application included a section where the applicant may certify non-compliance with applicable requirements, as well as provide information regarding the details of any compliance schedule. *See* Compliance Plan section (Section IV). Hudson Avenue certified that the facility would not be in compliance with the applicable opacity limit at the time of permit issuance and it referenced a consent order. Under the terms of that order, new recorders and digital opacity indicators were installed in the facility's control room to enable operators to have real-time opacity readings and to quickly

respond to opacity exceedances. The Order also required that the opacity monitors be operated and maintained in accordance with the requirements of 40 CFR part 75 to ensure that they function properly. The facility had met the major requirements of the Consent Order by the time the permit was issued on August 13, 2002 (*e.g.*, COMS upgrades, training, etc.) and is complying with other remaining provisions of the Order such as ongoing preventive maintenance program, training, root cause analyses and reporting.

The requirements of 40 CFR § 70.5(c)(8)(iii)(C) apply to "sources that are not in compliance with all applicable requirements at the time of permit issuance." Although Hudson Avenue certified in its 1997 application that it would not be in compliance with all applicable requirements at the time of permit issuance, DEC, in its response to comments on the Hudson Avenue facility, states that the facility is in "compliance with all applicable requirements." *See* Responsiveness Summary at 7. In addition, DEC notes that the facility is in compliance with the terms of the consent order issued in 1997. *Id.* Because all milestones for coming into compliance with applicable requirements have been met (and the facility is conducting ongoing programs for ensuring continuing compliance), EPA believes DEC properly referenced the consent order at Conditions 47 and 51 of Hudson Avenue's title V permit. All terms and conditions in a title V permit, including the compliance plan referenced in Conditions 47 and 51, are enforceable by EPA and by citizens. Therefore, EPA denies the petition on this point.

Second, the Petitioner alleges that the consent order gives Hudson Avenue a blanket excuse for violating the opacity standards during startups and emergencies so long as "the opacity reduction program is adhered to, the equipment is properly operated and Consolidated Edison takes all reasonable steps to minimize such exceedances". Petition at 24. Petitioner

asserts that if DEC believes that the facility cannot comply with the opacity requirements, it must revise the SIP. Otherwise, the Petitioner maintains that the Commissioner must continue to evaluate whether Consolidated Edison's opacity violations should be excused on a case-by-case basis. *Id.*

EPA disagrees. The Consent Order is referenced in the permit for purposes of implementing the compliance plan dates. It does not change any federally enforceable SIP requirements. *See* CAA §§ 110(l), 116. Therefore, EPA denies the petition on this issue.

The Petitioner further asserts that the Consent Order is flawed in that it establishes a set penalty to be applied to future opacity violations which precludes the public or EPA from seeking penalties. Petition at 25. EPA disagrees with the Petitioner. DEC's agreement to set a penalty schedule with Hudson Avenue regarding violations of opacity limits does not limit either the public's or EPA's right to seek full penalties as allowed under the CAA. Therefore, EPA denies the petition on this point.

Finally, the Petitioner states that the preventive maintenance requirements in the consent order are too general and allow Consolidated Edison to add appropriate new maintenance procedures and delete ineffective or obsolete maintenance activities. Petitioner argues that the title V permit must contain a compliance schedule which includes enforceable steps designed to bring the plant into compliance such as preventive maintenance, equipment upgrades, personnel training and communication and operating practices.

As explained above, DEC states that Hudson Avenue is currently in compliance with all applicable requirements and the terms of the consent order issued in 1997. *See* Responsiveness

Summary at 7. As NYPIRG notes, the preventive maintenance program may be revised by "adding appropriate new maintenance requirements and deleting ineffective or obsolete maintenance activities based on operating experiences or changes in equipment operation." Petition at 25 *citing* Consent Order at A-3. However, this does not provide "free range" to the facility, as NYPIRG alleges, because DEC has the opportunity to review these changes when the facility notifies DEC every quarter of any changes in this program. When such changes are reported, the preventive maintenance program on record at DEC will be updated. Including every requirement of a preventive maintenance program directly into the title V permit would require DEC to constantly reopen and modify the facility's title V permit each time an element in the preventive maintenance program changes. NYPIRG has not provided any information to justify requiring such an overly burdensome procedure that does not provide any corresponding substantial environmental benefit. As such, EPA denies the petition on this point.

X. Statement of Basis

Petitioner alleges that the permit is accompanied by an insufficient statement of basis. Petitioner is concerned that it fails to provide information regarding the adequacy of monitoring conditions. Petition at page 26.

EPA's permit regulations at 40 CFR § 70.7(a)(5) states that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." The statement of basis is not part of the permit itself. It is a separate document which is to be sent to EPA and to

interested persons upon request. [13]

A statement of basis ought to contain a brief description of the origin or basis for each permit condition or exemption. However, it is more than just a short form of the permit. It should highlight elements that EPA and the public would find important to review. Rather than restating the permit, it should list anything that deviates from simply a straight recitation of requirements. The statement of basis should highlight items such as the permit shield, streamlined conditions, or any monitoring requirements that are not otherwise required or are intended to fill in monitoring gaps in existing rules, especially the SIP rules. Thus, it should include a discussion of the decision-making that went into the development of the title V permit and provide the permitting authority, the public, and EPA with a record of the applicability and technical issues surrounding the issuance of the permit.[14] See e.g., *In the Matter of Port Hudson*

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[13] Unlike permits, statements of basis are not enforceable, do not set limits and do not create obligations. Thus, certain elements of statements of basis, if integrated into a permit document, could create legal ambiguities.

[14] Additional guidance was provided in a letter dated December 20, 2001 from Region V to the State of Ohio on the content of an adequate statement of basis. See http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/sbguide.pdf. Region V's letter recommends the same five elements outlined in a Notice of Deficiency ("NOD") recently issued to the State of Texas for its title V program. 67 Fed. Reg. 732 (January 7, 2002). These five key elements of a statement of basis are (1) a description of the facility; (2) a discussion of any operational flexibility that will be utilized at the facility; (3) the basis for applying the permit shield; (4) any federal regulatory applicability determinations; and (5) the rationale for the monitoring methods selected. Id. at 735. In addition to the five elements identified in the Texas NOD, the Region V letter further recommends the inclusion of the following topical discussions in the statement of basis: (1) monitoring and operational restrictions requirements; (2) applicability and exemptions; (3) explanation of any conditions from previously issued permits that are not being transferred to the title V permit; (4) streamlining requirements; and (5) certain other factual information as necessary. In a letter dated February 19, 1999 to Mr. David Dixon, Chair of the CAPCOA Title V Subcommittee, the EPA Region IX Air Division provided a list of air quality requirements to serve as guidance to California permitting authorities that should be considered when developing a statement of basis for purposes of EPA Region IX's review. This guidance is consistent with the other guidance cited above. Each of the various guidance documents, including the Texas NOD and the Region V and IX letters, provide generalized recommendations for developing an adequate statement of basis rather than "hard and fast" rules on what to include in any given statement of basis. Taken as a whole, they provide a good roadmap as to what should be included in a statement of basis on a permit-by-permit basis, considering the technical complexity of the permit, history of the facility, and the number of new provisions being added at the title V permitting stage, to name a few factors.

Operation Georgia Pacific, Petition No. 6-03-01, at pages 37-40 (May 9, 2003); *In the Matter of Doe Run Company Buick Mill and Mine*, Petition No. VII-1999-001, at pages 24-25 (July 31, 2002). Finally, in responding to a petition filed in regard to the Fort James Camas Mill title V permit, EPA interpreted 40 CFR § 70.7(a)(5) to require that the rationale for the selected monitoring method be documented in the permit record. *See In re Fort James Camas Mill*, Petition No. X-1999-1, at page 8 (December 22, 2000).

EPA's regulations provide that the permitting authority must provide EPA with a statement of basis. 40 CFR § 70.7(a)(5). The failure of a permitting authority to meet this requirement, however, does not necessarily demonstrate that the title V permit is flawed. In reviewing a petition to object to a title V permit because of an alleged failure of the permitting authority to meet all procedural requirements in issuing the permit, EPA considers whether the petitioner has demonstrated that the permitting authority's failure resulted in, or may have resulted in, a deficiency in the content of the permit. *See* CAA Section 505(b)(2) (objection required "if the petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable [SIP]"); *see also*, 40 CFR § 70.8(c)(1). Thus, where the record as a whole supports the terms and conditions of the permit, flaws in the statement of basis generally will not result in an objection.

The Petitioner alleges that permit conditions were not adequately addressed in the statement of basis. As an example, the Petitioner points to Condition 75 of the second draft permit stated that VOC emissions from Boiler 100 are limited to 15.33 tons per year but the permit review report was not updated to include a discussion on this and other conditions. Petition at 26. While NYPIRG is correct that the statement of basis did not include the basis of

the permit limitation or a description of the adequacy of monitoring, this information is available in the permit application. As stated in Condition 55 of the permit, Boiler 100 capped out of PSD review for SO_2 by taking a restriction on the annual heat input. As such, the permit for Boiler 100 also contained annual limits on other criteria pollutants which were tied to AP-42 emissions factors or stack test results and boiler heat input. The cap of 15.33 tons per year of VOC emissions is equivalent to the maximum annual heat input of 6,000,000 mmBtu and the AP-42 emission factor of 0.0051 lb VOC per mmBtu. Therefore, ensuring the maximum annual heat input does not exceed the specified limit ensures compliance with the annual VOC limit.

Another example the Petitioner provides is that the statement of basis does not contain an explanation of how a stack test every three years for particulate matter emissions from Boilers 71, 72, 81 and 82 (Condition 49) is adequate for ensuring compliance with the 0.10 lb/mmBtu limit. In this instance, neither the permit, permit review report, nor the permit record contained information which sufficiently set forth the rationale for the proposed monitoring. Further, EPA does not believe prescribing stack testing in the absence of additional parametric monitoring and other maintenance procedures for these boilers is adequate to satisfy PM emissions compliance for the relevant time period, nor would such monitoring yield data representative of the source's compliance with its permit conditions and the New York SIP. As such, EPA is requiring DEC to supplement the stack testing requirement for Boilers 71, 72, 81, and 82 with a requirement that monitors the combustion efficiency of the boilers, such as annual tune-ups along with appropriate record keeping. As stated in Section VIII.A, the annual tune-ups shall consist of preventative and corrective measures in accordance with manufacturer specifications to optimize the combustion efficiency of the unit and the source shall maintain records. These requirements along with the

fuel certifications would be sufficient to assure compliance with the PM standard between emission tests. Because EPA has determined that the PM monitoring in the Hudson Avenue permit is not adequate, it is unlikely that further justification in the permit record would have resulted in a different monitoring decision, EPA is denying petitioner's request on this point.

As more fully explained in Section VIII, *supra*, EPA is granting petitioner's request that the Administrator object to the Hudson Avenue permit because it does not contain monitoring sufficient to assure the plant's compliance with the applicable particulate matter limit. Accordingly, when the Hudson Avenue permit is reopened in response to this Order, the DEC is required to make available an adequate statement of basis that includes the rationale for the selected particulate matter emissions monitoring that takes into account the monitoring regime recommended in this Order. *See* 40 CFR §§ 70.7(a)(5) and 70.8(c); *Ft. James* at 8. Further, to ensure compliance with the fundamental title V procedural requirements of adequate public notice and comment required by sections 502(b)(6) and 503(e) of the Clean Air Act and 40 CFR § 70.7(h), the public and EPA must be provided an opportunity to comment on the re-issued title V permit as to the terms and conditions and as to the issue identified above.

Thirdly, NYPIRG asserts that the permit review report fails to mention how Hudson Avenue is complying with the opacity limits. Again, while the permit review report did not indicate how the facility is complying with their opacity limits, it is clear from the permit file that the boilers comply through the use of continuous opacity monitors (COMS). Furthermore, for the combustion turbines, the facility is required to conduct visual tests on a daily basis. EPA denies the petitioner's request on this issue.

Finally, petitioner states that the statement of basis did not include a description of why the proposed monitoring is sufficient to assure compliance with the sulfur-in-fuel limit nor why the required NOX monitoring is adequate. As stated in the permit and permit review report, Hudson Avenue is required to obtain supplier certifications with respect to the sulfur content of the oil for each shipment. A number of regulations, including New Source Performance Standards, rely on certifications, a responsibility that most sources and suppliers must take seriously to avoid liability for substantial penalties. Because this is a common way to assure compliance with sulfur-in-fuel limits, a justification and/or explanation is not necessary. With respect to NOx monitoring, emissions of NOx from the boilers are measured through the use of continuous emission monitors (CEMS). This is stated in both the permit and permit review report. Because this is the most stringent way to monitor compliance, a justification as to why CEMS are adequate is not necessary.

In this case, the draft permit contains a permit description and the final permit contains a permit review report which provide a description of the various operations at the facility. While neither of these documents provide an explanation of how the selected monitoring assures compliance, it is still possible to achieve a sufficient understanding of the Hudson Avenue facility using these and other available documents in the permit record, including the permit application, the permit descriptions and DEC's response to comments document. Although the substantive purposes of the statement of basis requirements were largely met through other available documents in the permit record, neither the permit nor the permit review report include either an adequate discussion regarding the permit shield with respect to 6 NYCRR Part 231 as discussed in Section I or a description of the NOx RACT plan and how the facility is complying

with that plan. The permitting authority's failure to adequately explain its basis for granting a permit shield with respect to Part 231 either in the statement of basis or elsewhere in the permit record is a flaw in the permitting process calling in question the adequacy of the permit itself. Further, DEC should include a detailed description of the NOx RACT plan, identifying the emission units, presumptive emission limits and facilities which are subject to system-wide averaging and an explanation of how Hudson Avenue is complying. As such, EPA grants in part and denies in part the petition on this issue, and by this Order, requires the DEC to reopen the Hudson Avenue Permit, and make available to the public an adequate statement of basis that provides the public and EPA an opportunity to comment on the title V permit and its terms and conditions as to the issues identified above.

XI. Credible Evidence

The Petitioner asserts that the permit should include clear language stating that all credible evidence can be used by DEC, EPA, members of the public, and the facility in demonstrating whether the facility is in compliance with federally enforceable requirements.

As emphasized by EPA's Credible Evidence Rule, 62 *Fed. Reg*. 8314 (Feb. 24, 1997), the CAA allows the public, DEC, EPA and the regulated facility to rely upon credible evidence to demonstrate violations of or compliance with the terms and conditions of a title V permit. The absence of language regarding the use of credible evidence in the title V permit does not preclude its use in demonstrating non-compliance. Therefore, EPA denies the petition on this point.

XII. Permit Condition Effective Dates

The Petitioner describes a concern with the way in which the Hudson Avenue permit was written. That is, in addition to the front page of the permit stating that the permit will expire on August 12, 2007, a clause has been added to most permit conditions, that the permit term is "effective between the dates of 8/13/2002 and 8/12/2007." NYPIRG asserts that including the aforementioned clause with each permit term is not the correct way to limit the overall permit term. The Petitioner contends that by adding this clause, if a renewal permit is not issued prior to the expiration of the current permit, then each permit term will expire on 8/12/2007, even if the permittee submits a complete and timely application (that is, there would be a "hollow" permit, without most applicable requirements). Petition at 29.

EPA disagrees with the Petitioner that the Hudson Avenue permit will become a "hollow" permit if the renewal permit is not issued before the original permit expires. The DEC regulations at 6 NYCRR § 201-6.7(a)(5) clearly state that all terms and conditions of a permit shall automatically continue while DEC reviews the renewal application. The Petitioner's interpretation of New York's operating permit rule is not correct. All terms and conditions of a title V operating permit will remain effective as long as a timely and complete renewal application has been submitted in accordance with the deadline established in 6 NYCRR § 201-6. We understand this labeling to be DEC's way of establishing the initial effective date of a permit term rather than a termination for the term. EPA interprets the later date, since it always coincides with the end date of the term of the permit itself, to be simply a reiteration of the term of the permit. EPA, therefore, denies the petition on this issue.

CONCLUSION

For the reasons set forth above and pursuant to section 505(b)(2) of the Clean Air Act, I deny in part and grant in part the petition of NYPIRG requesting the Administrator to object to the issuance of the Hudson Avenue title V permit. This decision is based on a thorough review of the August 13, 2002 permit, and other documents that pertain to the issuance of this permit.

September 30, 2003 /s/
Date Marianne Lamont Horinko
Acting Administrator