

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In the Matter of the Proposed Operating Permit for  
the NEW YORK CITY DEPT  
OF ENVIRONMENTAL CONSERVATION

Permit ID: 6-4058-00003/00365

to operate the North River Sewage Treatment Plant  
located in New York, New York  
Proposed by the New York State  
Department of Environmental Conservation

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PETITION REQUESTING THE EPA ADMINISTRATOR  
OBJECT TO ISSUANCE OF THE TITLE V OPERATING PERMIT  
FOR THE NEW YORK CITY DEPT OF ENVIRONMENTAL PROTECTION  
TO OPERATE THE NORTH RIVER SEWAGE TREATMENT  
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 the proposed Title V Operating Permit for the New York City Department of Environmental Protection’s (“DEP”) North River Sewage Treatment Plant (“sewage plant”) located in New York, New York.

NYPIRG is a not-for-profit research and advocacy organization that specializes in environmental issues. NYPIRG has more than 20 offices located in every region of New York State. NYPIRG has members who live, work, pay taxes, and breathe the air near where the depot is located. NYPIRG submit testimony at a June 4, 2002, public hearing on the Title V permit for this facility. That testimony is attached as **Exhibit 1**. NYPIRG then timely submitted two sets of written comments on June 6, 2002, and June 13, 2002, on the draft permits to DEC, based upon agreement with DEC. These comments are attached as **Exhibit 2** and **Exhibit 3**, respectively. DEC’s letter accompanying the responsiveness summary, dated June 20, 2002, stated that the EPA’s 45 day review period would lapse on Aug. 7, 2002. Thus, NYPIRG’s petition is timely filed within sixty days pursuant to Clean Air Act § 505(b)(2) and 40 CFR § 70.8(d).

If the U.S. EPA Administrator determines that this permit does not comply with applicable requirements or the requirements of 40 CFR Part 70, 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 the U.S. EPA will act expeditiously to respond to NYPIRG’s petition, and in any case, will respond within the 60-day timeframe mandated in the Clean Air Act.

The Administrator must object to the proposed Title V permit for this facility because it does not comply with Title V of the Clean Air Act or 40 CFR Part 70. In particular:

- (1) the permit is based upon an inadequate permit application;
- (2) the draft permit was accompanied by an inadequate statement of basis;
- (3) the final permit fails to set out conditions at the facility to assure compliance with applicable requirements;
- (4) the permit distorts the annual compliance certification requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5);
- (5) the permit does not require prompt reporting of all deviations from permit requirements as mandated by 40 CFR § 70.6(a)(3)(iii)(B);
- (6) the permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because it illegally sanctions the systematic violation of applicable requirements during startup/shutdown, malfunction, maintenance, and upset conditions;
- (7) the permit does not assure compliance with all applicable requirements as mandated by 40 C.F.R. § 70.1(b) and 40 C.F.R. § 70.6(a)(1) because many individual permit conditions lack adequate periodic monitoring and are not practically enforceable;
- (8) the permit fails to include terms to assure compliance with all applicable compliance schedules; and
- (9) the final permit may improperly limits the dates during which the permit conditions apply.

The grounds for objection are set out in greater detail below:

#### **I. The Permit is Deficient because it is Based on an Inadequate Permit Application**

DEP's application for a Title V permit for the this facility must be denied because DEP did not submit a complete permit application in accordance with the requirements of CAA § 114(a)(3)(C), 40 CFR §70.5(c), and 6 NYCRR § 201-6.3(d). First, DEP's permit application lacks an initial compliance certification. DEP is legally required to submit an initial compliance certification that includes:

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

upon which the compliance certification is based as required by Clean Air Act §114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii).

The initial compliance certification is one of the most important components of a Title V permit application. This is because the initial compliance certification indicates whether the permit applicant is currently in compliance with applicable requirements. Because DEP failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether the North River Sewage Treatment Plant is currently in compliance with every applicable requirement.

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

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

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

In addition to omitting an initial compliance certification, Con 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. 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.

DEC should have required DEP to submit a complete Title V permit application prior to the issuance of a final permit.

## **II. The Draft Permit Was Accompanied by an Inadequate Statement of Basis**

This Title V permit is deficient because DEC failed to include an adequate “statement of basis” or “rationale” with the draft permit. The requirement that DEC prepare a statement of basis for each draft Title V permit is set forth at 40 CFR §70.7(a)(5), which 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 and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it.”

Recently, U.S. EPA provided guidance with respect to the type of information that must be included in a statement of basis. See letter from Stephen Rothblatt, Chief, EPA Region 5 Air Programs Branch, to Robert F. Hodanbosi, Ohio EPA, dated December 20, 2001 (the “Rothblatt letter”). Although we appreciate the fact that DEC is now preparing a lengthy “permit review report” to assist the public in understanding the rationale behind permit conditions, the original permit review report accompanying the draft permit and possibly the permit review report for the current permit are missing certain key elements.

The draft permit review report did not provide the factual basis for applicability determinations or the basis for the periodic monitoring regime chosen, including appropriate calculations. Without such information, it is impossible for the public or a court to evaluate whether there is a rationale basis for DEC’s decisions with respect to the terms and conditions included in this permit. Some process descriptions do not indicate whether the process emits any pollutants. For example, processes listed on pages three through six of the permit review report do not indicate what types of pollutants are being emitted. The process descriptions alone are not adequate to inform a non-engineer of what types of regulated pollutants may be emitted. Without emission-point-specific and process-specific facts on what regulated pollutants are being emitted, the permit review report cannot establish the factual basis for specific permit conditions and thus fails to satisfy 40 C.F.R. Sec. 70.7(a)(5).

The draft permit review report also fails to state the heat input of the boilers in BTU per hour. Without this information, it is impossible for DEC to establish the factual basis for determining whether Parts 225, 227, or 227-2 of 6 NYCRR are applicable to the boilers. The permit review report fails to set out the factual basis for the requirement that the facility operate COMS, or for the determination that regulations governing lean burn engines apply to the facility. The permit review report fails to state whether the facility has submitted a RACT proposal for the “large boilers” on page four that are fueled with digester gas, as required by 6 NYCRR Sec. 227-2.4(b).

Condition 2 of the draft permit requires compliance with Consent Order R236699105, but fails to append a copy of the consent order to the permit. Also, the permit review report fails to discuss or describe the contents of the consent order or to explain how the facility is currently out of compliance.

The draft permit review report and the draft permit Condition 24 both state the facility is a non-industrial POTW, but fail to explain the basis for this determination. Are there any industrial major sources that comply with applicable NESHAP requirements by using the

treatment and controls located at this facility?

The permit review report fails to establish the factual basis for the permit's emissions limitations and monitoring conditions for the engines of emission unit 2BLENG (blower engines) and 1PUMPE (pump engines). Under 6 NYCRR 227, emission limitations for stationary combustion installations vary depending upon their heat input, fuel use and other factors, such as whether or not they are lean burn. Without this information, there is no factual basis for conditions 20 - 23, 29- 30, 32 - 38, and 42 - 48.

NYPIRG's review of this permit reveals a significant number of permit conditions that do not appear to require sufficient monitoring to assure the plant's ongoing compliance with applicable requirements. DEC bears the burden of justifying the adequacy of the monitoring included in the permit by including information in the statement of basis that supports the agency's determination. Unfortunately, DEC's discussion of monitoring in the permit review report and permit consists primarily of a recitation of the requirements included in the permit rather than an explanation as to why those requirements are sufficient.

The draft permit review report listing and description of regulations does not set out the legal basis for why the regulations have been applied to the facility, or any particular emission unit, emission point, or process. Rather, the permit review report merely provides a table, labeled "Regulatory Analysis" (PRR pp. 11 - 13) and brief narrative descriptions of some regulations, labeled "Applicability Discussion" (pp. 13 - 16). The table indicates, apparently, which permit condition number is associated with a particular "Facility/EU/Process/ES" and regulation. The table does not set out the legal basis for applying a particular law to a particular "Facility/EU/Process/ES" nor does it set out the legal basis for determining that a particular condition satisfies a regulation. The narrative description summarizes many of the regulations cited elsewhere in the permit, but does cross-reference these descriptions with permit conditions and does not set out the legal basis for why the regulation is relevant to the facility or any particular emission unit, emission source, or process.

Forty CFR Part 70 is filled with language describing the requirement that a Title V permit must include sufficient monitoring to assure the facility's compliance with all applicable requirements. See 40 CFR § 70.6(a)(1) (stating that a Title V 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."); see also 40 CFR § 70.1(b) ("All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements.") The explanation provided by DEC with respect to the sufficiency of its monitoring of permit terms is far from adequate to satisfy Title V requirements.

Our position that DEC's statement of basis must explain why the monitoring included in this draft permit is sufficient to assure the plant's ongoing compliance is supported by the recently interim final and proposed final rule clarifying the role of sufficiency and periodic monitoring noticed in the Sept. 17, 2002, *Federal Register*, by the Rothblatt letter, and by the U.S.EPA Administrator's order in response to the Fort James Camus Mill Title V petition. See U.S. EPA, *In re Fort James Camus Mill, Order Denying in Part and Granting in Part Petition*

for *Objection to Permit*, December 22, 2000. According to the Fort James Camus Mill order, “the rationale for the selected monitoring method must be clear and documented in the permit record.” *Id.* at 8.

In addition to adding a legitimate discussion of the adequacy of the monitoring in this draft permit, DEC must supplement the statement of basis with a discussion of a number of other important issues. First, DEC must supplement the statement of basis with an “explanation of any conditions from previously issued permits that are not being transferred to the Title V permit.” Rothblatt letter, p. 2. Finally, there are a host of other issues that are unique to this facility that DEC should have discussed in the statement of basis.

For example, the plant has been the subject of a consent decree, and, as frequently in violation of applicable requirements. **Exhibit 4**, attached, is a 2002 administrative complaint, prepared by DEC, regarding the facility’s violation of applicable environmental laws. DEC should explain whether this or previous consent decrees have been effective in bringing the plant into compliance with the applicable requirements. If the plant continues to violate applicable requirements, DEC should describe the frequency of these violations, their possible causes, and why the consent order remains adequate as a tool for bringing the plant into full compliance despite these ongoing violations.

DEC’s failure to provide the public with an adequate statement of basis to support this draft permit seriously impeded the ability of the public to participate in the permitting process. As Joan Cabreza of U.S. EPA Region 10 explains:

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. In light of the importance of the statement of basis to public participation, EPA must object to this permit because of its failure to include the information described in the September 2002 interim final order clarifying monitoring issues, the Rothblatt letter and the Fort James Camus Mill order.

### **III. The Permit Fails to Set Out Conditions at the Facility to Assure Compliance with Applicable Requirements**

According to 6 NYCRR § 201-6, a facility must submit “risk management plans . . . if required by Section 112(r) of the Clean Air Act for this facility.” NYPIRG understands that U.S. EPA has not delegated authority to DEC to administer the 112(r) program. This does not, however, excuse DEC from including 112(r) requirements in this permit. Section 112(r) is an applicable requirement and must be covered by this Title V permit. The permit must state

whether CAA § 112(r) applies to this facility, and must indicate which requirements in the facility's 112(r) plan are enforceable by the public. The requirements in the plan must be included in the permit.

Also, this permit contains certain conditions under the heading "notice of general permittee obligations" that do not indicate how they apply to the facility. These include Item C, maintenance of equipment; Item D, unpermitted emission sources; Item F, recycling and salvage; and Item G, prohibition of reintroduction of collected contaminants to the air; Item I, proof of eligibility for sources defined as exempt; and Item J, proof of eligibility for sources defined as trivial.

This is problematic because the Title V program was intended to clarify what general regulations applied to a source. In its preamble to the final rule for 40 CFR 70, regarding state operating permit programs, EPA noted "regulations are often written to cover broad source categories, therefore, it maybe unclear which, and how, general regulations apply to a source," 57 Fed. Reg. 140, p. 32251. EPA stated "[the Title V] program will generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements." 57 Fed. Reg. 140, p. 32251.

NYPIRG agrees that these conditions should continue to be included as general conditions in the permit, but the permit review report must state whether or how these requirements apply to the facility, and the permit should have included facility-specific conditions applying these requirements and imposing sufficient monitoring and recordkeeping to ensure compliance with these requirements.

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

Under 6 NYCRR § 201-6.5(e), a permittee must "certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices," at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirements included in the sewage plant's permit (Condition 6) do not require the plant to certify compliance with all permit conditions. Rather, the permit only requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification."

The permit states, at condition 6:

The responsible official must include in the annual certification report all terms and conditions contained in this permit which are identified as being subject to certification, including emission limitations, standards, or work practices. That is, the provisions labeled herein as "Compliance Certification" are not the only provisions of this permit for which an annual certification is required.

This appears to suggest that the facility need not certify compliance with each term of the

permit, because some conditions specifically state they are not subject to compliance certification, and others do not identify themselves as being subject to certification. Above the conditions listed under the heading of “General Permittee Obligations,” the permit states “[t]he items listed below are not subject to the annual compliance certification requirements under Title V.” As more fully stated below, Title V requires certification of compliance with all applicable requirements. These “general permittee obligations” are requirements and compliance with these requirements must be certified annually. 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. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. DEP must be required to certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

In addition to failing to require DEP to certify compliance with all terms and conditions of the draft permit, DEC also failed to clarify the deadline by which the annual compliance certification must be submitted. 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.” This language creates a number of problems. First, it is possible that a facility would not be required to submit the first compliance certification until after the end of the first annual period following the date of permit issuance. This violates 40 CFR § 70.6. Second, by adding “unless another quarter has been acceptable by the Department,” DEC makes it so that this requirement is unenforceable by the public, since it is unclear how the Department will go about revising the date that the certification is due. If the Department can change the due date through a telephone conversation with the permittee, a member of the public could never prove that the deadline had not been changed. Also, the phrase “calendar quarter that occurs just prior to the permit anniversary date” is vague, since it is unclear when quarters begin and end, and the permit does not specify whether a quarter “occurs” by beginning or by ending.

Given the importance of the annual compliance certification requirement, EPA must object to the permit and require DEC to revise the permit to make the annual compliance certification requirement clear and enforceable as a practical matter.

#### **V. The Permit is Deficient Because It Fails to Include Federally Enforceable Conditions Requiring DEP to Report Promptly Any Violation of Permit Conditions**

A key feature of the Title V program is that it requires a polluter to promptly report a violation of permit conditions. See 40 CFR § 70.6(a)(3)(iii)(B)(stating that each Title V permit must require “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 action or preventive measures taken.”). This requirement is in addition to the

requirement under 40 CFR § 70.6(a)(3)(iii)(A) that each Title V permit require “submittal of reports of any required monitoring at least every 6 months.”

The permit for the North River sewage plant violates the prompt reporting requirement because it does not contain a federally enforceable requirement for DEP to report all deviations promptly. Condition 7 of the DEC Special Conditions of the permit requires DEP to “report any exceedances / violation / complaints to NYSDEC within two hours of initial receipt, by telefax to the attention of the North River WPCP environmental Monitor, and Regional Air Pollution Control Engineer (RAPCE). Region 2 office fax number at present is 718 482-4874. Meanwhile, the facility will continue its investigation to identify sources/reasons for all such incidents and submit a written finding report to NYSDEC within 10 days of original incident.” Given this facility’s history of frequent violation of environmental regulations, this condition is undoubtedly a necessary component of assuring the plant’s eventual compliance with applicable requirements. Unfortunately, this prompt reporting is not federally enforceable.

Instead, in the federally enforceable section of the permit, the permit sets up a reporting scheme whereby DEP is required to report some deviations promptly, while reports of other deviations can be withheld until it is time for DEP to submit its six-month monitoring report. The primary permit condition governing prompt reporting is condition 5. This permit condition is rather lengthy and sets up a variety of different reporting obligations depending on a variety of factors. To start, condition 5 states that the permittee must:

Notify the Department and report permit deviations an incidences of noncompliance stating the probable cause of such deviations, and any corrective actions or preventive measures taken. Where the underlying applicable requirement contains a definition of prompt or otherwise specifies a time frame for reporting deviations, that definition or time frame shall govern.

This portion of condition 5 is patently illegal. Under 40 CFR § 70.6(a)(3)(iii)(B), “the permitting authority shall define ‘prompt’ in relation to the degree and type of deviation likely to occur and the applicable requirements.” Here, DEC is defining ‘prompt’ based solely upon the language of the underlying applicable requirement. Under the law, DEC must look not only at the underlying applicable requirement but also at the degree and type of deviation likely to occur. DEC’s explicit decision not to examine the degree and type of deviation likely to occur is arbitrary and capricious.

Condition 5 goes on to set out a reporting scheme for deviations from applicable requirements where the underlying applicable requirement does not specify a reporting frequency. It states:

(1) For emissions of a hazardous air pollutant or a toxic air pollutant (as identified in an applicable regulation) that continue for more than an hour in excess of permit requirements, the report must be made within 24 hours of the occurrence.

- (2) For emissions of any regulated air pollutant, excluding those listed in paragraph (1) of this section, that continue for more than two hours in excess of permit requirements, the report must be made within 48 hours.
- (3) For all other deviations from permit requirements, the report shall be contained in the 6 month monitoring report required above.

This portion of permit condition 5 also violates federal requirements. First, this reporting scheme sets up arbitrary distinctions between different kinds of violations. Under (1), if the facility violates an emission standard for a toxic air pollutant for 61 minutes, the facility must submit a report to DEC within 24 hours. If the violation is for 60 minutes, however, no report is due for up to 6 months. There is no rational basis for DEC's determination that a 61 minute violation is so serious as to require a report within 24 hours, while a 60 minute violation is so inconsequential that it need not even be reported until the six month report is due. While we understand that a line must be drawn somewhere, the distinction between these two deviations cannot possibly be so great as to warrant such a huge discrepancy in mandatory reporting requirements. Rather, it would make much more sense for reporting times to get progressively longer as the duration of the violation gets smaller. So, for example, the facility could be required to report a violation with a duration of between 30 and 61 minutes within 48 hours, a violation of between 15 and 29 minutes within 72 hours, etc. Even better would be a reporting scheme that requires a report within 1 hour any time that a facility violates an emission limitation that applies to a toxic air contaminant. After all, toxic pollutants are dangerous in very small quantities. Over the span of 5 minutes, a facility could release a quantity of toxic pollution that could be highly dangerous to the surrounding community. By the time a report is submitted 24 hours later, the damage may already have occurred.

Though experts are certain to disagree over how quickly a facility should be required to report a violation, it is clear that the reporting scheme included in this Title V permit is not based on reasoned consideration of "the degree and type of deviation likely to occur and the applicable requirements." In its June 12, 2002 responsiveness summary, DEC stated that the prompt reporting requirements for this permit were consistent with the prompt reporting requirements included in 40 CFR § 71.6(a)(3)(iii)(B), but this regulation addresses prompt reporting from facilities that are permitted under a federally administered Title V program. Permits issued by DEC must comply with 40 CFR § 70, which sets out a different standard for prompt reporting. DEC must rewrite this reporting scheme after giving careful consideration to the factors set forth in 40 CFR Part 70.

Part (2) of the portion of Condition 5 quoted above suffers from the same arbitrariness as Part (1). Moreover, as with the provision pertaining to toxic air pollutants, we are dismayed to see that so long as the facility comes into compliance with an applicable requirement for at least one fleeting moment every two hours, the facility could operate in violation of emission limitations on an almost continuous basis and never be required to submit a prompt report of its violations to DEC.

Part (3) as quoted above conflicts with federal law because it creates a huge category of deviations from permit conditions that are not subject to the prompt reporting requirement

contained in 40 CFR § 70.6(a)(3)(iii)(B). It does this by stating that reports for deviations other than those that fall into categories (1) and (2) are only to be reported in the six month monitoring reports. Defining “prompt” as every six months is no different from saying that the prompt reporting requirement does not apply to certain kinds of deviations. This is clearly illegal. The prompt reporting requirement applies to all deviations from permit terms, regardless of the duration of the deviation. In defining “prompt,” DEC must select a time period for the submission of prompt reports that is shorter than the six month reporting requirement, since the prompt reporting requirement is distinct from the six month reporting requirement. As EPA stated in dozens of Federal Register notices pertaining to state Title V programs:

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

60 Fed. Reg. 36083 (July 13, 1995) (granting interim approval to Arizona’s Title V program).

The next section of permit condition 5 goes on to say:

(4) This permit may contain a more stringent reporting requirement than required by paragraphs (1), (2) or (3) above. If more stringent reporting requirements have been placed in this permit or exist in applicable requirements that apply to this facility, the more stringent reporting requirement shall apply.

Determining whether more frequent reporting is required under any other provisions of the permit is quite difficult. This is because the permit conditions do not include a line where DEC must specifically identify the prompt reporting requirement. Rather, the reporting requirement is typically buried in the permit condition, and it may or may not pertain explicitly to prompt reports of deviations. Moreover, our review of the permit conditions reveals an additional and even more troubling problem: for the most part, this facility is not required to perform monitoring that assures its ongoing compliance with applicable requirements. Where ongoing compliance monitoring is not required, there cannot be any evidence of a deviation from permit conditions.

EPA must object to the permit and require DEC to revise this permit so that it sets forth prompt reporting requirements that are designed to allow government officials and the public to gain quick access to any information that suggests that there is an air pollution problem at this facility.

## **VI. The Permit is Defective Because it Does Not Properly Incorporate the Reporting Requirements that Apply When Con Edison Wishes for the DEC Commissioner to Excuse a Violation**

For years, NYPIRG has argued that the condition that DEC includes in New York Title V permits that allows the Commissioner to excuse a violation as unavoidable is far too broad. NYPIRG's biggest concern is that DEC is not requiring facilities to submit reports that provide detail about a violation that is sufficient for DEC or members of the public to determine whether a violation was truly unavoidable. In addition, NYPIRG commented to DEC with respect to previously issued Title V permits that the excuse provision that was placed in those permits went beyond the scope of the excuse provision that is part of New York's federally enforceable SIP.

Recently, DEC announced that because the excuse provision that it has been including in Title V permits is not the version that is in New York's SIP, the excuse provision will no longer be placed in the federally enforceable section of New York Title V permits. Now, the provision appears in the state-only section of each Title V permit. According to EPA, although the version of the excuse provision that is part of New York's approved SIP remains federally enforceable, "EPA does have some concerns regarding whether this regulation is consistent with the guidance EPA has issued to States regarding the type of excess emissions provisions that States may, consistent with the Act, incorporate into SIPs. As part of the SIP-approval process, EPA will evaluate 6 NYCRR § 201-1.4 in light of recent federal guidance." *Letter from U.S. EPA Region 2 to Keri Powell, NYPIRG*, dated December 12, 2001. It appears that EPA and DEC believe that by dropping the excuse provision from the federal side of the Title V permit, any possible concern about the excuse provision has been addressed. This is simply not the case.

Though a Title V permit must include all applicable requirements, a requirement does not become inapplicable simply because DEC fails to place it in the Title V permit. Thus, Con Edison is still free to take advantage of the excuse provision in the SIP. Moreover, the Title V permit for the Hudson Avenue Station does not, as DEC claims, "clarify that the excuse provision of 6 NYCRR 201-1.4 can only be used for violations of state regulations." *Letter from Carl Johnson, NYS DEC Deputy Commissioner, to George Pavlou, U.S. EPA Region 2*, dated November 16, 2001. Rather, permit Condition 5, a condition in the federally enforceable section of this draft permit, states that: "if the permittee seeks to have a violation excused as provided in 201-1.4, the permittee shall report such violations as required under 201-1.4(b)." Referencing the state-only excuse provision in a federally enforceable permit condition is a far cry from clarifying that the state-only excuse provision only applies to state-only requirements.

Like EPA and DEC, we have serious concerns about the adequacy of the SIP rule. Unfortunately, ignoring a SIP rule will not make it go away. We certainly hope that EPA and DEC will work together to revise the excuse provision so that it complies with EPA guidance. In the meantime, the best that can be done is to include the SIP rule in the federal side of the permit, but supplement the permit condition with additional recordkeeping and reporting to assure that the facility is not abusing the excuse provision by requesting that the Commissioner excuse violations that could have been avoided. DEC should add the provisions discussed below.

A. The Federally-Enforceable Section of the Title V Permit Does Not Include the SIP Version of the Excuse Provision

The excuse provision in New York's SIP is more restrictive than the provision in current New York regulations in that it does not cover violations that occur due to "shutdown" or during

“upsets.” See 6 NYCRR § 201.5(e), state effective date 4/4/93, U.S. EPA approval date 12/23/97<sup>1</sup> (stating that “[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up conditions and malfunctions may be excused if such violations are unavoidable.”). Since this is the excuse provision that is in the SIP, this is the only excuse provision that can be used to excuse violations of SIP requirements. Thus, the SIP version of the excuse provision must be placed in the federally enforceable section of the permit, and the permit must clarify that the current state version of the excuse provision does not apply to any violation of a requirement that is included in the federally-enforceable section of the Title V permit.

**B. The Permit Does Not Describe What Constitutes “Reasonably Available Control Technology” During Conditions that Are Covered by the Excuse Provision**

The excuse provision included in New York’s SIP mandates that “[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition.” See 6 NYCRR § 201.5(e). Under 40 CFR § 70.6(a)(1), each Title V permit must include “operational requirements and limitations that assure compliance with all applicable requirements.” Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York’s SIP, it is an applicable requirement. To assure each facility’s compliance with this requirement, DEC should have included terms and conditions in the permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility should also have included monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title V permit to include “monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit”). In situations where RACT is no different during these periods from what is required under other operating conditions, DEC should have explained and justify this determination in the statement of basis. The permit did not clearly state that compliance with the requirement to employ RACT during startup, maintenance, and malfunction conditions does not excuse the facility from compliance with applicable emission limitations.

**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)**

Under permit condition 5, “if the permittee seeks to have a violation excused as provided in 201-1.4, the permittee shall report such violations as required under 201-1.4(b). However, in no case may reports of any deviation be on a less frequent basis than those described in paragraphs (1) through (4) above.” Though the permit language is ambiguous, it appears that under circumstances where a facility wishes for a violation to be excused, the reporting requirements of 6 NYCRR § 201-1.4 apply instead of the prompt reporting requirement. This creates a problem because the reporting requirements contained in the excuse provision do not comply with 40 CFR § 70.6(a)(3)(iii)(B). Specifically, the permittee is allowed to submit reports

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

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

## **VII. The Permit is Deficient Because it Lacks Monitoring that is Sufficient to Assure the Facility’s Compliance with all Applicable Requirements**

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

U.S.EPA has adopted as noticed in the Sept. 17, 2002, Federal Register, an interim final rule clarifying that this interpretation applies to monitoring conditions in all Title V permits. U.S. EPA states:

[T]he periodic monitoring and sufficiency monitoring provisions will work together as follows. Where an applicable requirement does not require any periodic testing or monitoring, permit conditions are required to establish “periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source’s compliance with the permit.”

Sections 70.6(a)(3)(i)(B) and 71.6(a)(3)(i)(B). In contrast, where the applicable requirement already requires “periodic” testing or monitoring but that monitoring is not sufficient to assure compliance, the separate regulatory standard at Sec. 70.6(c)(1) or Sec. 71.6(c)(1) applies instead to require monitoring “sufficient to assure compliance with the terms and conditions of the permit.” Furthermore, where Sec. 70.6(a)(3)(i)(B) or Sec. 71.6(a)(3)(i)(B) applies, it satisfies the general sufficiency requirement of Sec. 70.6(c)(1) or Sec. 71.6(c)(1).

67 Fed Reg. 58529. In addition to containing adequate monitoring, each permit condition must be “enforceable as a practical matter” in order to assure the facility’s compliance with applicable requirements. To be enforceable as a practical matter, a condition must (1) provide a clear explanation of how the actual limitation or requirement applies to the facility; and (2) make it possible to determine whether the facility is complying with the condition.

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

### **Opacity limitations on any air contamination source Including Conditions 11 - 12**

These conditions are facility-wide limitation on opacity (condition 11) and a facility wide requirement for monitoring that are not sufficient to assure compliance with the applicable regulation. Condition 11 fails to apply any monitoring to assure compliance at any of the facility’s emission points. Condition 12 fails to identify to which unit(s) it applies. Rather, the reader is told it applies “except as permitted by a specific part of Title 6 of the NYCRR” to “operators of air contamination sources that are not exempt from permitting and where a continuous opacity monitor is not utilized.” DEC needs to apply the law and regulations to the facility and prepare specific emission limitations and monitoring conditions.

Additionally, the “Upper Permit Limits” of these terms do not adequately describe the limitation. One condition describes the limit as no more than 57 percent opacity in one continuous 6-minute period per hour. Other conditions describe the permit limit as no more than 20 percent opacity for any six minute average. Each is wrong. The permit needs to contain one condition for each emission point containing a proper limitation as described in Condition 11. If DEC decides that monitoring is not necessary at each emission point, it needs to provide the factual basis for this in its permit review report for the facility.

### **Condition 13 - Daily log of digester gas**

The condition does not provide sufficient detail. The permit review report must explain where digester gas is produced and emitted. The condition must specify where digester gas production and emission will be measured, the process or formula for determining the measurement. The daily log should include the name of the recordkeeper, the date for which the information is being recorded, the background measurements used to determine daily production

and emission of digester gas, and the amount of digester gas produced and emitted.

### **Continuous opacity monitoring**

Monitoring parts 2 and 3 of the COMS requirements condition needs to be amended to:

- 1) require monitoring, recordkeeping and reporting of the hours of operation of the process and whether the hours of process operation correspond with the time periods when the COMs were in operation;
- 2) change the exception to COMS operation to stated “the COMS must be operated whenever the process is in operation, except during quality control checks or routine maintenance **of the COMS.**” (changes bolded).

The last paragraph of Monitoring part 3 of this condition needs to be changed to more clearly state the conditions under which COMs can be discontinued (if the relevant section of 6 NYCRR 227 allows discontinuation of COMs). It should state:

“If, after COMs data for a 24-month monitoring period indicate that the blower engines have been operated in full compliance with all regulatory requirements relating to opacity, and NYSDEC provides written approval, COMs may be discontinued.”

Monitoring paragraph 4 needs to state that daily visual inspections for opacity **must** be performed whenever the COMs are not in operation.

### **Conditions 30, 41 - Manufacturers’ specifications**

These conditions are overly vague. The manufacturers specifications are not available to the public. The permit needs to set out the specific acts and timetable for the required periodic maintenance. The maintenance activities should be monitored, recorded, and reported so as to assure compliance with the applicable requirements.

### **Condition 48 - Tune-up**

The permit review report needs to explain the factual and legal basis for this condition.

### **Conditions 56 and 57 - Emissions from 4-WWTRE, 5-SLUDG and 6-MISCL**

The permit review report needs to detail the plants current or anticipated emissions rates for each pollutant listed in Tables 2 - 4 of 6 NYCRR Sec. 212. The permit review report needs to explain how this data was obtained. Condition 52 needs to set specific emission limits for each pollutant so identified and require monitoring, recordkeeping and reporting sufficient to assure compliance.

### **Condition 61 - Gasoline transport and dispensing**

The condition needs to state whether this facility is subject to this requirement, and if so, needs to set a deadline for completion of the actions listed, state what is necessary to comply

with all requirements, and include monitoring, recordkeeping and reporting sufficient to assure compliance with the applicable requirements.

### **VIII. The Permit is Deficient Because it Fails to Include an Adequate Compliance Schedule**

If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the facility's permit must include a compliance schedule. See 40 C.F.R. § 70.5(c)(8)(iii)(C). The compliance schedule must contain "an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance." See 40 C.F.R. § 70.5(c)(8)(iii)(C).

The Title V permit for this facility must include a compliance schedule because the plant is operating in ongoing or intermittent violation of various environmental regulations. Unfortunately, instead of developing a schedule and including it directly in this Title V permit, DEC simply references DEC consent order. This is inappropriate. First, the terms of a Title V compliance schedule must be enforceable by the public. By contrast, the terms of a state consent order are not enforceable by the public. EPA must object to the permit and require that it be revised to make the terms of the consent order unambiguously enforceable by the public under this Title V permit. The Title V compliance schedule in this permit must be amended to include more specific, enforceable requirements that pertain to operator training.

### **IX. The "Final" Permit May Improperly Limits the Effective Dates of Many Permit Conditions**

Under 40 CFR § 70.7(c)(ii), "[p]ermit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 70.5(a)(1)(iii) of this part." Similarly, 6 NYCRR § 201-6.7(a)(5) provides that "[a]ll the terms and conditions of a permit shall be automatically continued pending final determination by the Department on a request for renewal application for a permit provided a permittee has made a timely and complete application and paid the required fees. Thus, though the front page of this permit indicates that it will expire on 8/12/2007, this the term will be extended after that date so long as the facility submits a timely permit application.

Unfortunately, after expiration of the public comment and EPA review period on many of its Title V permits, DEC has modified the final permit to include, for most permit conditions, a clause stating, for example, "Effective between the dates of /13/2002 and 8/12/2007." This is not the correct way to limit the overall permit term. As a result of these statements, if a renewal permit is not issued by the five-year deadline each of the individual permit conditions may expire while the permit itself will persist (as a "hollow" permit without most applicable requirements). DEC must be required to remove these clauses from the permit so that permit conditions can be enforced after the expiration of the five-year permit term.

### **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 this facility.

Respectfully submitted,

Dated: Sept. 25, 2002  
New York, New York

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