BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

----------X

In the Matter of the Proposed Permit for

CONSOLIDATED EDISON CO OF NY, INC. Permit ID: 2-6304-01378/00002
to operate the Ravenswood Steam Plant
located in Long Island City, New York

Proposed by the New York State Department of
Environmental Conservation
----------X

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE RAVENSWOOD STEAM 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 proposed Title V Operating Permit for Con Edison's Ravenswood Steam Plant. This petition is filed within sixty days following the end of U.S. EPA's 45-day review period as required by Clean Air Act § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. Id.

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

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 U.S. EPA will act expeditiously, and in any case, within the 60-day timeframe mandated in the Clean Air Act, to respond to NYPIRG's petition.

I. The Administrator Must Object to the Proposed Permit Because it is Based on an Inadequate Permit Application

Con Edison's application for a Title V permit for the Ravenswood Steam Plant must be denied because Con Edison 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, Con Edison's permit application lacks an initial compliance certification. Con Edison is legally required to submit an initial compliance certification that includes:

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

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

Because Con Edison failed to submit an initial compliance certification, neither government regulators nor the public can truly determine whether the Ravenswood Steam 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. For example, an existing facility that is subject to major New Source Review ("NSR") requirements should possess a pre-construction permit issued pursuant to 6 NYCRR Part 201. Minor NSR permits, Title V permits, and state-only permits are also issued pursuant to Part 201. In the Title V permit application, a facility that is subject to any type of pre-existing permit simply cites to 6 NYCRR Part 201. Because DEC does not require the applicant to describe each underlying requirement, it virtually impossible to identify existing NSR requirements that must be incorporated into the applicant's Title V permit. The permit fails to clear up the confusion, since DEC takes the position that once a condition from a pre-existing permit is incorporated into a Title V permit, it is "not necessary to cite to the "old" permits in the draft permit." *DEC Responsiveness Summary, Ravenswood Steam Plant*, dated August 31, 2001. Moreover, DEC is obviously leaving terms and conditions of pre-existing permits out of the Ravenswood Title V permit, since DEC erroneously believes that emission limits in pre-existing permits "were not enforceable unless they were associated with a corresponding monitoring condition. Id. Without clear documentation in the permit application of the requirements of pre-existing permits, it is difficult for members of the public to ascertain when permit requirements have been erroneously left out of a Title V permit.

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

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

The Administrator must object to the proposed permit for the Ravenswood Steam Plant because the proposed permit is based on a legally deficiency permit application and therefore does not comply with 40 CFR Part 70.

II. The Administrator Must Object to the Proposed Permit Because it is Not Supported by an Adequate Statement of Basis

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

40 CFR §70.7(a)(5) provides that "the permitting authority shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory and regulatory provisions). The permitting authority shall send this statement to EPA and to any other person who requests it." No such statement was prepared for this permit. In fact, DEC takes the position that "the permit application and draft permit provide the legal and factual background and explanation for the draft permit conditions." *DEC Responsiveness Summary, Ravenswood Steam Plant*, dated August 31, 2001. It is obvious, however, that the permit application and draft permit fail to satisfy the requirement that DEC prepare a statement of basis to accompany the permit.

NYPIRG is particularly concerned about the fact that DEC fails to provide any information regarding the adequacy of monitoring conditions in this proposed permit. NYPIRG's review of this proposed 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. For example, DEC apparently believes that compliance with the particulate matter emission limit is assured by one stack test per permit term. DEC bears the burden of justifying the adequacy of the monitoring included in the permit. Nevertheless, DEC fails to include any information in a statement of basis or any other supporting documentation that explains why the permit assures the plant's compliance with the particulate matter limit. The Administrator must object to this proposed permit based on DEC's failure to carry its burden in justifying the type and frequency of monitoring required under the terms of this proposed permit.

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

The Administrator must object to the issuance of the permit and insist that DEC provide the public with a statement of basis for this permit. The public must be given a new opportunity to comment on the draft permit once a statement of basis is available.

III. The Administrator Must Object to the Proposed Permit Because it Distorts the Annual Compliance Certification Requirement of Clean Air Act § 114(a)(3) and 40 CFR § 70.6(c)(5)

Under 6 NYCRR § 201-6.5(e), a permittee must "certify compliance with terms and conditions contained in the permit, including emission limitations, standards, or work practices," at least once each year. This requirement mirrors 40 CFR §70.6(b)(5). The general compliance certification requirements included in this proposed permit (Condition 26) do not require the permitee to certify compliance with all permit conditions. Rather, the proposed permit only requires that the annual compliance certification identify "each term or condition of the permit that is the basis of the certification." DEC then proceeds to identify certain conditions in the draft permit as "Compliance Certification" conditions. Requirements that are labeled "Compliance Certification" are those that identify a monitoring method for demonstrating compliance. There is no way to interpret this designation other than as a way of identifying which conditions are covered by the annual compliance certification. The permit conditions that lack monitoring (often a problem in its own right) are excluded from the annual compliance certification. This is an incorrect application of state and federal law. The permittee must certify compliance with every permit condition, not just those permit conditions that are accompanied by a monitoring requirement.

In response to NYPIRG's comments on the inadequate compliance certification conditions, DEC stated:

> The format of the annual compliance report is being discussed internally and with EPA. The Department is dealing with this issue, as are other States, in light of the uncertainly regarding the implementation of the Part 70 requirements. The States and EPA are currently in discussions on this issue but no policy statements have been forthcoming from EPA. The Department does not see any reason to believe that it distorts the annual compliance certification requirement of § 114(a)(3) and 40 CFR 70.6(c)(5).

DEC Responsiveness Summary, Draft Title V Permit for Ravenswood Steam Plan, August 31, 2001. While NYPIRG agrees that U.S. EPA has been negligent by not providing state permitting authorities with guidance on how to properly implement the Part 70 program, U.S. EPA's failure to provide guidance does not excuse DEC from complying with Part 70 requirements. The annual compliance certification requirement is the most important aspect of the Title V program. The Administrator must object to any permit that fails to require the permittee to certify compliance (or noncompliance) with <u>all</u> permit conditions on at least an annual basis.

IV. The Administrator Must Object to the Proposed Permit Because it Does Not Require Prompt Reporting of All Deviations From Permit Requirements as Mandated by 40 CFR § 70.6(a)(3)(iii)(B)

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

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

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

60 Fed. Reg. 36083 (July 13, 1995). The proposed permit for the Ravenswood Steam Plant fails to specify either a general prompt reporting requirement or requirement-specific prompt reporting requirements. In response to NYPIRG's comments on the draft permit, DEC explain that "unless the permittee is seeking to have a violation excused either as unavoidable or for some other reason, all other permit deviations shall be reported according to the 6-month reporting requirement for required monitoring unless specified within an individual permit condition." *DEC Responsiveness Summary*, Draft Title V Permit for Ravenswood Steam Plan, August 31, 2001. While DEC correctly describes its own policy, NYPIRG believes that this policy violates 40 CFR Part 70. The only distinction that DEC makes between violations that must be reported within 2 days and violations that are to be reported every six months is that the violations that must be reported quickly are those that the permittee would like to have excused. There is no evidence that in defining "prompt," DEC takes into consideration "the degree and type of deviation" as required by 40 CFR § 70.6(a)(3)(iii)(B). Instead, DEC is trying as hard as it can to keep facilities like the Ravenswood Steam Plant from having to report violations any more frequently than required prior to Title V.

The Administrator must require DEC to include prompt reporting requirements in the permit for the Ravenswood Steam Plant that that are consistent with U.S. EPA's past interpretations of what qualifies as "prompt." That means that, in general, violations must be reported within 2 to 10 days. Any

determination by DEC that a violation need only be reported every six months must be backed up by strong evidence that such delayed reporting is justified based on the degree and type of violation. The Administrator must determine whether "prompt" as defined in THIS permit is reasonable.

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

V. The Administrator Must Object to the Proposed Permit Because its Startup/Shutdown, Malfunction, Maintenance, and Upset Provision Violates 40 CFR Part 70

Condition 5 in this draft permit states in part that "[a]t the discretion of the commissioner, a violation of any applicable emission standard for necessary scheduled equipment maintenance, start-up/shutdown conditions and malfunctions or upsets may be excused is such violations are unavoidable." The condition goes on to describe the actions and recordkeeping and reporting requirements that the facility must adhere to in order for the Commissioner to excuse a violation as unavoidable. In this petition, we refer to this condition as the "excuse provision." As detailed below, the excuse provision included in this proposed permit violates 40 CFR Part 70 in a number of ways.

A. The Excuse Provision Included in the Proposed Permit is Not the Excuse Provision that is in New York's SIP

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

[1] 40 CFR 52.1679 (2001).

B. The Draft Permit Must Describe What Constitutes "Reasonably Available Control Technology" During Conditions that Are Covered by the Excuse Provision

The excuse provision included in the draft permit and in New York's SIP mandates that "[r]easonably available control technology, as determined by the commissioner, shall be applied during any maintenance, start-up, or malfunction condition." See 6 NYCRR § 201.5(e); see also 6 NYCRR § 201-1.4. Under 40 CFR § 70.6(a)(1), each Title V permit must include "operational requirements and limitations that assure compliance with all applicable requirements." Since the requirement to apply RACT during maintenance, startup, or malfunction conditions is included in New York's SIP, it is an applicable requirement. To assure each facility's compliance with this requirement, DEC must include terms and conditions in each permit that clarify what constitutes RACT for this facility during maintenance, startup, and malfunction conditions. The final permit issued for this facility must also include monitoring, recordkeeping, and reporting requirements that will assure that RACT is employed during maintenance, startup, and malfunction conditions. See 40 CFR § 70.6(c)(1) (requiring each Title V permit to include "monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit"). In situations where RACT is no different during these periods from what is required under other operating conditions, DEC must explain and justify this determination in the statement of basis. The permit must be clear that compliance with the requirement to employ RACT during startup, maintenance, and malfunction conditions does not excuse the facility from compliance with applicable emission limitations.

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

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

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

can apply for a violation to be excused.

Though New York's SIP-approved excuse provision lacks an explicit definition as to what qualifies for an excuse, the Commissioner must exercise her discretion in accordance with Clean Air Act requirements. In other words, the Commissioner must define "unavoidable" as it is defined by EPA in its Startup/Shutdown/Malfunction Policy, as set forth in EPA's 9/28/82, 2/15/83, and 9/20/99 memorandums. In order to clarify the standard that applies to the Commissioner's determinations regarding whether a violation is unavoidable and therefore assure the public that permitted facilities are not allowed to operate in violation of applicable requirements, the permit must be modified to state that the Commissioner shall determine whether a violation is unavoidable based on the criteria in U.S. EPA's memorandum dated September 20, 1999 entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." In addition, the permit must include specific criteria regarding when this permittee's emission exceedances may qualify for an excuse. Specifically, what constitutes "startup," "malfunction," and "maintenance" must be explicitly defined in the permit. This clarifying language is necessary in order to assure each facility's compliance with all applicable requirements under 40 CFR § 70.6(a)(1).

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

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

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

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

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

(1) *Violations due to Startup, Shutdown and Maintenance*.[3] The facility must submit a written report whenever the facility exceeds an emission limitation due to startup, shutdown, or maintenance. (Proposed permit condition 8 only requires reports of violations due to startup, shutdown, or maintenance "when requested to do so in writing").[4] The written report must describe why the violation was unavoidable, as well as the time, frequency, and duration of the startup/shutdown/maintenance activities, an identification of air contaminants released, and the estimated emission rates. Even if a facility is subject to continuous stack monitoring and quarterly reporting requirements, it still must submit a written report explaining why the violation was unavoidable. (The draft permit does not require submittal of a report "if a facility owner/operator is subject to continuous stack monitoring and quarterly reporting requirements"). Finally, a deadline for submission of these reports must be included in the permit.

(2) *Violations due to Malfunction*. The facility must provide both telephone and written notification and to DEC within two working days of an excess emission that is allegedly unavoidable due to "malfunction." (Proposed permit condition 8 only requires notification by telephone, which means that there is no documentation of the exchange between the facility operator and DEC and there is no way for concerned citizens to confirm that the facility is complying with the reporting requirement.)[5] The facility must submit a detailed written report within thirty days after the facility exceeds emission limitations due to a malfunction. The report must describe why the violation was unavoidable, the time, frequency, and duration of the malfunction, the corrective action taken, an identification of air contaminants released, and the estimated emission rates. (The proposed permit only requires the facility to submit a detailed written report "when requested in writing by the commissioner's representative".)[6]

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

The proposed permit apparently allows the DEC Commissioner to excuse the violation of any federal requirement by deeming the violation "unavoidable," regardless of whether an "unavoidable" defense is allowed under the requirement that is violated. U.S. EPA was concerned about this issue when it granted interim approval to New York's Title V program. In the Federal Register notice granting program approval, 61 Fed. Reg. 57589 (1996), U.S. EPA noted that before New York's program can receive full approval, 6 NYCRR §201-6.5(c)(3)(ii) must be revised "to clarify that the discretion to excuse a violation under 6 NYCRR Part 201-1.4 will not extend to federal requirements,

[3] NYPIRG interprets U.S. EPA's 1999 memorandum as prohibiting excuses due to maintenance.

[4] See Condition 8(a) in the draft permit.

[5] See Condition 8(b) in the draft permit.

[6] Id.

unless the specific federal requirement provides for affirmative defenses during start-ups, shutdowns, malfunctions, or upsets." 61 Fed. Reg. at 57592. Though New York incorporated clarifying language into state regulations, the proposed permit lacks this language. U.S. EPA must require DEC to make it clear that a violation of a federal requirement that does not provide for an affirmative defense will not be excused.

VI. The Administrator Must Object to the Proposed Permit Because it Lacks Federally Enforceable Conditions that Govern the Procedures for Permit Renewal

Currently, the only condition governing permit renewal is condition 3 under "DEC General Conditions." Since this condition is not in the "Federally Enforceable Conditions" section of the Title V permit but is instead included in an attachment that does not appear to create federally enforceable obligations, this condition is insufficient to satisfy Part 70 requirements. Under 40 CFR § 70.7(c)(ii), "Permit 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." 40 CFR § 70.5(a) provides that "For each Part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section." § 70.5(a)(1)(iii) provides that "For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed." Thus, the requirement that a facility submit a timely permit application is a federal requirement.

A Title V permit may not be issued unless "the conditions of the permit provide for compliance with all applicable requirements and requirements of this part." 40 CFR § 70.7(a)(iv). Thus, this Title V permit violates 40 CFR Part 70 because it lacks the federally enforceable requirement that the facility apply for a renewal permit within six months of permit expiration.

VII. The Administrator Must Object to the Proposed Permit Because it Lacks Monitoring that is Sufficient to Assure the Facility's Compliance with all Applicable Requirements

Title V requires that operating permits include monitoring and reporting requirements sufficient to allow state and federal agencies and the public to determine whether the facility is complying with each individual applicable requirement. Each Title V permit must "set forth . . . monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. § 7661c(c).

EPA's part 70 regulations include two provisions to assure that Title V permits include adequate testing, monitoring, reporting and recordkeeping. Section 70.6(a)(3)(i)(B) requires that "[w]here the applicable requirement does not require testing or instrumental or noninstrumental monitoring . . . periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance" shall be added to the permit. 40 CFR § 70.6(a)(3)(i)(B). Likewise Section 70.6(c) states "[a]ll part 70 permits shall contain the following elements with respect to compliance: (1) Consistent with paragraph (a)(3) of this section, compliance certification, testing,

monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. . ." 40 CFR § 70.6(c)(1).

In *Natural Resources Defense Council v. EPA*, the D.C. Circuit referred to the part 70 monitoring requirements as "residual rules" and held that even sources which are not subject to CAM are subject to sections 70.6(a)(3)(i)(B) and 70.6(c) which "have the same bottom line -- a major source must undertake 'monitoring . . . sufficient to assure compliance.'" *Natural Resources Defense Council v. EPA*, 194 F.3d 130, 136 (D.C. Cir. 1997).

Similarly, in *In the Matter of: Pacificor's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, U.S. EPA stated that "the Clean Air Act requirements that each Title V permit have enhanced monitoring, and monitoring that is sufficient to assure compliance with the permit terms and conditions remain in place." *In the Matter of Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants*, Petition No. VIII-00-1, Order Responding to Petitioners Request that the Administrator Object to Issuance of State Title V Operating Permit at p. 19. U.S. EPA went on to state:

> Where 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,'
> . . .
> Where the applicable requirement already requires periodic testing or instrumental or non-instrumental monitoring . . . 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 as necessary to be sufficient to assure compliance with the terms and conditions of the permit.

Id. at p. 19-20.

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. U.S. EPA provided examples of permit conditions that are not enforceable as a practical matter in a recent letter to the Ohio Environmental Protection Agency ("OEPA") setting out deficiencies in Ohio's Title V program. In that letter, U.S.EPA explained that:

> In addition to implementing appropriate compliance methods, the monitoring, recordkeeping, and reporting requirements must be written in sufficient detail to allow no room for interpretation or ambiguity in meaning. Requirements that are imprecise or

> unclear make compliance assurance impossible. For example, some Title V permits require monitoring devices to be 'installed, calibrated, operated, and maintained in accordance with the manufacturer's specifications,' without explaining in detail the steps in these processes or the manufacturer's specifications. There steps must be explained in detail in order for such a requirement to have any meaning. The description of plant activities need not be exhaustive, but they must be specified in the permit if they would significantly affect the source's ability to comply. Leaving the source to follow 'manufacturer's specifications' does not help direct the source toward compliance. In some instances, manufacturer's specifications may not even exist.
>
> Many Title V permits contain ambiguous phrases, such as 'if necessary.' For example: 'If necessary, the permittee shall maintain monthly records . . .' The phrase 'if necessary' should be removed altogether; the permit should specify exactly what is necessary. In this example, the permit should either precisely explain the situation that would necessitate monthly records, or simply require monthly records at all times. Ambiguous language hampers the source in its duty to independently assure compliance, and leaves legal requirements open to interpretation.

Attachment to Letter from Bharat Mathur, U.S. EPA Region 5, to Robert F. Hodanbosi, Ohio EPA, dated November 21, 2001 (Exhibit 2).

The proposed Title V permit for the Ravenswood Steam Plant fails to require the plant to perform monitoring that is sufficient to assure the plant's compliance with applicable requirements and contains numerous conditions that are too vague to be enforceable as a practical matter. Specific monitoring and enforceability deficiencies are identified below.

A. The Proposed Permit Because it Fails to Assure the Plant's Ongoing Compliance with Particulate Matter Emission Limits That Apply to the Boilers

The Ravenswood Steam Plant includes 4 steam generating boilers. Each of the boilers are permitted to combust #6 fuel oil and natural gas. The permit fails to indicate whether the boilers are equipped with any kind of particulate matter ("PM") emissions control device. Obviously, then, the permit also fails to require the plant to monitor control devices to determine whether they are functioning properly. In addition, according to the proposed permit, each boiler is subject to a PM limit of 0.1 lbs/MMBtu when burning #6 fuel oil. At the outset, the proposed permit is deficient because the PM limit must be stated as 0.10 lbs/MMBtu, as it is written in the underlying applicable requirement.

The proposed permit is also deficient because it fails to include monitoring that is sufficient to assure the plant's ongoing compliance with the PM limit. In accordance with 40 CFR § 70.6(a)(3)(i)(B), the permit must contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit.[7] The proposed

[7] The underlying applicable requirement does not specify a compliance monitoring method.

permit violates this requirement because it only requires the Ravenswood Steam Plant to perform one Method 5 test per permit term and it fails to require surrogate monitoring that could assure the plant's ongoing compliance with PM limits between stack tests. It is inconceivable that one stack test every five years could assure the plant's compliance with a standard that is based on a one-hour average.

According to DEC, "[t]he initial stack test will establish an emission factor which will be used to verify ongoing compliance. If, during an inspection, it is apparent that the facility is not being maintained properly, under the terms of the permit, the facility can be directed to perform an additional stack test." *DEC Responsiveness Summary*, Draft Permit for the Ravenswood Steam Plant, August 31, 2001. DEC's reasoning is seriously flawed. First, the proposed permit says absolutely nothing about establishing an emission factor and using that factor to verify ongoing compliance. Second, Title V requires that a permit include sufficient monitoring to assure compliance on an ongoing basis. The idea is that Title V will help assure compliance between inspections. Certainly, the Title V program does not replace the need for regular DEC inspections of the plant. Conversely, regular DEC inspections do not replace the need for a permit that assures compliance on an ongoing basis.

NYPIRG believes that appropriate compliance monitoring would be an annual stack test that is supplemented by parametric monitoring of relevant operational parameters. DEC must establish the relationship between the parameter being monitored and compliance with the emission limit. In addition, the acceptable parameter range must be identified in the permit. See *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, F.J. Gannon Station, Permit no. 0570040-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, September 8, 2000. See also *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Tampa Electric Company, Big Bend Station, Permit no. 0570039-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, September 5, 2000; *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, North County Regional Resource Recovery Facility, Permit no. 0990234-001-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, August 11, 2000; *U.S. EPA Region 4 Objection, Proposed Part 70 Operating Permit, Pinellas County Resource Recovery Facility, Permit no. 1030117-002-AV*, under cover of letter from Winston A. Smith, U.S. EPA Region 4, to Howard Rhodes, Florida Department of Environmental Protection, July 20, 2000. All of these objection letters are available on the internet at www.epa.gov/region4/air/permits/index.htm#TitleV. Finally, NYPIRG suggests that DEC develop a correlation between PM emissions and opacity at the plant so that opacity can be used as a surrogate monitoring method to help assure the plant's compliance with the PM limit.

The Administrator must object to the Title V permit proposed for the Ravenswood Steam Plant because (1) the applicable PM limit is misstated in the permit, (2) the monitoring included in the permit is blatantly inadequate to assure the plant's compliance with the applicable PM limit on an ongoing basis,

and (3) DEC fails to provide any information in the statement of basis indicating why one stack test per permit term is sufficient to assure the facility's ongoing compliance with the PM limit.

B. The Proposed Permit Fails to Assure Compliance with 6 NYCRR § 211.3

The proposed permit fails to include any monitoring designed to assure the plant's compliance with 6 NYCRR § 211.3, which limits opacity emissions from anywhere at the plant to 20 percent, except for one continuous six-minute period per hour of not more than 57 percent opacity. See Condition 46. Any decision on the part of DEC to streamline this requirement with another opacity requirement must be explained in the statement of basis. The Administrator must object to this proposed permit due to its lack of any monitoring to assure compliance with this applicable requirement.

C. The Proposed Permit Fails to Assure Compliance with Applicable NOx Emission Limits

1. NOx RACT

There are several flaws in the way that the requirements of 6 NYCRR § 227-2 (Reasonably Available Control Technology for Oxides of Nitrogen) are incorporated into the proposed permit for the Ravenswood Plant. First, the permit allows the Ravenswood Plant to demonstrate compliance with the NOx RACT emission limits through the use of system-wide averaging pursuant to 6 NYCRR § 227-2.5. The "system" that is being averaged is the system of fossil-fuel fired facilities owned and operated by KeySpan Energy. Under 6 NYCRR § 227-2.2(b)(16), "system" is defined as "[t]hose units regulated under this Title which are owned and/or operated by the same person provided that the person holds Department operating permits for each unit." The permit for the Ravenswood Steam Plant has been issued to Consolidated Edison Co. of NY, Inc., not KeySpan Energy. Thus, the permit may not allow NOx emissions from the Ravenswood Steam Plant to be averaged with any facilities other than those owned or operated by Consolidated Edison Co. of NY, Inc.

A second flaw in the NOx RACT conditions is that the permit fails to identify the applicable NOx emission limits. DEC responds that it is not necessary to state the specific NOx limits in the permit because the NOx RACT Compliance and Operating Plans are attached to the permit. The primary way that DEC publicizes Title V permits is on the Internet, however, and the Compliance and Operating Plans are not attached to the permit for the Ravenswood Steam Plant that is available on DEC's website. Moreover, the Clean Air Act specifically requires that each permit include "emission limitations and standards." 32 U.S.C. § 7661c(a). Including the emission limitations in an attachment to the permit is not the same as explicitly including the emission limits in the permit. DEC also argues that "the NOx limits apply to the KeySpan system of facilities and not to the Ravenswood Steam plant. It would be misleading to cite specific NOx limits for the combustion equipment at the Ravenswood Steam plant in the draft permit." The permit would only be misleading, however, if it included the emission limitations in the permit and failed to explain that the limitations applied to the system as a whole rather than the plant, alone. The fact that compliance with NOx RACT is measured based on a system-wide average does not remove DEC's obligation to include applicable emission limits in each

permit. Rather, DEC must include the emission limits and take the extra step of explaining exactly how compliance with those limits is measured. Moreover, it is NYPIRG's understanding that when compliance with NOx RACT is measured based on a system-wide average, each plant is assigned a "target" emission rate. NYPIRG views this target emission rate as a form of compliance assurance monitoring -- a deviation from the target emission rate provides an indication that there may be a problem, but does not constitute a violation in and of itself. DEC must provide an explanation in the statement of basis for why the monitoring that is included in the permit assures compliance with NOx RACT, and why DEC believes that it is not necessary to include a target emissions rate for this plant in the permit.

2. NOx Budget Rule (6 NYCRR Part 204).

The permit for the Ravenswood Steam Plant fails to assure compliance with the NOx Budget rule in 6 NYCRR Part 204 because many of the conditions are too vague to be enforceable. The conditions refer generically to a "NOx Budget unit," but neither the permit nor the permit description explains what units at the facility may qualify as a NOx Budget unit. See, e.g. Conditions 31, 32, and 33. Similarly, Condition 39 refers to the use of "any other approved emission monitoring system under this subpart," leaving it unclear what kind of monitoring system will be used at the Ravenswood Steam Plant. Condition 42 also refers to parameters, but fails to specify what parameters are to be monitored at this plant. Condition 42 refers generically to "any other values required to determine NOx mass," while Condition 44 only applies to a "unit that elects to monitor and report NOx Mass emissions using a Nox concentration system and a flow system." DEC did not respond to NYPIRG's comments on the draft permit regarding the vague and unenforceable terms included in the conditions that relate to the NOx Budget rule. As explained at the beginning of this section, U.S. EPA is already on record as stating that 40 CFR Part 70 requires that permit conditions be written in clear and enforceable language. The Administrator must object to this permit because the NOx Budget conditions are littered with language that is unenforceable as a practical matter.

D. The Proposed Permit Fails to Assure Compliance Sulfur Limits

Condition 48 limits the sulfur content of residual fuel burned at the Ravenswood Plant to 0.30 percent by weight. Though condition 48 indicates that sulfur content is to be monitored "per delivery," Condition 48 fails to mention what kind of monitoring will be performed to assure compliance with this limit. Condition 49 states that the facility must comply with the emission and fuel monitoring methods and requirements of § 225-1.7. A review of § 225-1.7, however, reveals that certain aspects of this regulation are not enforceable as a practical matter unless terms are added to the permit condition detailing how the requirement applies with respect to this particular facility. For example, the rule requires that the facility's continuous emissions monitors be maintained in accordance with the manufacturer's recommendations, but these recommendations are not included in the permit and are not generally available to the public.

In response to NYPIRG's comments on the draft permit, DEC explained that the requirements for monitoring to verify compliance with the sulfur limit are stated in Condition 48. Specifically, DEC

informed NYPIRG that "Condition 48 requires the facility to 'comply with the emission and fuel monitoring methods of 6 NYCRR 225-1.7, that is, the facility must conduct 'representative sampling and sulfur analysis' on the fuel oil 'in a manner approved by the commissioner.' The facility is required to report monthly on the sulfur content of the fuel oil used at its facility"

After more than two years of submitting petitions and comments to DEC and U.S. EPA regarding inadequacies in New York's Title V permits, NYPIRG is getting rather frustrated about the fact that we continue to receive responses from DEC about monitoring such as the response quoted above. We are perfectly able to read the regulation, but as we told DEC, the regulation, by itself, is not enforceable as a practical matter. DEC must actually explain in the permit how compliance will be assured. The permit must explain exactly what method will be used to measure the sulfur content of the fuel. In addition, DEC must explain in a statement of basis why the selected monitoring is sufficient to assure the facility's ongoing compliance with applicable requirements.

NYPIRG is also concerned about the fact that DEC has exempted the Ravenswood Plant from the requirement that it continuously monitor sulfur dioxide emissions. 6 NYCRR § 227-1.7 states that for stationary combustion installations with a total heat input greater than 250 million Btu per hour:

> Instruments for continuously monitoring and recording sulfur compound emissions (expressed as sulfur dioxide) must be installed and operated at all times that the stationary combustion installation is in service. Such instruments must be operated in accordance with manufacturer's instructions, must satisfy the criteria in "performance specification 2," appendix B, part 60 of title 40 of the Code of Federal Regulations (see Table 1, section 200.9 of this Title), and must be acceptable to the commissioner.

The permit description accompanying the draft permit (and the proposed permit) states that "continuous monitors are installed on both stacks at the facility to record and report emissions" of sulfur dioxide." Given that nothing in the draft permit indicated that that the facility may be exempt from this requirement, NYPIRG is surprised to be informed by DEC in its response to our comments that:

> The facility is exempt from the requirement to continuously monitor and record sulfur compound emissions (expressed as sulfur dioxide). Under 225-1.7(b)(2), the facility is permitted to conduct 'representative sampling and fuel sulfur analysis,' in a manner approved by the commissioner, in lieu of having to install equipment to continuously monitor and record sulfur emissions. Recommendations from the manufacturer of continuous monitoring equipment are, therefore, not included in the permit.

DEC Responsiveness Summary, Draft Permit for the Ravenswood Steam Plant, August 31, 2001. In light of the fact that Con Edison would be required to continuously monitor sulfur dioxide emissions if not for DEC's decision that representative fuel sampling is sufficient, DEC's failure to provide sufficient detail in the permit regarding the fuel sampling requirements is even more inexcusable.

In comments on the draft permit, NYPIRG also pointed out that DEC fails to acknowledge that the current state version of 6 NYCRR § 225-1 is not part of New York's SIP. NYPIRG commented that DEC must correctly identify the version of Subpart 225-1 that forms the basis for the federally-enforceable condition in the draft permit, and must determine whether the draft permit correctly incorporates all requirements included in the SIP-approved version of Subpart 225-1. DEC failed to respond to this comment.

The Administrator must object to this proposed permit because (1) the monitoring conditions included in the permit for assuring compliance with the sulfur-in-fuel limit are vague and unenforceable as a practical matter, (2) DEC fails to provide information in the statement of basis justifying its reliance on fuel analysis to assure the facility's compliance rather than continuous monitoring, which is established in the applicable requirement as the preferred form of monitoring for this type of facility, and (3) DEC fails to correctly identify the SIP version of 6 NYCRR § 225-1 as the legal basis for the sulfur limits.

VIII. The Administrator Must Object to the Proposed Permit Because it Fails to Include Federally Enforceable Emission Limits Established Under Pre-Existing Permits

The Ravenswood Steam Plant is subject to a number of federally enforceable permits that were issued pursuant to 6 NYCRR Part 201, which is part of New York's federally enforceable State Implementation Plan ("SIP") under the Clean Air Act. These permits, issued by DEC on May 31, 1995, place enforceable limits on emissions of criteria air pollutants from each boiler. The emission limits in the underlying permits are expressed as "permissible" emission rates. "Permissible emission rate" is defined in 6 NYCRR § 200.1(bj) as "[t]he maximum rate at which air contaminants are allowed to be emitted to the outdoor atmosphere. This includes . . . (3) any emission limitation specified by the commissioner as a condition of a permit to construct and/or certificate to operate." Similarly, the SIP version of 6 NYCRR § 201 states that "a certificate to operate will cease to be valid under the following circumstances . . . (3) the permissible emission rate of the air contamination source changes." 6 NYCRR § 201.5(d)(3) (effective 4/4/93). Thus, the SIP makes it clear that the "permissible emission rate" included in SIP-based Part 201 permits is an enforceable requirement. The permissible emission rates included in the Part 201 permits previously issued to this facility must therefore be included in this Title V permit.

In response to NYPIRG's comments on the draft permit for the Ravenswood Steam Plant, DEC took the position that "[t]he 'permissible emission' limits in the old permits were not enforceable unless they were associated with a corresponding monitoring condition. . . . These limits, based on regulations, and the Special Conditions from the 'old' permits have been incorporated into the draft permit." *DEC Responsiveness Summary*, Draft Permit for the Ravenswood Steam Plant, August 31, 2001.

DEC's position that only emission limits that were associated with a corresponding monitoring condition are federally enforceable requirements does not comport with the plain language of 6 NYCRR Part 200 and the SIP-approved version of 6 NYCRR Part 201. All of the emission limits in the Ravenswood Steam Plant's pre-existing Part 201 permits, not just those that were associated with a

monitoring condition, are federally enforceable applicable requirements that must be included in the plant's Title V permit.

U.S. EPA is already on record requiring the terms and conditions of permit issued pursuant to SIP regulations to be included in Title V permits. In a letter to Robert Hodanbosi of STAPPA/ALAPCO, U.S. EPA stated:

> Title V and the part 70 regulations are designed to incorporate all Federal applicable requirements for a source into a single title V operating permit. To fulfill this charge, it is important that all Federal regulations applicable to the source such as our national emission standards for hazardous air pollutants, new source performance standards, and the applicable requirements of SIP's and permits issued under SIP-approved permit programs, are carried over into a title V permit.[1] All provisions contained in an EPA-approved SIP and all terms and conditions in SIP-approved permits are already federally enforceable (see 40 CFR § 52.23).[2] The enactment of title V did not change this. To the contrary, all such terms and conditions are also federally enforceable "applicable requirements" that must be incorporated into the Federal side of a title V permit [see CAA § 504(a); 40 CFR § 70.2)]. Thus, if a State does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of a title V permit, it must take appropriate steps in accordance with title I substantive and procedural requirements to delete those conditions from its SIP or SIP-approved permit. If there is not such an approved deletion and a SIP provision or condition in a SIP-approved permit is not carried over to the title V permit, then that permit would be subject to an objection by EPA.

Letter from John Seitz, U.S. EPA, to Robert Hodanbosi, STAPPA/ALAPCO, dated May 20, 1999. The relevant portions of this letter are attached to this petition as Exhibit 3. Based on the rationale set forth in that letter, the Administrator must object to the proposed permit for the Ravenswood Steam Plant on the basis that DEC improperly omitted applicable emission limits.

Conclusion

In light of the numerous and significant violations of 40 CFR Part 70 identified in this petition, the Administrator must object to the proposed Title V permit for the Ravenswood Steam Plant

Respectfully submitted,

Dated: December 13, 2001
New York, New York

Keri Powell, Esq.
New York Public Interest Research Group, Inc.
9 Murray Street, 3rd Floor
New York, New York 10007
(212) 349-6460
<kpowell@nypirg.org>