

Sierra Club -- Environmental Working Group -- National Environmental Trust -- Clean Air Task Force -- Clear the Air -- Public Citizen's Critical Mass Energy and Environment Program -- Atlantic States Legal Foundation -- Conservation Law Foundation -- New England Clean Water Action -- Consumer Policy Institute -- Consumer Policy Union -- Sierra Club Great Lakes Program -- Citizens Awareness Network -- Alabama Environmental Council -- Greenaction for Health and Environmental Justice -- California Communities Against Toxics -- Coalition for Clean Air -- Land and Water Fund of the Rockies -- Toxics Action Center -- Legal Environmental Assistance Foundation -- Ozone Action -- Campaign for a Prosperous Georgia -- American Lung Association of Metropolitan Chicago -- Illinois Environmental Council -- Center for Neighborhood Technology -- Valley Watch -- Hoosier Environmental Council -- Citizens for Clean Air and Water -- It's Our Home -- Natural Resources Council of Maine -- Toxics Action Center -- Ozark Chapter of the Sierra Club -- American Lung Association of Michigan -- Ecology Center of Ann Arbor -- Hamtramck Environmental Action Team -- Michigan Environmental Council -- Pyramid Lake Paiute Tribe -- Rural Alliance for Military Accountability -- American Lung Association of New Jersey -- NJ/NY Environmental Watch -- New Jersey Environmental Lobby -- American Lung Association of New York State -- New York Public Interest Research Group -- Citizens' Environmental Coalition -- Environmental Advocates -- Scenic Hudson -- Chenango North Energy Awareness Group -- Temple Beth El Social Action Committee -- Kids Against Pollution -- Central New York -- Citizens Awareness Network -- Appalachian Voices -- North Carolina Public Interest Research Group -- Earth Day Coalition -- Ohio Environmental Council -- The Environmental Community Organization -- Ohio Citizen Action -- Northeast Ohio Group, Sierra Club -- Oregon Environmental Council -- Swan Island Airshed Committee -- Clean Air Council -- Group Against Smog and Pollution -- Citizens for Pennsylvania's Future -- People United for a Responsible Environment -- Southern Alliance for Clean Energy -- Tennessee Citizens for Wilderness Planning -- Tennessee Environmental Council -- Sierra Club, Lone Star Chapter -- Galveston-Houston Association for Smog Prevention -- Public Citizen of Texas -- Texas Sustainable Energy and Economic Development Coalition -- Wasatch Clean Air Coalition -- American Lung Association of Washington -- Washington Regional Network for Livable Communities -- Concerned Citizens' Coalition -- U.S. Public Interest Research Group -- Georgia Public Interest Research Group -- Washington Public Interest Research Group -- Wisconsin Public Interest Research Group -- Public Interest Research Group in Michigan -- Florida Public Interest Research Group -- Illinois Public Interest Research Group -- Ohio Public Interest Research Group -- Massachusetts Public Interest Research Group

May 9, 2000

Carol Browner, Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re: EPA's Response to the DC Circuit Court Decision Striking Down the Title V  
Periodic Monitoring Guidance

Dear Ms. Browner:

We are writing to urge you to take quick action to ensure that permits issued pursuant to the Clean Air Act Title V permit program require permitted facilities to perform adequate pollution control monitoring.

On April 14, 2000, the United States Court of Appeals for the District of Columbia Circuit ruled in favor of industry petitioners in Appalachian Power Company v. EPA, setting

aside EPA's 1998 Title V "Periodic Monitoring Guidance." The Periodic Monitoring Guidance gave state and local permitting authorities specific direction on the type and frequency of pollution control monitoring that must be included in a Clean Air Act Title V air pollution permit. The loss of this guidance makes it far less likely that our nation's largest polluters—including power plants, incinerators, petroleum refineries and large factories—will be held accountable for compliance with the Clean Air Act through effective Title V permits.

EPA must revise 40 CFR Part 70, the federal regulation governing state Title V programs, to include language that clearly supports the periodic monitoring principles contained in the Periodic Monitoring Guidance. Moreover, EPA must take all actions necessary to prevent the issuance of inadequate permits pending the elimination of any gaps in periodic monitoring requirements.

In the Periodic Monitoring Guidance, EPA interpreted 40 CFR Part 70 as requiring state permitting authorities to include additional monitoring in a facility's Title V permit "for each applicable requirement for which the present monitoring is nonexistent or otherwise inadequate." Periodic Monitoring Guidance, p. 7 (emphasis added). In Appalachian Power Company, industry petitioners challenged the Periodic Monitoring Guidance on the basis that 40 CFR Part 70 does not give states the authority to require additional pollution monitoring when monitoring provided in an underlying requirement is "inadequate." Rather, industry argued that when an applicable requirement specifies some form of monitoring that must take place from time to time, no matter how infrequently, 40 CFR Part 70 does not require additional monitoring. In ruling against EPA, the Court did not find that EPA lacks the authority under the Clean Air Act to require by regulation that a Title V permit include additional monitoring when existing monitoring is inadequate. Instead, the Court held that EPA improperly expanded 40 CFR Part 70 by issuing the Periodic Monitoring Guidance without following mandatory rulemaking procedures.

The Appalachian Power Company decision threatens to undermine the effectiveness of the Title V program by making it so that Title V facilities are not required to perform monitoring that is sufficient to assure compliance with Clean Air Act-based requirements. In addition, the decision is likely to result in a stampede by facilities that already possess final Title V permits to get the periodic monitoring conditions included in those permits relaxed. Permitting authorities, already overwhelmed by the task of processing initial permit applications, could be swamped by this push for permit modifications.

EPA must revise 40 CFR Part 70 as soon as possible to clarify that a Title V permit must require the permitted facility to perform additional pollution monitoring when monitoring provided in an underlying requirement is inadequate. At the very least, this revision must be included in the Part 70 revision package that is scheduled to be released for public comment in late summer or early fall of 2000.

Pending the revision of 40 CFR Part 70, EPA must take all actions necessary to prevent the issuance of inadequate Title V permits and to discourage facilities from asking for modifications in permits that have already been issued. While a variety of actions may be necessary, we specifically ask that EPA immediately publish a Federal Register notice

announcing the agency's intention to propose revisions to Part 70 that will reinstate the periodic monitoring principles included in the Periodic Monitoring Guidance. The Federal Register notice must also clarify that EPA and permitting authorities are still under an obligation to ensure the adequacy of the periodic monitoring required in Title V permits. As the Court made clear in Appalachian Power Company, existing regulations allow for increased monitoring in cases where an applicable emissions standard lacks monitoring, where there is only a one-time monitoring requirement, or where an underlying requirement fails to specify how frequently monitoring must be performed. Moreover, Clean Air Act § 505(b) requires EPA to object to any Title V permit that does not comply with the Clean Air Act, including the Clean Air Act § 505(a)(1)(A) requirement that every Title V permit include "conditions as are necessary to assure compliance with applicable requirements [of the Clean Air Act], including the requirements of the applicable implementation plan." Clearly, a Title V permit cannot assure the public and government regulators that a facility is operating in compliance with the law if the facility is not required to perform adequate periodic monitoring.

The Court's decision in Appalachian Power Company poses a serious threat to the success of the Title V program. We urge you to avert this threat by implementing the recommendations discussed above without delay.

Sincerely,

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