

Sierra Club ♦ Environmental Working Group ♦ Appalachian Mountain Club ♦ Clean Air Task Force ♦ Environmental Law & Policy Center ♦ Atlantic States Legal Foundation ♦ Sierra Club Great Lakes Program ♦ New England Clean Water Action ♦ Consumer Policy Institute ♦ Consumers Union ♦ Alabama Environmental Council ♦ Alaska Clean Air Coalition ♦ Alaska Center for the Environment ♦ Greenaction for Health and Environmental Justice ♦ California Communities Against Toxics ♦ Toxics Action Center ♦ Idaho Conservation League ♦ American Lung Association of Metropolitan Chicago ♦ Valley Watch ♦ Hoosier Environmental Council ♦ Kentucky Resources Council ♦ Natural Resources Council of Maine ♦ Ecology Center of Ann Arbor ♦ East Michigan Environmental Action Council ♦ Michigan Environmental Council ♦ Montana Environmental Information Center ♦ Citizen Alert ♦ Sierra Club, Southern Nevada Group ♦ New Jersey Environmental Federation ♦ Clean Water Action, New Jersey Chapter ♦ American Lung Association of New Jersey ♦ NJ/NY Environmental Watch ♦ New Jersey Environmental Lobby ♦ Sierra Club, New Jersey Chapter ♦ South Bronx Clean Air Coalition ♦ Citizens Advisory Panel ♦ American Lung Association of New York State ♦ Citizens' Environmental Coalition ♦ Long Island Neighborhood Network Research Center ♦ Environmental Advocates ♦ Chenango North Energy Awareness Group ♦ Long Island Progressive Coalition ♦ Appalachian Voices ♦ North Carolina Wildlife Foundation ♦ North Carolina Public Interest Research Group ♦ Ohio Public Interest Research Group ♦ The Ohio Environmental Council ♦ Campaign for an Energy Efficient Ohio ♦ Rivers Unlimited ♦ The Environmental Community Organization ♦ Sierra Club, Ohio Chapter ♦ Ohio Citizen Action ♦ Oregon Environmental Council ♦ Clean Air Council ♦ PURE ♦ Tennessee Valley Energy Reform Coalition ♦ Sierra Club, Lone Star Chapter ♦ Galveston-Houston Association for Smog Prevention ♦ Public Citizen of Texas ♦ Sustainable Energy & Economic Development ♦ Downwinders at Risk ♦ Citizens Aware & United for a Safe Environment ♦ People Against Contaminated Environments ♦ Texas Campaign for the Environment ♦ Wasatch Clean Air Coalition ♦ American Lung Association of Washington ♦ Washington Regional Network ♦ Concerned Citizens' Coalition ♦ Citizens for a Better Environment (Wisconsin) ♦ Midwest Environmental Advocates

January 18, 2000

By Fax (202-260-0279) and Overnight Mail

Carol Browner, Administrator

United States Environmental Protection Agency

401 M Street, S.W.

Washington, D.C. 20460

Re: NYPIRG's April 13, 1999 Request for a Determination that the New York State Department of Environmental Conservation is Inadequately Administering New York's Title V Program

Dear Ms. Browner:

On April 13, 1999, the New York Public Interest Research Group ("NYPIRG") requested that the United States Environmental Protection Agency ("EPA") make a determination that the New York State Department of Environmental Conservation ("DEC") is inadequately administering New York's Clean Air Act Title V Permit Program. NYPIRG's petition asserted in part that New York's standard Title V permit application form undermines the permit program by failing to require applicants to certify compliance with applicable requirements in accordance with state and federal law.

The Title V program is intended to provide members of the public with a way to protect local air quality by helping make sure that air pollution sources are following the

law. Unfortunately, the defects in New York's standard permit application form are likely to result in poorly-written permits that fail to assure compliance with Clean Air Act-based requirements. As representatives of environmental and public health organizations, we join NYPIRG in insisting that EPA bring New York's Title V program into compliance with federal law.

EPA's resolution of NYPIRG's concerns regarding New York's inadequate compliance certification requirements is of nationwide significance. EPA must mandate that DEC require all permit applicants to certify compliance with applicable requirements as part of the permit application. State and local permit programs across the country will be substantially weakened if EPA fails to enforce this requirement.

Both law and policy support NYPIRG's position that Title V permit applicants must certify whether they are in compliance with applicable requirements at the time that the permit application is submitted. Under 40 CFR § 70.5(c)(9)(i), the permit application must include:

Requirements for compliance certification, including the following:

- (i) A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act.
- (ii) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods.

40 CFR § 70.5(c)(9)(i) makes it clear that the compliance certification that is part of the permit application must be consistent with Clean Air Act § 114(a)(3). Clean Air Act § 114(a)(3) mandates that:

Compliance certifications shall include (A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require.

EPA must abide by the clear-cut requirements of 40 CFR Part 70 and the Clean Air Act and require DEC to correct its standard application form to require each applicant to submit a complete compliance certification. The initial compliance certification must inform the government and the public of the compliance status of the applicant's facility with respect to each applicable requirement, whether compliance is continuous or intermittent, and how the applicant made the compliance determination. Anything less is illegal and unacceptable.

A strong policy foundation underlies the statutory and regulatory requirement that each permit applicant certify whether his or her facility is in compliance with applicable requirements. For each facility that is not in compliance with an applicable requirement as of the date of permit issuance, the Title V permit must include an enforceable schedule by which the facility will come into compliance with the requirement. The Permitting Authority is unable to develop an effective compliance schedule if it does not know whether the facility is out of compliance with an applicable requirement. The best way to know whether a facility is in compliance with an applicable requirement is to require a responsible official to sign a document that states whether the facility is in compliance and how the responsible official made his or her determination. This is what a compliance certification is meant to accomplish. In the preamble to the final 40 CFR Part 70 rulemaking, EPA emphasized the importance of the initial compliance certification by stating that:

In § 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).

For a permitting authority to develop a Title V permit that actually holds a facility accountable for compliance with applicable requirements, the permitting authority must be aware of the facility's compliance status at the time that the permit application is submitted and the permitting authority begins drafting the permit. If the applicant certifies non-compliance in the permit application but the permitting authority determines that the facility will be in compliance at the time of permit issuance, a compliance schedule may not need to be included in the facility's final Title V permit. It is up to the permitting authority to make the determination as to whether a compliance schedule is necessary. If the permit application does not include a compliance certification that is consistent with Clean Air Act Section 114, the permitting authority will lack the information needed to make that determination.

The legal and policy justifications for requiring permit applicants to submit a compliance certification that is consistent with Clean Air Act Section 114 are clear. Nevertheless, it has come to our attention that EPA suggested in an informal response to industry comments with respect to 40 CFR Part 70 that in the initial compliance certification, an applicant is only required to certify its compliance with applicable requirements *as of the expected date of permit issuance*. See "Technical Support Document for Title V Operating Permit Program," Air Quality Management Division, Office of Air Quality Planning and Standards, United States Environmental Protection

Agency (May 1992), page 5-17. This interpretation directly contradicts the requirements of 40 CFR Part 70 and the Clean Air Act. Furthermore, this incorrect interpretation of the law poses a serious threat to the ability of permitting authorities nationwide to draft strong Title V permits that assure that facilities are complying with applicable requirements.

Under the illegal interpretation of the law put forth in EPA's 1992 response to industry comments, a permit applicant would only be required to provide an informed guess as to the facility's compliance status as of the projected date of permit issuance. During the initial implementation of the Title V program, several years typically elapse between the time that an applicant submits a permit application and a permit is issued. A reasonable permit applicant is unlikely to certify that his or her facility will be out of compliance with any requirement as of the projected date of permit issuance. If it later turns out that the applicant was wrong about the facility's projected compliance status, the applicant could offer innumerable excuses. A court is unlikely to hold a permit applicant accountable for a false prediction of what the facility's compliance status will be several years after the permit application is submitted.

Not only would the illegal interpretation of the initial compliance certification requirement put forth in EPA's response to industry comments remove any incentive for a permit applicant to certify non-compliance, but it would lead to the absurd result that neither the permitting authority nor the public could be reasonably certain of the compliance status of a facility as of the date of permit issuance. A permit applicant is not required to submit a new compliance certification on the date of permit issuance. In fact, the permit applicant is not required to submit a new compliance certification until one year after the permit is issued. The end result is that under the illegal interpretation of the compliance certification requirement, a Title V applicant is not required to produce a reliable compliance certification until several years after the initial permit application is submitted. By the time complete compliance certifications are submitted, thousands of facilities across the country may be operating under inadequate permits that do not assure compliance with applicable requirements.

Congress created the Title V program to allow the public and government officials to know whether facilities covered by the program are complying with Clean Air Act-based air pollution limitations and standards. It is EPA's responsibility to ensure that the Title V program is properly implemented by state and local permitting authorities across the country. If the Title V program is to fulfill its legislative purpose, EPA must mandate that permit applicants submit initial compliance certifications that are consistent with Clean Air Act Section 114. Otherwise, at the time of permit issuance neither the public nor the permitting authority will know whether a facility's Title V permit must include an enforceable compliance schedule. The permit cannot assure the public that the facility is complying with applicable requirements unless a reliable compliance certification is available to the permitting authority and the public prior to permit issuance.

As representatives of environmental and public health organizations, we insist that EPA grant NYPIRG's petition and require DEC to modify its permit application to conform with legal requirements. Furthermore, we urge EPA to resolve similar deficiencies in other state and local Title V permit programs promptly.

Sincerely,

**National and Regional Organizations**

Ross Vincent  
Chair, Environmental Quality Strategy Team  
Sierra Club

Ken Cook  
Environmental Working Group  
Washington, D.C.

Bruce Hill  
Appalachian Mountain Club  
Gorham, NH

David Wooley  
Counsel, Clean Air Task Force  
White Plains, NY

Susan Hedman  
Environmental Law & Policy Center  
Chicago, IL

Samuel H. Sage  
Atlantic States Legal Foundation  
Syracuse, NY

Glenn Landers  
Sierra Club Great Lakes Program  
Cleveland, OH

Cindy Luppi  
New England Clean Water Action  
Boston, MA

Barbara Warren  
Consumer Policy Institute/Consumers Union  
Yonkers, NY

**Alabama**

Kirsten Bryant  
Alabama Environmental Council  
Birmingham, AL

**Alaska**

Cheryl Richardson  
Alaska Clean Air Coalition  
Anchorage, AK

Jeff Richardson  
Alaska Center for the Environment  
Anchorage, AK

**California**

Bradley Angel  
Greenaction for Health And Environmental Justice  
San Francisco, CA

Jane Williams  
California Communities Against Toxics  
Rosamond, CA

**Connecticut**

Bernadette Del Chiaro  
Toxics Action Center  
West Hartford, CT

**Idaho**

John McCarthy  
Idaho Conservation League  
Boise, ID

**Illinois**

Brian Urbaszewski  
American Lung Association of Metropolitan Chicago  
Chicago, IL

## **Indiana**

John Blair  
Valley Watch, Inc.  
Evansville, IN

Andrew Knott  
Hoosier Environmental Council  
Indianapolis, IN

## **Kentucky**

Tom FitzGerald  
Kentucky Resources Council, Inc.  
Frankfort, KY

## **Maine**

Sue Jones  
Natural Resources Council of Maine  
Augusta, ME

## **Michigan**

Jeff Gearhart  
Ecology Center of Ann Arbor  
Ann Arbor, MI

Karen Kendrick-Hands  
East Michigan Environmental Action Council  
Grosse Pointe Park, MI

Isaac Elnecave  
Michigan Environmental Council  
Lansing, MI

## **Montana**

Anne Hedges  
Montana Environmental Information Center  
Helena, MT

## **Nevada**

Jessica Hodge  
Citizen Alert  
Las Vegas, NV

Margaret Pierce  
Clean Air Project  
Sierra Club, Southern Nevada Group  
Las Vegas, NV

## **New Jersey**

David Pringle  
New Jersey Environmental Federation  
New Jersey Chapter of Clean Water Action  
Trenton, NJ

Linda Stansfield  
American Lung Association of New Jersey  
Union, NJ

Joseph R. Parrish  
NJ/NY Environmental Watch  
Elizabeth, NJ

Marie Curtis  
New Jersey Environmental Lobby  
Trenton, NJ

Dennis W. Schvejda  
Sierra Club, New Jersey Chapter  
Princeton, NJ

## **New York**

Carlos Padilla  
South Bronx Clean Air Coalition  
New York, NY

Gordian Raacke  
Citizens Advisory Panel (CAP)  
Long Island, NY

Peter M. Iwanowicz  
American Lung Association of New York State  
Albany, NY

Anne Rabe  
Citizens' Environmental Coalition  
Albany, NY

Neal Lewis  
Long Island Neighborhood Network Research Center  
Long Island, NY

Jason K. Babbie  
Environmental Advocates  
Albany, NY

Susan B. Griffin, Coordinator  
Chenango North Energy Awareness Group  
South Plymouth, NY

Judy Pannullo  
Long Island Progressive Coalition  
Long Island, New York

### **North Carolina**

Harvard Ayers  
Appalachian Voices  
Boone, NC

Chuck Rice  
North Carolina Wildlife Federation  
Raleigh, NC

Elizabeth Ouzts  
North Carolina Public Interest Research Group  
Chapel Hill, NC

### **Ohio**

Amy Simpson  
Ohio Public Interest Research Group  
Cleveland, OH

Kurt Waltzer  
The Ohio Environmental Council  
Campaign for an Energy Efficient Ohio  
Columbus, OH

Mike Freemont  
Rivers Unlimited  
Columbus, OH

Marilyn Wall  
The Environmental Community Organization  
Sierra Club, Ohio Chapter  
Cincinnati, OH

Shari Weir  
Ohio Citizen Action  
Cleveland, OH

### **Oregon**

Jeff Allen  
Oregon Environmental Council  
Portland, OR

### **Pennsylvania**

Joseph Otis Minnot  
Clean Air Council  
Philadelphia, PA

### **South Carolina**

Pat Cannon  
PURE  
Columbia, SC

### **Tennessee**

Ulla-Britt Reeves  
Tennessee Valley Energy Reform Coalition  
Knoxville, TN

## **Texas**

Neil Carman, PhD  
Sierra Club, Lone Star Chapter  
Austin, TX

Ron Parry, PhD  
Galveston-Houston Association for Smog Prevention  
Houston, TX

Tom Smith  
Public Citizen of Texas  
Austin, TX

Peter Altman  
SEED - Sustainable Energy & Economic Development  
Austin, TX

Sue Pope  
Downwinders at Risk  
Midlothian, TX

Linda Lott  
Citizens Aware & United for a Safe Environment  
Midlothian, TX

Reverend Roy Malveaux  
People Against Contaminated Environments  
Beaumont, TX

Todd Main  
Texas Campaign for the Environment  
Austin, TX

## **Utah**

Kathy Van Dame  
Wasatch Clean Air Coalition  
Salt Lake City, Utah

## **Washington**

Chetana Acharya  
American Lung Association of Washington  
Seattle, WA

## **Washington, D.C.**

James W. Clarke  
Washington Regional Network  
Washington, D.C.

## **West Virginia**

Vivian Stockman  
Concerned Citizens' Coalition  
Spencer, WV

## **Wisconsin**

Susan Mudd, Wisconsin Director  
Citizens for a Better Environment  
Milwaukee, WI

Melissa K. Scanlan  
Midwest Environmental Advocates  
Madison, WI

CC: Jeanne M. Fox, Regional Administrator, USEPA Region 2  
Gerry DeGaetano, USEPA Region 2  
Steven Riva, USEPA Region 2  
Barbara Pastalove, USEPA Region 2, Policy, Planning and Evaluation Branch  
David Stone, USEPA Region 2, Office of Regional Counsel  
Mary McHale, USEPA Region 2  
John Seitz, USEPA, Director, Office of Air Quality Planning and Standards  
Kirt Cox, USEPA Office of Air Quality Planning and Standards  
John D. Walke, USEPA Office of General Counsel  
Carol Holmes, Office of Enforcement and Compliance Assurance  
Robert Dresdner, Office of Enforcement and Compliance Assurance  
Gerald Potamis, USEPA Region 1  
Elizabeth Waddell, USEPS Region 10  
David Wampler, USEPA Region 9  
Jennifer Abramson, USEPA Region 3  
Carla Pierce, USEPA Region 4  
Beth Valensiano, USEPA Region 5  
Anupa Ahuja, USEPA Region 6  
Ward Burns, USEPA Region 7  
Patricia M. Reisbeck, USEPA Region 8