

10/30/98

(AR-18J)

Robert F. Hodanbosi, Chief
Division of Air Pollution Control
Ohio Environmental Protection Agency
1800 WaterMark Drive
Columbus, Ohio 43215-1099

Dear Mr. Hodanbosi:

This letter is in response to your letter dated October 2, 1998, proposing the option of expanding the credible evidence boilerplate language in your Title V permits. I understand from your letter as well as conversations on September 22, 1998 and October 7, 1998, that the regulated community in Ohio has concerns with the current language and some groups have verbally informed you that they may appeal their Title V permit if the language is not removed.

It is the United States Environmental Protection Agency's (USEPA) position that the general language addressing the use of credible evidence is necessary to make it clear that despite any other language contained in the permit, credible evidence can be used to show compliance or noncompliance with applicable requirements. Permit provisions containing testing or monitoring requirements sometimes represent instances where a regulated entity could construe the language to mean that the methods for demonstrating compliance specified in the permit are the only methods admissible to demonstrate violation of the permit terms. It is important that Title V permits not lend themselves to this improper construction.

It is also important to note, however, that since its initial promulgation in 1992, part 70 has required sources certifying compliance with terms and conditions in their operating permits to consider information other than data from reference test methods in providing certifications that are true, accurate and complete. See, e.g., 40 CFR § 70.5(d) (requiring compliance certifications to be true, accurate, and complete "based on information and belief formed after reasonable inquiry"); § 70.6(a)(3) (discussing required monitoring, recordkeeping, and reporting in part 70 permits); § 70.6(c)(5) (1997) & § 70.6(c)(5) (1998) (compliance certification requirements of part 70 before and after Compliance Assurance Monitoring rule revisions to part 70); see also 62 Fed. Reg. 8314, 8319-20 (Feb. 24, 1997). Therefore, prior to and independent of the credible evidence rule and the concerns expressed by the regulated community with that rule, part 70 already required responsible officials to consider non-reference test data in certifying compliance, and part 70 permit terms may not alter nor impede that requirement.

Having explained the importance of including the credible evidence general language currently contained in the Title V permits the Ohio Environmental Protection Agency (OEPA) issues, USEPA does not believe that it is appropriate to include in Title V permits the additional language you propose in your October 2 letter. The

background of this court decision does not belong in Title V permits. The Title V permit is designed to include the requirements for the subject source, not the historical and legal background for those requirements. In addition, the decision did not affect the validity of EPA's Title V regulations or any permits issued thereunder. However, neither the credible evidence rule nor the inclusion of general credible evidence language in a Title V permit waives the permittee's right to challenge either the credible evidence rule, or the admissibility or credibility of particular evidence in individual adjudications. I believe the concerned parties you mention in your letter are aware of the court decision and their rights preserved in the ruling, and would have the opportunity to exercise those rights if the appropriate situation arose. For the reasons listed above, it is USEPA's position that the numerous requests for hearings before the Director of OEPA are unfounded.

I hope that this letter clarifies USEPA's position with respect to the need for credible evidence boilerplate language and assists OEPA with any hearings that may result from the issuance of Title V permits containing such language. If you have any questions regarding this letter, please contact Genevieve Damico, of my staff, at (312) 353-4761.

Sincerely yours,

/s/

Cheryl L. Newton, Acting Chief
Air Programs Branch