



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

December 19, 2001

Mr. David Baron
EarthJustice Legal Defense Fund
1625 Massachusetts Avenue, N.W., Suite 702
Washington, D.C. 20036

Dear Mr. Baron:

Thank you for your letter of March 12, 2001, on behalf of the District of Columbia Chapter of the Sierra Club, concerning potential deficiencies in the construction or implementation of the District's title V operating permit program. In the December 11, 2000 Federal Register (65 FR 77376), EPA solicited comments on perceived title V program and program implementation deficiencies. Pursuant to that notice, EPA is required to respond by letter addressing each of the issues raised in your March 12, 2001 letter. In addition to this response, a notice will appear in the Federal Register responding to those comments which EPA has determined, pursuant to 40 CFR 70.10(b), identify deficiencies with the District of Columbia's operating permit program.

We have carefully considered the concerns raised in your March 12, 2001 letter and determined that only one issue justifies a Notice of Deficiency in the District's title V operating permit program. Our response to each of your remaining concerns is enclosed.

We appreciate your interest and efforts in ensuring that the District of Columbia's title V operating permit program meets all federal requirements. If you have any questions regarding our analysis, please contact Ms. Makeba Morris, Chief, Permits and Technical Assessment Branch at (215) 814-2187.

Sincerely,

/s/

Judith M. Katz, Director
Air Protection Division

Enclosure

cc: Mr. Theodore J. Gordon, Chief Operating Officer
Department of Health
Government of the District of Columbia

The following is in response to your March 12, 2001 comments on the District of Columbia's title V program.

Comment 1. Failure to incorporate applicable SIP requirements in permits: Regulations incorporated into the District's federally approved SIP require the Mayor to ensure the following (among other things) before issuing an air pollution permit: (a) the applicant's proposed equipment, facilities, and procedures are adequate to minimize danger to public health and welfare; b) issuance of the permit will not be inimical to public health and welfare; c) operation of the source will not prevent or interfere with the attainment and maintenance of any applicable national ambient air quality standard. 20 DCMR 201; 40 CFR 52.470(c). The District consistently fails to include emission limitations in its Title V permits to ensure compliance with these applicable requirements. In fact, the District routinely fails to evaluate compliance of sources with these applicable requirements or consider what permit conditions are needed to ensure compliance with these requirements. The foregoing failures are illustrated by Title V permits and fact sheets submitted by the District to EPA, which routinely omit any reference to these requirements.

Response 1. 20 DCMR § 201.1 provides that the Mayor "may issue a permit upon finding the following: (a) the applicant's proposed equipment, facilities, and procedures are adequate to minimize danger to public health and welfare; b) issuance of the permit will not be inimical to public health and welfare...; d) operation of the source will not prevent or interfere with the attainment and maintenance of any applicable national ambient air quality standard and will not result in the contravention of any provision of the Federal Clean Air Act or the Regulations promulgated under the Act..." Based on the permit application submitted by the source, the District of Columbia (hereinafter "District") issues a title V permit only after the District is satisfied that the operation of the facility will be consistent with all applicable requirements of the District of Columbia Municipal Regulations (DCMR) and all Federal regulations. See 20 DCMR 201.1(d). The District has stated to EPA that when it reviews the source's title V permit application, it utilizes 20 DCMR 201.1 such that if the District determines that 20 DCMR 201.1 is not satisfied or if the source cannot operate in a manner consistent with 20 DCMR 201.1, then the District would not issue a title V permit to the source. To assure that the source complies with all applicable requirements, each title V permit issued by the District specifies testing, monitoring, record keeping and reporting requirements that must be followed in order to assure compliance with the District of Columbia Municipal Regulations (including 20 DCMR 201.1) and all Federal regulations.

Comment 2. Enforcement: Pursuant to 40 C.F.R. §70.4(b)(9), the District is required as part of its Title V program to commit to submit at least annually to EPA information on the District's enforcement activities, including, but not limited to, the number of criminal and civil, judicial and administrative enforcement actions. The District has not made this commitment, nor has it submitted the required annual enforcement reports pursuant to 40 C.F.R. §70.4(b)(9).

There is also evidence that the District is not in fact adequately enforcing its Title V program. The Title V budget attached to the District's 9/12/00 letter to Region 3 contains no funding earmarked for enforcement, and the District has reported no expenditures for enforcement purposes. EPA itself has found that the District does not verify emission statements filed by sources for purposes of Title V fee determinations. The District cannot adequately enforce its Title V permits without fully funded enforcement personnel, and without taking steps to verify reports filed by permittees.

Response 2. With regard to the submission of annual enforcement reports, the District has committed to submitting information to the Aerometric Information Retrieval System/AIRS Facility Subsystem (AIRS/AFS). In addition to entering information into AIRS/AFS, the District submits enforcement reports to EPA on a semi-annual and annual basis. This year, the report was submitted to EPA in April 2001 and October 2001. The report entitled, "Compliance and Enforcement Activities and Accomplishments - Year End 2001 Report" contains information on High Priority Violators, as well as the dates that inspections were conducted at all title V sources in the District. In addition, the District participates in quarterly enforcement program reviews with EPA.

With regard to title V expenditures for enforcement, Section IV of the District's original title V program submittal (dated January 13, 1994), states that "District law provides authority for the Administrator of the Environmental Regulation Administration to assess and collect annual permit fees (or the equivalent amount of fees over some other period of time) from sources within the District which are subject to the requirements of title V of the CAA and 40 CFR Part 70, in an amount sufficient to cover all reasonable direct and indirect costs required to develop, administer, and enforce the District's title V program." (emphasis added). This District authority is provided in 20 DCMR Sections 302.1(h) and 305. The District has documented to EPA that time spent on title V activities by clerical staff, engineers and supervisors (in both the Engineering & Planning Branch (EPB) and the Compliance & Enforcement Branch (CEB)) are being tracked and accounted for appropriately as title V fees. In addition, the District's title V account shows a surplus, which demonstrates that title V fees are more than adequate to cover compliance and enforcement activities.

With regards to verifying emission statements filed by title V sources for purposes of title V fee determinations, this was identified during the title V fee audit conducted by Region III. Since that time, the District has begun verifying emission statements filed by sources. The District has also acquired and installed a software system which is being used to generate invoices to title V facilities for the payment of fees (see enclosure #1).

In a section of the District's "Air Quality Inspection/Compliance Monitoring Plan" entitled "Compliance Monitoring Evaluation - Section 5.3," the District demonstrates how it will follow-up on violations. That section of the plan describes three compliance categories used by the District. This is taken from EPA's Clean Air Act Stationary Source Compliance Monitoring Strategy. In addition, another report entitled "Compliance and Enforcement Activities and Accomplishments - Year End 2001 Report" contains information on new High Priority Violators.

Comment 3. Variances: Pursuant to 20 DCMR 103, the Mayor can excuse any person from compliance with the District's air pollution rules (which include the District's Title V rules) upon a finding by the Mayor that compliance would result in "exceptional or undue hardship." These variance provisions are completely contrary to Title V and EPA's rules thereunder. Variances are not allowed in Title V permit programs except to the extent allowed by the narrow emergency defense provision in Part 70, or expressly provided for under specific applicable requirements. EPA must so notify the District.

In the past, EPA has asserted that variance provisions are "wholly external" to Title V programs and therefore not binding on EPA. Such a position is legally indefensible here. The above-cited variance provisions are a part of the District's law governing air pollution sources, including Title V sources. In fact, 20 DCMR 100.2 indicates that the variance provision controls over all other regulations that are inconsistent with it. EPA therefore cannot pretend the variance provision does not exist or that it has no legal effect. It is no answer to say that EPA can object to variances, because it is the District's job in the first instance to ensure that Title V requirements are met, and because EPA cannot possibly police every Title V permit and every variance that might be granted. Where (as here) the District refuses to adopt a program that complies with Title V, then EPA must find it inadequate.

Response 3. The provision at 20 DCMR § 103, is not contrary to Title V even though, on its face it authorizes the Mayor to excuse Part 70 sources from compliance with applicable requirements or other federal requirements. A provision of the District's Part 70 rules, 20 DCMR § 300.1, effectively trumps Section 103 so that the variance provision does not have any practical effect for Title V sources. Corporation Counsel for the District of Columbia provided an opinion regarding Corporation Counsel's interpretation of these provisions. See, "Legal Opinion on whether there is an inherent conflict between 20 DCMR § 103.1 and the requirements of 20 DCMR Chapter 3" written by Daryl G. Gorman, Senior Deputy Corporation Counsel for Government Operations, Legal Counsel Division, dated November 13, 2001 (see Enclosure #2). As discussed below, EPA and Corporation Counsel for the District of Columbia interpret 20 DCMR §§ 103 and 300.1 to be consistent with the CAA and part 70 and therefore find that section 103 does not constitute a deficiency in the District's Title V program.

Section 103 is one of the District's general air pollution rules (Chapter 1 of Title 20) and is not approved as part of the District's State Implementation Plan. Section 103.1 provides that "[e]ach person required to perform an act by this subtitle may be excused by the Mayor from the performance of the act, either in whole or in part, upon a finding by the Mayor that the full performance of the act would result in exceptional or undue hardship by reason of excessive structural or mechanical difficulty, or the impracticability of bringing the activity into full compliance with the requirements of this subtitle," provided that certain conditions are met.

The District's part 70 and acid rain program rules are contained in 20 DCMR 300 *et seq.* Section 300.1 defines the sources that are subject to the requirements of the Act. Section 300.2 defines and limits the sources that are exempt from the part 70 permit requirements. Section 301 outlines the permit application process and Section 302 defines the actual permit content required, including specific emissions limitations. Section 301(a)(2) indicates that the permit shall state that the requirements of both Title IV of the Act and the District's regulations have been complied with under certain circumstances. Section 301.1(g)(1) requires that a permit include provisions stating that "[a]ny noncompliance with the permit constitutes a violation of the Act and this chapter and is grounds for enforcement action or permit revocation or modification or for denial of a permit renewal application." Section 303 governs the permit issuance, renewal, reopenings, and revisions in accordance with Part 70. It is in this context that 20 DCMR § 300.1 is found.

Section 300.1 provides that "[e]xcept as exempted from the requirement to obtain a permit under § 300.2 and elsewhere herein, the following sources shall be subject to the permitting requirements under

the chapter. In the event that this chapter conflicts or is inconsistent with other requirements of this subtitle, this chapter shall supersede for sources subject to its provisions... (emphasis added). “[T]his chapter” refers to D.C.’s Operating Permits and Acid Rain Programs rules (Chapter 3 of Title 20). “This subtitle” refers to all of D.C.’s air pollution rules contained in Chapters 1 through 10 of Title 20 of the District of Columbia Municipal Regulations. Thus, to the extent that any conflict exists between the provisions, section 300.1 supercedes Section 103.

Under this interpretation, Section 103 may only have a practical effect for sources that are not subject to Part 70, and the Mayor may not use Section 103 to excuse part 70 sources from compliance with applicable requirements or Part 70 requirements. In the event that a part 70 permit includes a variance granted pursuant to Section 103, the variance may only be State-enforceable and should be clearly labeled as such.¹

Because this interpretation of 20 DCMR §§ 103 and 300.1 is consistent with title V and part 70, EPA disagrees that 20 DCMR § 103 constitutes a deficiency in the District’s part 70 program.

Comment 4. Shutdowns: Pursuant to 20 DCMR 107, the Mayor can authorize a source to shut down its pollution control equipment for periodic maintenance while continuing to operate the source. This provision effectively allows a variance from emission limits and pollution control requirements, and therefore violates Title V and EPA rules for the same reasons as the variance provision discussed above. Title V and EPA rules do not allow variances to accommodate shutdown of air pollution equipment for regular maintenance, except to the extent that such variances are expressly allowed as part of a specific applicable requirement.

Response 4. The EPA approved the codification of the provisions governing control devices or practices, including air pollution control equipment maintenance, (20 DCMR 107) as part of the District of Columbia SIP. Because these provisions are contained in the District of Columbia SIP, they represent federally enforceable applicable requirements. If the commenter believes that these, or other, provisions should not be in the SIP, the commenter may petition EPA to require the District to amend the SIP.

The EPA will review the District of Columbia’s renewal of title V operating permits and seek to ensure that the District does not unlawfully propose as title V permit requirements any terms based on non-federally enforceable applicable requirements that conflict with federally-enforceable applicable requirements. If during its oversight, the Agency determines that the District is unlawfully including such a provision in an operating permit, EPA has a statutory obligation to object to that permit and, if warranted, issue a notice of deficiency. See, 42 U.S.C. §7661d(b).

¹In addition, the “State side” of permits containing a variance granted pursuant to 20 DCMR § 103 should clearly state its origin, authority, scope and duration, as well as any other limitations on the variance (including a reference to 20 DCMR § 300.1). Similarly, the statements of basis for permits containing a variance granted pursuant to 20 DCMR § 103 should explain the variance and its scope and effect.

Comment 5. Risk Management Plans: 20 DCMR 302.1(d) says that the content of a 112(r) risk management plan need not be included in permit. This does not comport with Title V and EPA rules.

Response 5. 20 DCMR 302.1(d) states that the permit need only specify that it will comply with the requirements to register a risk management plan (RMP). The contents of the RMP need not be incorporated as a permit term. Pursuant to 40 CFR 68.215(a)(2)(ii), a source is required to certify compliance with all requirements of 40 CFR part 68, including the registration and submission of the RMP, as part of the annual compliance certification required by 40 CFR 70.6(c)(5). In addition, 40 CFR 68.215(e)(1) and (2) provide that the air permitting authority shall verify that the source has registered and submitted an RMP and also verify that the source has submitted a source certification or compliance schedule. The language in 40 CFR 68.215 does not, however, require the contents of the RMP to be included as part of the Title V permit.

Comment 6. Public participation: EPA rules require that notice of proposed permit actions be given: a) by publication; b) to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and c) by other means if necessary to assure adequate notice to the affected public. 40 C.F.R. §70.7(h)(1). Although the District does provide notice by publication, it does not provide notice to a mailing list or by other means as required by the foregoing EPA rule. The District's rules do not provide for notice by these other means (20 DCMR 303.10), and the District does not in fact provide such notice. Further, the only published notice appears in the D.C. Register, an obscure publication of the District Government that is not readily accessible to the average citizen. For all these reasons, notice of proposed permit actions is grossly deficient, both legally and in fact.

The District has also conducted its permit issuance process in a manner that effectively precludes meaningful public participation, and deprives the public of the full 30-day comment period required by Title V and EPA rules. According to Region III correspondence, the District established public comment periods for 25 of its 33 Title V facilities during a single 36 day period between November 10, 1997 and December 16, 1997. Thus, the public had slightly more than a month to review and comment on most of the District's Title V permits simultaneously. The District subsequently established a concurrent public comment period on 3 additional permits, those for the Bureau of Printing and Engraving, St. Elizabeth's Hospital, and the Blue Plains Wastewater Treatment Plants. As EPA is well aware, thorough and careful review of any one of these permits requires considerable time and effort. By forcing the public to comment on virtually all of them at once, and establishing concurrent comment periods on others, the District effectively deprives the public of the 30-day public comment required by Title V and EPA rules. This is not a situation where individual permits are of concern only to discrete neighborhoods within the District. By virtue of the District's small size and the fact that the entire community is part of the same ozone nonattainment area, Title V permits issued anywhere in the District are of legitimate public concern District-wide. Moreover, only a very limited number of environmental and community groups have the resources to comment on permits in the District. By issuing proposed permits simultaneously, the District precludes meaningful public comment.

The District also does not make readily available to the public important information relevant to proposed permits, such as permit applications and relevant supporting materials. Nor does it take other basic steps to facilitate public participation. The attached statement from Julie Eisenhardt, Sierra Club Environmental Justice Coordinator, describes some of these above-described problems in greater detail.

Response 6. Comment 6 raises a number of concerns about the District's procedures for providing public notice of title V permit actions. During the permit issuance process, adequate procedures for public notice were followed by the District, including offering an opportunity for public comment and a hearing on the draft permits. Notice was given in the District of Columbia Register and the Washington Times (for the initial 25 permits), and public hearings were held on each draft title V permit. There are no outstanding actions on any of the issued title V permits. The following responses address each concern raised by EarthJustice.

a. Mailing list: In the proposed and final actions granting interim approval of the District of Columbia's program (March 21, 1995, 60 FR 14921 and August 7, 1995, 60 FR 40101), EPA directed the District to amend 20 DCMR § 303.10(a) to require that notice be sent to persons on a mailing list, including those persons who request in writing to be included on the list. The District amended 20 DCMR 303.10(a) to include this requirement. The District thereby corrected the interim approval deficiency regarding use of a mailing list to provide public notice. The revisions to 20 DCMR § 303.10(a) require notice of all future title V permits, permit renewals and significant permit modifications to be sent to those individuals who are on the District's mailing list. Moreover, the District has added information to its website, located at www.environ.state.dc.us, which informs members of the public of the opportunity to have their name added to the District's title V permitting mailing list. EPA believes that publicizing the mailing list in this manner will enable the District to implement the revised 20 DCMR § 303.10(a) consistent with the CAA and part 70.

b. Notice "by other means if necessary": Although the District's regulations do not require public notification of permit proceedings "by other means if necessary to assure adequate notice to the affected public," other means were employed to provide notice on many of the permits issued. According to the District, the first 25 draft permits were placed on a website established by the District. Nevertheless, EPA agrees that the absence of language in the District's regulations requiring the District to provide public notification of permit proceedings "by other means if necessary to assure adequate notice to the affected public" constitutes a deficiency in the District's Part 70 program. Accordingly, EPA is issuing a Notice of Deficiency (NOD) requiring the District to correct the deficiency by requiring public notification of permit proceedings "by other means if necessary to assure adequate notice to the affected public."

As discussed above, in the proposed and final actions granting interim approval of the District of Columbia's program, EPA fulfilled its obligation under section 502(g) of the CAA by specifying the changes the District of Columbia must make to its program in order to receive full approval. 42 U.S.C. § 7661a(g); 40 CFR § 70.4(e)(3). The District then amended 20 DCMR 303.10(a) to require that notice be sent to persons on a mailing list (including those people who request in writing to be on the

list). Therefore, the District has met its statutory obligation under section 502(g) of the CAA to make changes to its operating permit program as specified by EPA

EPA did not identify any concerns with respect to requiring that the District also modify 20 DCMR 303.10(a) to include a requirement for notice “by other means if necessary to assure adequate notice to the affected public”. Therefore, EarthJustice is expressing a concern with the District’s public notice rule that was not identified by EPA or any other interested party prior to EPA’s interim approval in 1995. The District’s receipt of full approval of its operating permit program is contingent upon it successfully correcting its regulations as directed by EPA in the March 21, 1995 and August 7, 1995 notices granting interim approval and not the correction of all deficiencies alleged or identified after interim approval was granted.

EPA, however, has carefully considered EarthJustice’s concerns regarding the impact of 20 DCMR 303.10(a) on the District’s operating permit program and determined that an NOD is warranted. EPA is in the process of issuing a notice of deficiency to the District of Columbia identifying a deficiency in its currently approved operating permit program regulations regarding public notification of permit proceedings. The notice directs the District to correct the deficiency by requiring public notification of permit proceedings "by other means if necessary to assure adequate notice to the affected public." Such a correction would make the District’s program fully consistent with 40 CFR 70.7(h) regarding public notification. The EPA directs the Commenter to the Federal Register notice announcing the notice of deficiency for further information.

c. D.C. Register Notice: EPA’s regulations at 40 CFR § 70.7(h)(1) require that public notice of permit proceedings be given “by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice” (emphasis added). The District of Columbia’s operating permit program regulations at 20 DCMR § 303.10 require, in relevant part, that public notice of draft initial title V permits, significant modifications and permit renewals be published in the District of Columbia Register. The District of Columbia Register is a “publication designed to give general public notice” within the meaning of 40 C.F.R. § 70.7(h)(1). Therefore, EPA disagrees that the District’s use of this publication for public notice constitutes a deficiency in its part 70 program.

d. Permit issuance process: In order to meet permit issuance deadlines set forth in section 503(c) of the Clean Air Act, 42 U.S.C. § 7661b(c), the District issued multiple permits in 1998, following a public comment period in late 1997. However, nothing in the CAA or EPA’s or the District’s operating permits program regulations (20 DCMR or 40 CFR part 70) prohibits holding multiple public comment periods and issuing multiple title V permits at the same time. Therefore, EPA finds that the District’s issuance of multiple permits within a relatively short period of time in 1998 does not constitute a deficiency in the District’s part 70 program.

e. Availability of information for review: The District’s regulations at 20 DCMR § 303.10(a)(1)(A) require the District to make available “a public file containing a copy of all materials (including permit applications, compliance plans, permit monitoring and compliance certification reports,

except for information entitled to confidential treatment...) that the applicant has submitted, a copy of the preliminary determination and draft permit or permit renewal, and a copy or summary of other materials, if any, considered in making the preliminary determination". Consistent with this provision, according to the District, it routinely makes their files available to the public for review. The District informed EPA that the incident described by Ms. Eisenhardt of the Sierra Club was an isolated event specific to only one source in the District, and that such occurrences do not usually take place. EPA finds that this issue does not constitute a deficiency in the District's part 70 program.

Comment 7. Judicial Review: The District requires a petition for judicial review of a permit decision to be filed within 90 days of final action, but nowhere do the District's rules require notice to commenters of final action. 20 DCMR 303.11. It is violative of due process and contrary to Title V to set a 90 day deadline on appeals for persons who are not assured timely notice that the 90 day clock has started. The 90 day time limit is even more untenable as to permit actions that do not go through public notice and comment (e.g. minor modifications).

Response 7. EPA believes that the requirement to file an appeal within 90 days after a final decision does not impose an unreasonable demand on the public. Ninety days is a reasonable amount of time to allow a citizen to determine whether a permit that was commented on by that citizen has been finalized and to file an appeal, if warranted. For significant modifications, the public can conservatively assume that they have 165 days (i.e., 30 days for public comment, plus 45 days for EPA review, plus 90 days to file an appeal) from the date of publication in which to file a timely appeal.

Moreover, regulations under 40 CFR part 70 do not require a permitting authority to provide notification of a final action on a permit, including minor modifications to a permit. EPA previously addressed this issue when it proposed and adopted part 70. During that process, EPA responded to comments raised regarding whether notice of final permit issuance should be required. Specifically, when EPA proposed part 70, it stated that "[t]here has been some interest regarding whether State permitting authorities would be required to publish notice both of proposed State action on the permit (prior to EPA review) and of final permit issuance (following EPA review), or only the latter. The EPA proposes not to require the latter notice." 56 FR 21712 @ 21742 (May 10, 1991). In that notice, EPA provided the opportunity for public comment and hearing on the proposed part 70 regulations. Comments were to be submitted by July 9, 1991.

In July of 1992, EPA promulgated part 70. 57 FR 32250 (July 21, 1992). When EPA adopted part 70, it addressed, among other things, comments regarding whether states should be allowed to establish procedures for making minor permit modifications without public notice or comment. EarthJustice may refer to the Federal Register publications listed above to review EPA's reasoning in adopting the public notice requirements for permit issuance and modifications in the part 70 regulations. Any comments by the public, including EarthJustice, on these matters were required to be submitted by July 9, 1991. 56 FR 21712.

Comment 8. Fees: By letter to Theodore Gordon dated October 25, 1999 from Judith Katz of Region III, EPA notified the District of the following serious deficiencies in the accounting and reporting

of fee revenues for the Title V program: 1) Title V revenues and expenses not accurately reflected in the District's financial management system; 2) District's financial management system does not separate title V fund accounting from other accounting systems; 3) District does not bill title V sources for annual emission fees, does not verify annual emission reports submitted by title V sources, and does not perform a timely follow up on delinquent accounts; and 4) Despite an apparent surplus of title V funds, other funding sources are being used to cover a portion of the title V program. By subsequent letter dated April 19, 2000, Region 3 notified the District that EPA was not satisfied with the District's progress in correcting these deficiencies.

Although the District subsequently submitted additional materials to Region 3 on this issue, they do not show that the deficiencies have been fully corrected. Based on the materials included in EPA's response to our Freedom of Information Request of 1/17/01 (03-RIN-00504-01)(hereinafter, "FOIA" materials), the District has still not addressed all of the concerns raised in EPA's 10/25/99 and 4/19/00 letters. For example, although the District has attempted to bring FY 2000 accounting up to date, it has not addressed the problems in FY 1999 or before. In addition, the FOIA materials do not show that the District's Title V staff have developed an accurate budget, submitted time and attendance records, submitted a study of labor costs, or provided an itemize monthly accounting of Title V fees received and expenditures all of which were specifically requested by Region 3. A table attached to the District's 9/12/00 letter to EPA shows total labor costs and hourly rates, but does not explain what these staff do or what specifically the other expenditures are for. The Region's 4/19/00 letter called for a detailed complete corrective action plan by May 1, 2000, but the only plan in the FOIA materials is a "draft" dated 9/12/00 which is neither detailed nor complete (as discussed above). Another deficiency cited by the Region was the District's failure to verify annual emission reports submitted by Title V sources. The District has not addressed this deficiency.

Unless there have been additional audits or submittals by the District showing that all Title V fee accounting issues have been corrected, EPA must find that the District is failing to adequately administer its Title V program due to these fee and accounting deficiencies.

Title V Fee audit issues not fully corrected. For example, (a); (b) The District's financial management system does not separate Title V fund accounting from other accounting systems; (c) The District does not bill Title V sources for annual emission fees, does not verify annual emission reports submitted by Title V sources, and does not perform a timely follow-up on delinquent accounts receivable; and, (d) Despite what appears to be surplus Title V funds, other funding sources are being used to cover a portion of the Title V program costs.

Response 8. The District has corrected the issues identified during the title V fee audit that was conducted by Region III. For example, regarding the issue of title V revenues and expenses being accurately reflected in the District's financial management system, the Office of the Chief Financial Officer (OCFO) with the District's Department of Health has combined revenue and expenditure reports and accounts into one, now called the "DC Title V Account". The time spent on title V activities by clerical staff, engineers, and supervisors is being tracked and provided to the OCFO for

computation of expenses to include salary, fringe benefits and indirect charges to cover overhead costs as well as any other charges for supplies or other services.

With regards to verifying emission statements filed by title V sources for purposes of title V fee determinations, this was a problem identified during the title V fee audit conducted by Region III. However, since that time, the District has begun verifying emission statements filed by sources. The District has also acquired and installed a software system which is being used to generate invoices to title V facilities for the payment of fees. In addition, the District has been following-up on delinquent accounts.

EPA Region III identified (during the title V fee audit) that surplus title V funds and other funding sources may have been used to cover a portion of the title V program costs. EPA found that supervisors' time was not being charged to title V, but rather was being paid from another source called "DC Appropriated Funds". This was referred to by EPA in an October 25, 1999 letter from Judith M. Katz, Director, Air Protection Division, EPA Region III to Theodore J. Gordon, Senior Deputy Director for Operations, District of Columbia Department of Health, as other funding sources that were being used to cover a portion of the title V program costs. This problem has been corrected, and now supervisors' (and all employees') time and overhead are being tracked and charged to title V. The District has provided to EPA a Corrective Action Plan for the Administration of Title V Fees (dated September 6, 2001) documenting the issues discussed above (see Enclosure #3).

Comment 9. Monitoring: Several of the District's proposed Title V permits have provided for daily observations for signs of visible emissions from specified emission units (e.g., boilers, stacks). Such permits further typically provide that if a daily observation detects visible emissions, the permittee must make arrangements for opacity observations by a certified person. The permits do not set a deadline for this follow up observation. As a result, the permittee might well argue that the follow up observation can take place hours, days, or even weeks after the initially observed visible emission. Such an approach does not assure results that are "representative of the source's compliance" as required by 20 DCMR 302.1(c)(1)(B). See also 40 CFR 70.6(a)(3)(iii)(A).

Response 9. The District of Columbia's regulation 20 DCMR 302.1(c)(1)(B) is adequate as it tracks the equivalent provision in part 70 (40 CFR 70.6(a)(3)(i)(B)). With regard to the implementation of this provision, although the permits do not include follow up observation deadlines, the District provided a letter to EPA, dated October 18, 2001, that discusses many of the issues raised in the comment (see Enclosure #4). This letter from the District describes their response to visible emissions (VE) detected during periodic monitoring observations by sources as well as the District's response to citizen complaints. As a standard practice, the District's Compliance & Enforcement Branch (CEB) responds within 24 hours, and when personnel are available - immediately, but in no case later than 24 hours after a report or complaint is received about smoke, dust or odor.

The fuel burning equipment at 8 of the 35 title V sources in the District are equipped with continuous opacity monitors (COM's) which record visible emissions. If a VE violation occurs at any of these

facilities, compliance or non-compliance can be determined immediately. In addition, the records are submitted to the District semi-annually and annually for determination of compliance with permit conditions. The facilities that do not have COM's are required by the terms of their title V permits to make daily observations of the stacks and if a VE violation should occur, they are required to correct the problem and test with a certified VE reader using EPA Method 9. An example of such a situation that occurred in 1999 at the General Services Administration is provided in the District's October 18, 2001 letter to EPA.

The District has completed the issuance of all title V permits. The District has agreed that upon permit renewal, the requirement to conduct opacity testing within 24 hours after an exceedance will be added to each title V permit.

Comment 10. Other permit deficiencies: In correspondence to the District dated December 16, 1997 and July 24, 1998, EPA Region 3 identified numerous, significant deficiencies in Title V permits proposed by the District. Letter dated December 16, 1997, from Kathleen Henry, EPA Region III, to Donald E. Wambsgans II, D.C. Government (with attachments); Letter (memorandum) dated July 24, 1998, from MaryBeth Bray, EPA Region III, to Stan Tracey, D.C. Government (with attachments). The permits at issue in letters address most of the District's Title V sources. There is no indication in EPA's correspondence files that these deficiencies were fully corrected. The FOIA materials supplied to us by Region III in response to our 1/17/01 FOIA request (which encompassed materials relating to permit deficiencies) do not include any response by the District to Region III's 7/24/98 and 12/16/97 letters. EPA's 7/24/98 letter indicates that some of the Region's comments were not incorporated into the District's permits. If the District has not in fact corrected all of the deficiencies identified by Region III, then the District is plainly failing to adequately administer its Title V program.

Response 10. In the case of the District of Columbia title V permits, EPA commented on both the predraft and the proposed permits. EPA is not aware of any issues raised in its comments that were not addressed by the District when the permits were finally issued. As the issued permits are matters of public record, EarthJustice may review them and to the extent that EarthJustice believes the permits should be reopened, it may seek such reopening in accordance with 40 CFR § 70.7.

Furthermore, the provision at 40 CFR § 70.8(c) describes the process by which EPA may object to the issuance of a proposed permit. EPA did not object, pursuant to that provision, to issuance of the proposed permits.