

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of)	
Dougherty County Fleming/Gaissert)	
Road MSW Landfill's)	
Title V Operating Permit No.)	
4953-095-0095-V-01-0)	
)	Petition No: 04-01-_____
)	
Issued by the Georgia Environmental)	
Protection Division)	

PETITION TO HAVE THE ADMINISTRATOR OBJECT TO DOUGHERTY
LANDFILL'S TITLE V PERMIT

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I. INTRODUCTION

Air pollution is causing a public health crisis in Georgia. Recent scientific studies reveal that air pollution kills over a thousand Georgians each year. Many more suffer other adverse health effects, such as asthma attacks and decreased lung capacity. There are also economic consequences of Georgia's bad air quality. The air pollution issue is of such importance that it has appeared in a major newspaper. See e.g. May 1, 2001 Atlanta Journal, "Bad air days: Atlanta ranks sixth in pollution."

Interposed between Georgians and the air pollution is the Clean Air Act. In simple terms, the Clean Air Act sets standards for safe ambient air and then issues permits to major stationary sources of air pollution as well as implements regulations for mobile sources. The permits are designed to ensure that aggregate air pollution does not create unhealthy air.

According to the EPA, Title V operating permits are a vehicle to ensure that facilities comply with all of the applicable Clean Air Act requirements. However, the Georgia Environmental Protection Division has derailed this purpose by issuing a Title V permit with numerous flaws that are discussed in more detail below.

II. PARTIES

The Sierra Club, a non-profit corporation, is one of the nation's oldest and largest environmental organizations. The Sierra Club has long been involved in air pollution issues in Georgia and throughout the nation. The Georgia Chapter of the Sierra Club has approximately 13,000 members. Sierra Club members live, work, farm, recreate, grow food, own land and structures, and obtain spiritual and aesthetic pleasure from locations that are adversely affected

by the air pollution from Dougherty County Fleming/Gaissert Road MSW Landfill (“Dougherty Landfill”). In addition, the Sierra Club requires the information that the permittee will submit to EPD pursuant to its final Title V permit in order to conduct its work to clean up the air in Georgia. However, if the permit does not contain complete monitoring and reporting, the Sierra Club will not be able to obtain the information that it needs to do its work.

III. PREVIOUS PROCEEDINGS

The United States Environmental Protection Agency (EPA) granted final approval of the Georgia Title V operating permit program on June 8, 2000. 65 FR 36398 (June 8, 2000). The Environmental Protection Division (EPD) of the Georgia Department of Natural Resources is the agency responsible for issuing Title V operating permits in Georgia. O.C.G.A. §§12-9-3(12), 12-9-4, 12-9-6(b)(3).

EPD issued a draft Title V operating permit for Dougherty Landfill and granted the public a thirty-day period, which ended on April 18, 2001. Petitioner assumes that EPD issued the Dougherty Landfill proposed permit to EPA for EPA’s initial 45-day comment period on the same day EPD issued the draft permit for public comment.

On April 18, 2001, the Sierra Club submitted comments to EPD on the Dougherty Landfill draft permit. A copy of these comments, including the facsimile confirmation sheet, is attached as Ex. 1. EPD then notified the Sierra Club, through its counsel, that it intended to re-propose the Dougherty Landfill permit to EPA. See Ex. 2 (Addendum to Narrative) at 2. EPD claims that it followed through with its stated intention by making some slight modifications to the permit and re-proposing the permit to EPA on May 25, 2001. See Ex. 3; see also Ex. 2

at 2. EPD issued the final permit on June 11, 2001. See Ex. 4. However, EPA's 45-day review period did not expire until July 9, 2001. The Petitioner notes that EPD issuance of the final permit before EPA's 45-day review period expired appears to be a violation of 40 CFR § 70.7(a)(1)(v). In any event, the public's period to petition the EPA to object to this permit expires on September 7, 2001. 40 CFR § 70.8(d). See also Ex. 2 at 3. Thus, this petition is timely.

Art Hofmeister, of EPA Region 4's Air Division, stated that he could not find EPD's notice of re-proposal for this permit. However, this is irrelevant in terms of determining the timeliness of this permit. The Sierra Club is reasonably allowed to rely on information EPD provided to them when determining the due date for this petition. EPA cannot challenge the timeliness of this petition on this basis because the Sierra Club has told EPA on several occasions that the "system" EPD had developed to inform the public of when their petition period begins is inadequate. Despite Sierra Club's attempts to rectify the problem, EPA has chosen to do nothing about this system. Therefore, it would be inequitable to allow EPA to take advantage of an apparent flaw in the system to avoid having to respond to this petition in a timely manner.

IV. FACTS

"Dougherty County Fleming/Gaissert Road Municipal Solid Waste Landfill receives, manages, and disposes of solid waste, including, but not limited to, municipal solid waste, commercial waste and industrial waste." Ex. 4 at 1, Part 1.3. Even though it is not a hazardous waste landfill, it disposes of asbestos. In addition, the facility emits methane, a greenhouse gas

that is also dangerous because of its ability to ignite and explode. The facility also emits a variety of other substances, many of which are toxic, which are known as non-methane organic compounds (NMOC).

V. SUMMARY OF THE ARGUMENT

1. Dougherty Landfill's permit does not require it to biannually report the results of all monitoring, contrary to requirements in 40 CFR § 70.6(a)(3)(iii)(A) and 42 U.S.C. § 7661(c)(a).

2. The Clean Air Act ("Act") provides that any "person" can take an enforcement action to stop a violation of a Title V permit. 42 U.S.C. § 7604. The Act defines "person" to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a state" 42 U.S.C. 7602(e). However, this permit limits those who can take enforcement actions to "citizens of the United States." This is contrary to the statute and therefore must be removed from the permit.

3. The EPD provided inadequate public notice for this permit because it failed to send a public notice to people on its Title V mailing list, misled the public by not informing them that they are able to enforce the Title V permit, and failed to establish a workable system of informing the public when their period to petition EPA to object begins.

4. This permit contains language that appears to limit the use of credible evidence in enforcement actions in violation of the EPA's credible evidence rule.

5. The permit does not require the prompt reporting of all violations.

VI. ARGUMENT

A. LEGAL BACKGROUND AND STANDARD OF REVIEW

The Clean Air Act is “Congress’s response to well-documented scientific and social concerns about the quality of the air that sustains life on earth and protects it from . . . degradation and pollution caused by modern industrial society.” Delaware Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256, 260 (3rd Cir. 1991). A key component to achieve the Clean Air Act’s goal of protecting our precious air is the Title V operating permit program. Title V permits are supposed to consolidate all of the requirements for facilities into a single permit and provide for adequate monitoring and reporting to ensure the regulatory agencies and the public that the permittee is complying with its permit. See generally S. Rep. No. 101-228 at 346-47; see also In re: Roosevelt Regional Landfill, (EPA Administrator May 11, 1999) at 64 FR 25336.

When a state or local air quality permitting authority issues a Title V operating permit, the EPA will object if the permit is not in compliance with any applicable requirement or requirements under 40 CFR Part 70. 40 CFR § 70.8(c). However, if the EPA does not object, then “any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period to make such objection.” 40 CFR § 70.8(d); 42 U.S.C. § 7661d(b)(2)(CAAA § 505(b)(2)). “To justify exercise of an objection by EPA to a [T]itle V permit pursuant to Section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with applicable requirements of the Act, including the requirements of Part 70. [40 CFR] § 70.8(d).” In re: PacifiCorp’s Jim Bridger and Naughton Plants, VIII-00-1 (EPA Administrator Nov. 16, 2000) at 4.

B. DOUGHERTY LANDFILL'S PERMIT IS NOT IN COMPLIANCE WITH APPLICABLE REQUIREMENTS OF THE CLEAN AIR ACT.

1. DOUGHERTY LANDFILL'S PERMIT DOES NOT REQUIRE IT TO REPORT ALL OF THE RESULTS OF ITS MONITORING.¹

40 CFR § 70.6(a)(3)(iii)(A) and 42 U.S.C. § 7661(c)(a) require that permits issued by state agencies include a requirement for submittal of reports of any required monitoring at least every 6 months. See In re Shintech (EPA) at 25.² Moreover, such a provision is likewise required by § 70.1(b) in order to ensure that the public is able to enforce the permit provisions. See also Sierra Club v. Public Service Co. of Colorado, Inc., 894 F. Supp. 1455, 1459 (D. Colo. 1995). Dougherty Landfill's permit does not contain any such requirement. See Exhibit 4.

EPD claims that condition 5.3.1 of the permit satisfies the requirements of § 70.6(a)(3)(iii)(A). See Narrative at Addendum to Narrative at 6, attached as Ex. 2. However, Condition 5.3.1 requires the permittee to develop and implement a Dust Suppression Plan. See Ex. 4 at 8, Condition 5.3.1. This has nothing to do with reporting except that it is another example of a condition in the permit for which the permit does not require bi-annual reporting of monitoring in violation of 40 CFR § 70.6(a)(3)(iii)(A).

We assume that EPD actually meant to reference Condition 6.1.3. Condition 6.1.3 requires the reporting of failures to meet applicable emission limitations and standards. See Ex. 4 at 9, Condition 6.1.3. This reporting is required by § 70.6(a)(iii)(B). However, §

¹ This issue was raised in Petitioner's Comment 4 at page 4-5, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

² Available at http://www.epa.gov/rgytgrnj/programs/artd/air/title5/petitiondb/petitions/shintech_decision1997.pdf

70.6(a)(iii)(A) requires reporting of all monitoring. It is a cardinal rule of statutory and regulatory interpretation that a regulation should be interpreted in such a manner as to not render any provision of the regulation meaningless. However, EPD's interpretation that reporting of deviations constitutes reporting of any required monitoring renders § 70.6(a)(iii)(A) meaningless, as it would be redundant to § 70.6(a)(iii)(B).

It is true that Condition 6.2.1 does require annual reporting of NMOC emission rate calculations. See Ex. 4 at 7. While this certainly is a small step towards compliance with § 70.6(a)(iii)(A), that subsection requires reporting of *all* monitoring. In addition to the example above, Condition 6.2.5 requires the permittee to monitor the location of deposited asbestos and other nondegradable wastes. Ex. 4 at 11, Condition 6.2.5. This is exactly the type of monitoring that § 70.6(a)(iii)(A) requires to be reported at least bi-annually, which the permit does not require. Condition 2.2.1. is yet another example of whether there are monitoring requirements but no requirement for biannually reporting of that monitoring.³

There is a related issue that will arise if EPA requires EPD to include a requirement of biannual reporting of all monitoring information. Therefore, it is the best use of resources to address this issue now rather than have Petitioner once again appeal this permit. EPD appears to take the position in its narrative that even if it did include a requirement to provide monitoring information, § 70.6(a)(iii)(A) only requires a report of the monitoring information rather than submission of the actual monitoring information. While this may be a fair interpretation of the

³ To the extent that EPA has a difficult time determining what are the monitoring requirements contained in Condition 2.2.1, it should object to this permit as not practicably enforceable. However, one example of required monitoring can be found in 40 CFR 60.113b, which is incorporated by reference into Condition 2.2.1.

regulation, Petitioner is not sure that there is any difference between a report of the monitoring information and the actual monitoring information. It would seem that it would be the least onerous requirement on the permittee to have it simply photocopy the monitoring information, such as the log books, rather than having to convert the information into some unspecified report format.

In conclusion, EPA should object to this permit and modify the permit to include a permit provision that requires “submittal of reports of any required monitoring at least every 6 months.” 40 CFR § 70.6(a)(3)(iii)(A).

2. DOUGHERTY LANDFILL’S PERMIT IMPERMISSIBLY LIMITS WHO MAY TAKE ENFORCE ACTIONS FOR VIOLATIONS OF THE PERMIT.⁴

“The Title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these requirements is assured.” In re: Roosevelt Regional Landfill, (EPA Administrator May 11, 1999) at 64 FR 25336. There are three entities that are permitted to take action to assure compliance with a Title V permit. Specifically, the following entities may

⁴ This issue was raised in Petitioner’s Comment 2 at pages 4, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

take such action: the EPA pursuant to 42 U.S.C. § 7413, the State pursuant to state law or 42 U.S.C. § 7604, and any “person” pursuant to 42 U.S.C. § 7604. Of course, 42 U.S.C. § 7604 is labeled “citizen suits.” However, “citizen” in this context includes all members of the public.

Citizen suits are a particularly important method of assuring compliance with Title V permits. As the Supreme Court has noted:

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency, which in time develops, between the regulator and the regulated. As early as 1894, Attorney General Olney predicted that regulatory agencies might become 'industry-minded,' as illustrated by his forecast concerning the Interstate Commerce Commission:

'The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things.' M. Josephson, *The Politicos* 526 (1938).

Years later a court of appeals observed, 'the recurring question which has plagued public regulation of industry (is) whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.' *Moss v. CAB*, 430 F.2d 891, 893.

Sierra Club v. Morton, 405 U.S. 727, 745-47 (1972). See also *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1402 (D. Haw. 1995) (Congress intended that citizen suits would serve as "an integral part of [the Clean Water Act's] overall

enforcement scheme"); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1525 (9th Cir. 1987) ("citizens should be unconstrained to bring [Clean Water Act] actions") (quoting S. Rep. No. 92-414 (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3746); see also id. ("Congress intended Clean Water Act citizen suits to be "handled liberally, because they perform an important public function"); Marbled Murrelet v. Babbitt, 182 F.3d 1091, 1095 (9th Cir. 1999) (noting Congress' intent to promote citizen enforcement of ESA); Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 560, 106 S.Ct. 3088 (1986) (Congress enacted Clean Air Act's attorney's fees provision "to promote citizen enforcement of important federal policies.").

EPD's Title V permit seriously undermines the citizen suit provision of the Clean Air Act. Condition 8.2.1 of the permit states:

Except as identified as "State-only enforceable" requirements in this Permit, all terms and conditions contained herein shall be enforceable by the EPA and citizens **of the United States** under the Clean Air Act[.]

Ex. 4 at Condition 8.2.1 (emphasis added). However, the relevant section of Part 70 provides that "all terms and conditions in a part 70 permit, are enforceable by the Administrator and citizens under the Act." 40 CFR § 70.6(b)(1). This section clearly does not limit who may bring enforcement actions to citizens of the United States. Furthermore, the Clean Air Act ends any debate on this issue. It provides that "any person" may bring a citizen suit. 42 U.S.C. § 7604(a). The Act goes on to define person as including "an individual, corporation, partnership, association, State, municipality, political subdivision of a state" 42 U.S.C. § 7602(e). Thus, the impact of this oversight is significant. Specifically, "citizens of the United

States” represents a small subset of those that fall under the statutory definition of “person.” As written, the EPD permit excludes corporation, both for and non-profit, counties, not to mention resident aliens and others whose immigration status is other than citizens of the United States.⁵

Nevertheless, EPD argues that the use of the term “citizens of the United States,” does not affect the fact that any person, as authorized by the Act, can enforce the permit. Ex. 2, at 5. EPD cites no authority for its argument. In addition, EPD ignores the permit shield in condition 8.16.1. Even assuming that EPD’s position is correct, a plaintiff may be forced to litigate this issue. Even if a court would ultimately rule that any person, and not only a citizen of the United States, can enforce this permit, what could possibly be the value of forcing parties to expend valuable resources litigating an issue that could have been expeditiously addressed in the context of the permit? Surely draining public and private resources through protracted litigation does nothing to assure compliance with the provisions of a Title V permit. Moreover, given the misleading language contained in the permit, an individual untrained in the law may actually conclude that he or she cannot enforce the permit based on the plain language of the permit. Again, there is no value in allowing room for this confusion. Rather, the purpose of Title V permits assuring compliance is served by modifying the language.

Of course, the remedy is so simple that it is difficult to conceive any legitimate reasons for EPD to refuse Petitioner’s request to modify the language. EPD simply needs to delete the phrase “of the United States,” out of condition 8.2.1.

⁵ The fact that Georgia’s Title V permits claim to limit the rights of non-citizens of the United States raises serious environmental justice and equal protection issues.

3. THE PUBLIC NOTICE FOR DOUGHERTY LANDFILL'S PERMIT DID NOT COMPORT WITH THE PART 70 REGULATIONS.

The EPD did not undertake the required public participation activities for this permit. Therefore, EPD may not issue the final permit. 40 CFR § 70.7(a)(1)(ii). Rather, EPA should object to this permit and require EPD to re-notice the draft permit for a new public comment period that follows, at a minimum, the public participation processes specified in the law.

A. EPD DID NOT PROVIDE NOTICE OF THIS PERMIT VIA A MAILING TO PEOPLE ON ITS MAILING LIST.⁶

40 CFR § 70.7(h)(1) requires that EPD give notice of the draft permit by mailing such notice to a mailing list that includes people who have requested to be on that mailing list. EPD did not mail notice of this draft permit to people on the mailing list. EPD does not dispute this point. See Ex. 2 at 2. Therefore, because EPD did not comply with the requirements for public participation under paragraph (h), EPA should object to the permit and require EPD to re-notice this permit for a new 30-day comment period. 40 CFR § 70.7(a)(1)(ii).

⁶ This issue was raised in Petitioner's Comment 1 at pages 2, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

B. THE PUBLIC NOTICE INCORRECTLY STATES THAT THE PERMIT IS ONLY ENFORCABLE BY THE EPA AND EPD.⁷

40 CFR § 70.7(h) also provides that the permitting authority shall provide “adequate” procedures for public notice. While the Part 70 rules and the Act do not define “adequate,” it is apparent that adequate should at least include information that is accurate. EPD failed to meet this standard. For example, EPD’s public notice is inadequate because it contains inaccurate information. The public notice stated: “[t]his permit will be enforceable by the Georgia EPD and the U.S. Environmental Protection Agency.” See Ex. 5. This statement is incomplete. The permit will also be enforceable by any “person.” 42 U.S.C. § 7604(a). “Person” includes an individual, corporation, partnership, association, State, municipality, and a political subdivision of a state. 42 U.S.C. § 7602(e). EPD has implicitly conceded this point by modifying its subsequent public notices to acknowledge that the permit is also enforceable by the public. See Ex. 6.

While this oversight may appear insignificant, correcting this misstatement is important for at least two reasons. To begin with, it is inherently important for the government to always provide the public with accurate information regarding implementation of air pollution laws. In addition, EPD has recognized that public involvement in the Georgia Operating Permit program has been very limited. It is only with full and meaningful public participation that we can hope to have clean air here in Georgia. See generally Ashley Schannauer, Science and Policy in Risk

⁷ This issue was raised in Petitioner’s Comment 1 at pages 3-4, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

Assessment: The Need for Effective Public Participation, 24 Vermont Law Review 31 (1999).

In order to involve the public in the Operating Permit program, an important first step is to convince the public that this program is a legitimate means by which the public can participate in the effort to achieve the goal of attaining clean air. If the public is aware of their right to enforce a permit, they are more likely to put effort into ensuring that the permit is adequately protective of the environment. Therefore, EPA should object to the permit, as a public notice that contains inaccurate information about a critical point is not adequate. The EPA should require the EPD to re-notice this permit for a new 30-day comment period with a public notice that accurately explains to the public that they, as well as EPD and EPA, can enforce this permit.

In addition, 40 CFR § 70.7(h)(2) states that the public notice will explain where the public can review all relevant supporting documents. EPD's public notice states that all relevant information is available at the Air Protection Branch in Suite 120. See Ex. 5. This may not be accurate. For example, relevant information may be located in an EPD regional office. Other information may be in EPD's Land Branch. In addition, information relevant to accidental releases under Clean Air Act § 112(r) may be located at other agencies. Other information, such as past monitoring records, will likely be located at the facility.

Furthermore, the public notice states that “[a]fter the comment period has expired, the EPD will consider all comments, make any necessary changes and issue the Title V operating permit.” This statement is inaccurate. Specifically, the statement suggests that, while changes may be made, in the end, the permit *will* be issued. However, under certain circumstances, EPD is required to refuse to issue a Title V permit. 40 CFR § 70.7(a). As such, the aforementioned statement could be interpreted as an indication of EPD's predisposition to issue

Title V permits regardless of whether the permit complies with the law. See American Wildlands v. Forest Service, CV 97-160-M-DWM (D.Mont. Apr. 16, 1999)(Denying government deference because of evidence of predisposition towards a predetermined outcome). Therefore, EPA should object to this permit and require EPD to re-notice it with a public notice that does not contain inaccurate information.

C. EPD AND EPA HAVE NOT PROVIDED THE PUBLIC WITH AN ADEQUATE SYSTEM OF NOTICE OF WHEN THE PUBLIC'S PETITION PERIOD BEGINS.⁸

Another source one can use to judge the adequacy of the public notice is the requirements in the Implementation Agreement between EPD and US EPA Region 4 for the Title V Operating Permit Program (IA). The IA provides that EPD will put the end date for EPA's review period in addition to the end date for the public comment period in the public notice. IA at 16. The public notice for this draft permit does not contain the end date for the

⁸ This issue was raised in Petitioner's Comment 1 at pages 2-3, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

EPA review period. It is not sufficient for EPD to claim in the public notice that this date is 45 days after the public comment period begins. The reality is that the end date of EPA's review period can and often does change when EPD re-proposes the permit. As such, by providing only that the review period ends "45 days" after the commencement of the public comment period, EPD could potentially provide inaccurate information. In fact, that is what happened in this case. Failing to provide accurate information regarding EPA's review of the proposed permit greatly inhibits the ability of the public to participate in the permitting process. The end date of EPA's review period is important because it is also the first day of the public's 60-day period to petition EPA to object to the permit. It is axiomatic that the public knows when this time period begins and whether EPA has already objected to the permit in order to determine whether to file a petition to EPA. In order to remedy this dilemma and provide accurate information, we recommend that EPD add two more entries on its web page. First, EPD should provide a timely entry indicating whether or not EPA has objected to the permit with the following possible answers: yes, no and has not decided. Second, EPD should create an entry indicating the precise date that EPA's review period ends. While EPD can initially calculate this date as 75 days after the date the public comment period begins, in order to comply with the IA and 40 CFR § 70.7(h), EPD must continue to update this information on day 76 and thereafter depending on whether EPA's review period has truly expired.

EPD's current system of notifying the public of when EPA's comment period ends, described in its addendum to the narrative, does not work. See Ex. 2 at 3-4. On two occasions, EPD has claimed that it has re-proposed a permit and EPA has claimed that EPD did not re-propose that permit. However, this dispute only arose after the Sierra Club's time

for filing a petition under EPA's view had expired. In addition, EPA has suggested that petitioner simply file its petition on the 135 day after the draft permit is issued. This approach would be a tremendous waste of Sierra Club's resources. In addition, if Sierra Club adopted this approach, it would expect EPA to respond to these petitions within the legal deadline and sue EPA if EPA did not respond. This also would appear to be a tremendous waste of EPA's resources.

4. THE PERMIT APPEARS TO LIMIT CREDIBLE EVIDENCE FROM BEING USED IN AN ENFORCEMENT ACTION.⁹

As emphasized by the EPA's Credible Evidence Rule, 62 FR 8314 (Feb. 24, 1997), the Clean Air Act (CAA) allows the public, EPD, EPA, and the regulated facility to rely upon any credible evidence to demonstrate violations of or compliance with the terms and conditions of a Title V operating permit. Specifically, EPA revised 40 CFR § 51.212, 51.12. 52.30, 60.11 and 61.12 to "make clear that enforcement authorities can prosecute actions based exclusively on any credible evidence, without the need to rely on any data from a particular reference test." 62 FR at 8316. EPD has failed to ensure that no permit condition purports to limit the use of credible evidence. Moreover, EPD failed to include standard language in the permit stating that all credible evidence may be used.

A. EPD MUST REMOVE LANGUAGE THAT PURPORTS

⁹ This issue was raised in Petitioner's Comment 5 at pages 5-6, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

TO LIMIT THE USE OF CREDIBLE EVIDENCE.

EPA has made it very clear that Title V permits must contain no language that could be interpreted to limit credible evidence. However, this permit does contain language that could easily be understood as limiting credible evidence. For example, condition 4.1.3. in the permit states that “[t]he methods for the determination of compliance with emissions limits listed under Sections 4.2 which pertains to the emission units listed in Section 3.1 are as follows:” One could read this provision to stand for the proposition that when a government agency or member of the public takes an enforcement action for a permittee violating its permit, the enforcer can only rely on information from the methods of determination listed in the permit. This position is directly contrary to the Clean Air Act requirements in CAA §§ 113(a), 113(e)(1) and 40 CFR § 51.212, 51.12. 52.30, 60.11 and 61.12 which allows anyone taking an enforcement action to rely on any credible evidence. Therefore, the aforementioned sentence in Section 4.1.3 should be stricken.

Another example of the permit’s attempt to limit credible evidence is found in the second sentence of condition 18.17.1. This condition claims to limit the usable evidence to information that is available to EPD. Of course, the public or EPA may obtain information about a facility from sources other than EPD, such as information from a whistleblower or from people that live near the facility. As such, it is inappropriate to limit credible evidence to exclude such information. Therefore, the aforementioned provision must be removed from the permit. Of course, the preferred option is to simply remove the sentence. A less desirable option is to re-write it to state that “EPD may determine . . .”

Similarly, Condition 6.1.3 of the permit, which states that “failures shall be determined through observation, data from any monitoring protocol, or by any other monitoring which is required by the permit,” could be considered to limit the use of credible evidence. To correct the problem, this Condition should include an additional clause requiring reporting of any failure based on any credible evidence, including observation, data from monitoring protocols and other monitoring required by the permit.

EPD claims that Rule 391-3-1.02(3)(a) and Procedures for Testing and Monitoring Sources of Air Pollutants (“Procedures Manual”) at Section 1.3(g) remove any limitation on the use of any credible evidence in enforcement actions. Ex. 2 at 6. Even if these two items stood for the proposition for which EPD offers them, EPD ignores the permit shield provision in the permit. EPD also fails to explain why addressing such a critical issue by incorporation by reference to a testing manual or Georgia state rules make this permit practicably enforceable. Again, it is difficult to see any rationale basis for this approach and EPD has certainly not offered one.

Turning to these two items, Rule 391-3-1-.02(3)(a) is in fact another apparent limit on credible evidence. It states:

Any sampling, computation and analysis to determine the compliance with any of the emissions limitations or standards set forth herein shall be in accordance with the applicable procedures and methods specified in the Georgia Department of Natural Resources **Procedures for Testing and Monitoring Sources of Air Pollution.**

Rule 391-3-1-.02(3)(a)(emphasis in the original). It is difficult to not interpret this statement as excluding any evidence to determine compliance except evidence obtained through methods set

forth in Georgia Procedures Manual. The fact that, with the exception of the undersigned, the only people in possession of this Procedures Manual are regulated entities, their contracts and a few other government agencies, does nothing to strengthen EPD's position.

Turning to Section 1.3(g), it states:

Notwithstanding any other provision of any applicable rule or regulation or requirement of this text, for the purpose of submission of compliance certifications or establishing whether or not a person has violated or is in violation of any emissions limitation or standard, nothing in these Procedures for Testing and Monitoring Sources of Air Pollutants or any Emission Limitation or Standard to which it pertains, shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.

Again, even if we assume that this Section supported EPD's position, we would nevertheless have to overcome the seemingly insurmountable due process obstacle that a Procedures Manual cannot overcome the language of a permit with a permit shield provision and a rule that has been promulgated following notice and comment. If we were able to overcome this obstacle, it is extremely unclear that Section 1.3(g) helps to remove limitations on the use of credible evidence. The Section states that "nothing in these Procedures . . . or any Emissions Limitation or Standard." This Section thus applies to the Procedures Manual and to Emissions Limitations and Standards. This Section does not appear to apply to Title V permits or Georgia state rules. Worse yet, the Section does not state that one can use any credible evidence. It only states that one can use any credible evidence to show whether a source would have been in compliance "if the appropriate performance or compliance test or procedure had been performed." Section 1.3(g). Whether the credible evidence one wants to use is the

“**appropriate** performance or compliance test or procedure” is anyone’s guess.

However, Title V was not created to encourage guessing. Therefore, rather than this morass, EPA should require EPD to remove the language that appears to limit credible evidence.

B. EPD SHOULD INCLUDE STANDARD LANGUAGE IN ITS PERMITS THAT EXPLICITLY STATES THAT ANYONE CAN USE ANY CREDIBLE EVIDENCE.

EPA should further require EPD to affirmatively state in the permit that any credible evidence may be used in an enforcement action. EPA supports the inclusion of credible evidence language in all Title V permits. As explained by the Acting Chief of US EPA’s Air Programs branch:

It is the United States Environmental Protections Agency’s 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. . . . [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.

Letter from Cheryl L. Newton, Acting Chief, Air Programs Branch, EPA, to Robert F.

Hodanbosi, Chief, Division of Air Pollution Control, Ohio Environmental Protection Agency,

dated October 30, 1998. In fact, EPA apparently sent a letter in May 1998 specifically directing EPD to amend its SIP to include language clarifying that any credible evidence may be used. See Letter from Winston A. Smith to Ronald C. Methier. Nevertheless, while three years have elapsed since EPA's request, the permit does not contain the necessary language.

While anyone may rely on *all* credible evidence regardless of whether this condition appears in the permit, EPD should include credible evidence language in the permits and permit template to make the point clear. Specifically, EPA has recommended that the following language be included in all Title V permits:

Notwithstanding the conditions of this permit that state specific methods that may be used to assess compliance or noncompliance with applicable requirements, other credible evidence may be used to demonstrate compliance or noncompliance.

Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, US EPA, to Paul Deubenetzky, Indiana Department of Environmental Management, dated July 28, 1998. We request that EPA object to this permit and modify the permit to include this provision to clarify the availability of any credible evidence to demonstrate noncompliance with permit requirements.

5. THE PERMIT MUST REQUIRE THE PERMITTEE TO PROMPTLY REPORT ALL PERMIT VIOLATIONS REGARDLESS OF HOW THEY ARE DISCOVERED.¹⁰

¹⁰ This issue was raised in Petitioner's Comment 6 at pages 6-7, attached as Ex. 1. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

Condition 6.1.3. requires the permittee to report any failure to meet any emission standard or limitation or any work practice standard or requirement. Generally, this is a positive provision. However, it has two shortcomings. The first is that it limits the use of credible evidence as discussed in Section 4.A. above. It also requires that the permittee only report these violations once every six months. However, 40 CFR § 70.6(a)(3)(iii)(B) requires “prompt reporting of deviations from permit requirements[.]” Id. (emphasis added). While it is true that the regulations do allow the agency discretion in defining “prompt,” it is difficult to imagine the six months allowed for reporting deviations not caused by malfunctions or breakdowns as qualifying as a rational definition of “prompt” by any objective fact finder. In 60 Fed. Reg. 36083 (July 13, 1995) 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)." Therefore, the permit should require the permittee to report all deviations within seven days.

VII. CONCLUSION

For the reasons explained above, pursuant to 40 CFR § 70.8(d) the EPA should object to this permit and modify it as explained above.

Respectfully Submitted,

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Dated: August 21, 2001

CC: Acting Regional Administrator, EPA Region 4
Art Hofmeister, EPA Region 4 (w/o attachments)
Congresswoman Cynthia McKinney
Curt Smith, Sierra Club
Jimmy Johnston, EPD (w/o attachments)