UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

December 14, 2001

Mr. Marc Chytilo
Law Office of Marc Chytilo
P.O. Box 92233
Santa Barbara, California 93190

Attorneys for Communities for Land,
Air, Water and Species

Dear Mr. Chytilo:

Thank you for your comment letter dated March 12, 2001 to our Acting Regional Administrator at the time, Ms. Laura Yoshii, regarding possible deficiencies in the title V operating permit programs in California. Your letter was in response to EPA's announcement made in the Federal Register on December 11, 2000, that members of the public, during the 90-day period that followed our announcement, could identify deficiencies they perceive exist in State and local agency operating permits programs required by title V of the Clean Air Act ("Act")(65 FR 77377). Enclosed is our response to your comments.

By way of background, the opportunity for the public to comment on the title V programs was the result of a settlement between EPA and the Sierra Club and New York Public Interest Group (NYPIRG) resolving a challenge to EPA's extension of the interim approval period for 86 operating permit programs. In the context of discussing settlement of that litigation, Sierra Club and NYPIRG raised concerns that many programs with interim approval, as well as those with full approval, have program and/or implementation deficiencies.

In our December 11, 2000 Federal Register notice we asked members of the public to be as specific as possible in their comments and to not include in the comments any program deficiencies that were already identified as such by EPA when we granted the program interim approval. Further, we stated that comments that generically assert deficiencies for multiple programs would not be considered. As you may be aware, Region 9 oversees title V programs for 43 permitting authorities and more than 2,000 title V sources are located within Region 9's jurisdiction. For reasons related to administrative limitations, EPA requested the public to be as specific as possible.

Your letter generally described twenty (20) deficiencies that you allege exist in the California part 70 programs. Your comments raised concerns over: 1) the adequacy of public access to information regarding permitting decisions; 2) the adequacy of enforcement programs

in California; 3) certain sources being exempt entirely from part 70 permitting requirements; and 4) in some cases, certain applicable requirements not being included in part 70 permits. At times, you used examples from a specific District as a means to illustrate your point, but mostly your comments were not specific and often directed at the California Air Resources Board, which has no authority to issue permits in California.

Many of your comments concern alleged implementation deficiencies -- whether permitting authorities in California are implementing their programs consistent with the requirements of their EPA-approved programs and EPA's part 70 regulations. Although the enclosure responds to all issues you have raised, we would like to point out that where appropriate, EPA has received commitments from permitting authorities regarding certain alleged implementation deficiencies providing that future permits will be issued consistent with state and federal requirements. EPA is not issuing notices of deficiency for these implementation deficiencies because each permitting authority has committed to address these issues. EPA will monitor each permitting authority's compliance with its commitments to ensure that the permitting authority implements its program consistent with its approved program, the CAA and EPA's regulations.

Specifically, with respect to prompt reporting of permit deviations, Mojave Desert AQMD, San Diego County APCD, North Coast Unified APCD, Northern Sonoma APCD, Lassen County APCD, and Kern County APCD have committed to ensure that all new title V permits and permit renewals will include clear requirements for prompt reporting of all deviations according to language provided to us in their commitment letters on the matter. A more thorough discussion of this issue is included in issue #1, Enclosure 1, and a copy of each of the permitting authority's commitment is enclosed. (See Enclosure 2).

In addition, a number of permitting authorities in California have not issued permits at the rate required by the CAA. Because of the sheer number of permits that remain to be issued, EPA believes that a period of up to two years will be needed for permitting authorities to be in full compliance with permit issuance requirements of the CAA. Because each permitting authority in California where this is a problem has submitted a commitment to correct this, EPA interprets that the permitting authority has already taken "significant action" to correct the problem and thus does not consider it a deficiency at this time. Each commitment establishes semi-annual milestones for permit issuance, and provides that a proportional number of the outstanding permits will be issued during each 6-month period leading to issuance of all outstanding permits. All outstanding permits will be issued as expeditiously as practicable, but no later than December 1, 2003. EPA will monitor the permitting authority's compliance with its commitment by performing semiannual evaluations. For so long as each district issues permits consistent with its semi-annual milestones, EPA will continue to consider that the permitting authority has taken "significant action" such that a notice of deficiency is not warranted. If the permitting authority fails to meet its milestones, EPA will issue an NOD and determine the appropriate time to provide for the State to issue the outstanding permits.

The following districts in California have submitted a commitment and a schedule providing that all permits will be issued by December 1, 2003 with milestones every six months between now and then: the Bay Area AQMD, Colusa County APCD, El Dorado County APCD, Feather River AQMD, Glenn County APCD, Great Basin Unified APCD, Imperial County

APCD, Mojave Desert AQMD, Northern Sierra AQMD, Placer County APCD, Sacramento Metro AQMD, San Diego County APCD, San Joaquin Valley Unified APCD, Santa Barbara County APCD, Shasta County APCD, Siskiyou County APCD, South Coast AQMD, Tehama County APCD, Tuolumne County APCD, Ventura County APCD, and Yolo-Solano AQMD.

The milestones described in each letter reflects a proportional rate of permit issuance for each semiannual period. A copy of each of the permitting authority's commitment is enclosed (See Enclosure 3).

Again, thank you for your comment letter. We believe that it has made a difference in improving the part 70 programs in California. If you have any questions, please contact Gerardo Rios, Chief of the Permits Office at (415) 972-3974.

Sincerely,

/s/

Jack P. Broadbent
Director, Air Division

Enclosures

cc: Peter Venturini, CARB
Stew Wilson, CAPCOA

ENCLOSURE 1

EPA Response to Comments Received by Marc Chytilo, Esq.
Representing Committees for Land, Air, Water and Species

Comment #1:

Reporting. Many permits issued in the state and the CARB "model" rule lack specific terms mandating and defining prompt reporting of all permit deviations. This ambiguity has led to disparate treatment of the requirement by sources and districts and has deprived the public of timely information about unpermitted releases. For example, a currently pending application in Santa Barbara County lacks mention of deviation reporting and instead appears to provide that only District detection of excessive fuel use. (ExxonMobil modification, PTO 10181 and related entitlements.) "Prompt reporting" means immediate notification of the district, emergency response personnel and local media in the area of the release for all non-trivial releases. Again, by means of example, this has only become a condition of operations of Venoco's Elwood Gas Plant in Santa Barbara County after multiple releases.

Similar problems accompany the issue of what emissions are monitored and reported. The CARB model rule and guidance are silent on the precise scope of topics and issues to be included in a permit (see also supercession discussion below), leading to widely disparate District practices. For example, California's visible emissions limitations are some of the oldest rules in the SIP, yet many districts don't impose this as a parameter for monitoring and/or reporting of each, or even some Title V permits.

Response to Comment #1:

Your comment raises two separate issues. First, you assert that the ARB model rule and district-issued permits lack specific terms mandating and defining prompt reporting of all deviations. Second, you claim that the approved rules (or ARB guidance) need to identify the precise scope of topics and issues to be included in a permit.

Regarding the first issue, EPA determined that the rules submitted to EPA as part of initial program approval in 1993 did not require that prompt be defined in the rules. (See, for example, 59 FR 63292). Within certain bounds described in our Federal Register notice, EPA left the determination of what constitutes "prompt" to the discretion of the Air Pollution Control Officer. We said that although the permit program regulations should define "prompt" for purposes of administrative efficiency and clarity, it was acceptable to define the term in each individual permit. We also said that "prompt" for many sources means reporting a deviation within two to ten days of the deviation. Two to ten days, we felt, was sufficient time in most cases to protect public health and safety as well as to provide a forewarning of potential problems. We also said that for sources with a low level of excess emissions, a longer time period was acceptable.

To respond to your comment, in addition to our review of the part 70 programs and our review of hundreds of permits, we evaluated at least one final permit issued by each district specifically in response to your comment. We have summarized our results of the prompt reporting requirements below. Of the 34 districts in California:

- Eleven (11) districts, have not issued any final permits;
- Fifteen (15) California districts do not define prompt in the program but adequately define prompt or include standard reporting requirements (or references to those requirements) in the permits. For example, see the excerpt from the final Santa Barbara permits below.
- Two (2) districts (Bay Area and Sacramento) define prompt in their regulation and in the final issued permits. For Bay Area, its regulation requires prompt reporting for any deviation of a permit condition within 10 days (see Manual of Procedures, February 1995, Section 4.7); Bay Area permits also require, as a standard permit condition, that all instances of non-compliance be reported within 10 calendar days of the discovery of the incident. Sacramento's rule requires reports of any permit excursion within 24 hours; emergencies must be reported no later than one hour after detection. (see rule 501.1 and 501.3). Sacramento's final title permits mirror these rule requirements.
- Six (6) districts do not properly define prompt reporting for all deviations. For these districts, EPA agrees with your comment that neither the district rule nor the final permits issued adequately require or define prompt reporting of all deviations. The six districts are Northern Sonoma, San Diego, Lassen, North Coast, Kern and Mojave. In general, these districts require reports for semi-annual monitoring, including all instances of deviations as required by 40 CFR § 70.6(a)(3)(iii)(A), and prompt reporting of emergency situations. However, the permits do not include or define prompt reporting for non-emergency instances where excess emissions occur (these instances should be reported generally within 10 days), or separate the class of deviations that must be reported more frequently than every six months from those that can be reported every six months.

As we described in the cover letter, the six California permitting authorities noted above have committed to ensure that newly issued permits and permit renewals they issue will define prompt reporting of all permit deviations. Each of these six districts have provided EPA with a commitment to include prompt reporting requirements in newly issued permits and at permit renewal (See Enclosure 2).

Lastly, regarding the Santa Barbara permits that you cited (we have included Santa Barbara into the second category above), those final title V permits properly include the deviation reporting requirements. For example, here is the final permit condition for the ExxonMobil permit:

> **Prompt Reporting of Deviations.** The permittee shall submit a written report to the APCD documenting each and every deviation from the requirements of this permit or any applicable federal requirements within 7 days after discovery of the violation, but not later than 6 months after the date of occurrence. The report shall clearly document 1) the probable cause and extent of the deviation 2) equipment involved, 3) the quantity of excess pollutant emissions, if any, and 4) actions taken to correct the deviation. The

> requirements of this condition shall not apply to deviations reported to APCD in accordance with Rule 505. Breakdown Conditions, or Rule 1303.F Emergency Provisions. *[APCD Rule 1303.D.1, 40 CFR 70.6(a) (3)]*
>
> [from The Final Exxon/Mobil -- SYU Project - Las Flores Canyon Permit]

and the final permit for the Venoco, Ellwood Gas Plant requires:

> **Deviation from Permit Requirements.** The permittee shall report any deviation from requirements in this Permit to Operate, other than deviations reported to the APCD pursuant to the APCD Upset/Breakdown Rule 505, or the Part 70 Emergency Breakdown Rule 1303.F, to the APCO within 7 days of the occurrence of the deviation**.** The permittee shall use APCD approved **breakdown** forms to report any such deviations such as operation of permitted or non-listed, insignificant emission units which increases the stationary source's potential to emit [*Re: APCD Rule 1303.D.1.g, 40 CFR 70.6(a)(3)(iii)(B)*]

Regarding your second issue -- that the approved rules (or ARB guidance) need to identify the precise scope of topics and issues to be included in a permit -- we believe that all operating permits programs in California meet the part 70 requirements for what is to be included in a permit. Other than your general statement that opacity monitoring is omitted, and except as you describe in your comment regarding authority to construct conditions (comment # 9) which we address separately below, you did not provide examples of any District in California where final permits did not incorporate all applicable requirements (including opacity). In response to your specific example that districts in California have omitted opacity monitoring, we believe that permits do include opacity limits and, in most cases, have determined adequate monitoring to assure compliance with the associated opacity monitoring requirement. For some cases where we have disagreed with districts about the adequacy of its monitoring in proposed permits, we have objected to those proposed permits. In fact, our objections prompted CAPCOA in 1999 to form a periodic monitoring workgroup with EPA Region 9 representatives so that agreement about appropriate monitoring could be reached for commonly permitted emission units subject to SIP opacity standards, such that EPA would not have to object to permits. These periodic monitoring recommendations are available on the CARB website at http://www.arb.ca.gov/fcaa/tv/tvinfo/guidmrr.htm. Public workshops were held to discuss the proposed recommendations before they were finalized.

Comment #2:

Permit excursions. Many permits and districts have differing treatment of variances, emergencies, startup/shutdown, upset, malfunction and maintenance emission excursions beyond the terms of permits. This is complicated by state law provisions enabling sources to obtain state air permit relief for these incidents as variances, which are not available for federal permit terms. *See*, Train v. NRDC, 421 U.S. 60 (1975). Now that the variance issue has been resolved in Region IX (*see* 62 Federal Register 34641, 6/27/1997, recognizing long-standing precedent that variances from sources regulated in SIPs require SIP revisions for effectiveness), and an industry challenge to this determination defeated (*see* Industrial Environmental Association v. Browner, 2000 U.S.App LEXIS 12110 (9th Cir., 2000)(not published)), EPA must now review the state approach and district practices that must be in place to enforce this distinction. This is not the

case in many, if not most, California districts. (*See, for example*, San Diego APCD rules; San Joaquin Valley APCD rules.) For example, districts' rules may improperly define exceedences as occurring only during normal operating conditions, which, by definition, excludes variances, emergencies, startup/shutdown, upset, malfunction and maintenance emission excursions as a means to evade enforceability.

Our Response to Comment #2:

Your comment is very general and although you cite San Diego and San Joaquin, you do not clearly specify why, or which, San Diego and San Joaquin rules are problematic with respect to Part 70. Regarding variance provisions in state law, EPA views the State and district variance provisions as wholly external to the program submitted for approval under part 70 (see our discussion of this matter in 59 FR 63292, December 8, 1994). EPA did not, and still does not, recognize the ability of a permitting authority to grant relief from the duty to comply with a federally enforceable part 70 permit, except where such relief is granted through procedures allowed by part 70. A part 70 permit, however, may be issued or revised (consistent with part 70 permitting procedures) to incorporate those terms of a variance that are consistent with applicable requirements. A part 70 permit may also incorporate, via part 70 permit issuance or modification procedures, the schedule of compliance set forth in a variance. However, EPA reserves the right to pursue enforcement of applicable requirements notwithstanding the existence of a compliance schedule in a permit to operate. This is consistent with 40 CFR § 70.5(c)(8)(iii)(C), which states that a schedule of compliance "shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based." EPA's position on this matter has not changed since our initial interim approval actions. We will continue to ensure the programs are not inconsistent with federal law. Enclosure 4 includes a summary of the efforts along these lines.

Comment #3:

SIP revision incorporation. Districts have not been vigilant in updating local Part 70 rules at or immediately after EPA acts to incorporate a local rule revision into the SIP. Nor has CARB played a significant role in monitoring EPA actions on SIP submittals and notification of the affected districts.

Our Response to Comment #3:

Districts are not required to update local Part 70 rules after EPA approves a local rule into the SIP. Please note that local rules and regulations adopted to implement Part 70 rules are not submitted to EPA for SIP-approval. Instead, separate authority is provided for EPA approval at CAA § 502(d) and 40 C.F.R. § 70.4(a). In addition, we understand that SIP requirements change with time and part 70 anticipates that this will occur. 40 CFR § 70.7(f) requires that permits be re-opened and revised when additional applicable requirements under the Act become applicable to the source with a remaining permit term of 3 or more years.

Comment #4:

Public participation issues. Public participation in federal operating permit program actions has been extremely infrequent and limited in effectiveness. Large volumes of documents, short comment periods, restricted access to documents, and institutional resistance to public involvement in permitting processes that is present at many districts throughout the state combine to affirmatively discourage meaningful public participation.

Our Response to Comment #4:

Overall, we agree that public participation in the title V operating permits program has been uneven. Although there has been some public involvement in some districts, such as the Bay Area, the other districts have had little or no public involvement. The South Coast Air Quality Management District, for example, has received no comments on any of the 300-plus final permits that it has issued to date. EPA has taken some steps to increase the level of public interest and understanding of the title V program. For example, nationally, EPA and the Earth Day Coalition ("EDC"), an environmental organization based in Cleveland, Ohio, have co-sponsored numerous public workshops on title V permits in 2000 and 2001, which were attended by more than 150 individuals. Last year, EPA Region 9 and EDC conducted a well-attended title V citizen's training in Torrence, CA. Part 70, however, does not require active public participation, only the opportunity for such participation. See 40 C.F.R. § 70.7(h). An interim approval issue in some California districts required the districts to revise their rules to provide for public notice of permitting actions "by other means if necessary to assure adequate notice to the affected public" as required by Sec. 70.7 (h)(1). Notwithstanding the correction of this deficiency, Region 9 is not aware of any other instance in the state where public notice requirements are lacking in district rules or any instances where the districts are not following the required public notice procedures. Therefore, given that districts are complying with all relevant statutory and regulatory requirements to ensure that members of the public have an opportunity to participate in the process (or the rules that require adequate public notice are being corrected), Region 9 does not believe that this is a deficiency (see also our response to the mailing list comment #5 below).

Comment #5:

Public notice. EPA should require CARB to systematically review district public noticing procedures to ensure that source-specific, part 70 generic, and district-action wide mailing lists are properly maintained and utilized. List servers should be maintained by each District and/or the state to email interested parties when applications are submitted and deemed complete and where, when and how to get documents.

Our Response to Comment #5:

Regarding the use of mailing lists, 40 CFR 70.8(h)(1) requires districts to "notify persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list." Your comment was very general in nature and did not cite any district-specific examples to support your claim. In response to your claim, we reviewed the larger non-attainment area districts in California. EPA Region 9 found that all districts have rules requiring use of mailing lists, and in practice, such lists exist if: 1) individuals or organizations have asked to be on the list; or 2) if the district knows of a person or organization that is interested in

permitting decisions about a source or sources. In the latter case, sometimes public interest in title V sources is apparent from past interest expressed during NSR permitting decisions. If that is the case, all districts we spoke with had developed mailing lists and they use them for title V permitting decisions. For example, Bay Area has developed and maintains an extensive mailing list to better communicate proposed title V decisions to the community members interested in a medical waste incinerator. Also, they have developed and maintain extensive mailing lists for community members interested in the refineries. Finally, although not requiring them to do so, EPA encourages the use of electronic mail as a means by which permitting authorities can reduce their mailing costs while at the same time improving information availability to certain interested parties. To conclude, EPA believes that districts are complying with the mailing list requirements at 70.8(h)(1) and therefore we do not believe that this is a deficiency.

Comment #6:

Access to documents. Participation in Title V proceedings is necessarily a very document-intensive process, and the sheer size and cost of the voluminous documents can chill public participation. District practices in providing public access to Title V documents ranges widely. While the Public Records Act (Government Code § 6250, et seq.) applies to district documents, it lacks specific provisions for fee waivers and thus fees are rarely waived. As these district documents are also provided to EPA, they are also available under the Freedom of Information Act (5 U.S.C. § 552, et seq.), although the timing of delivery of FOIA documents typically presents problems. Most federal agencies have adopted FOIA regulations which allow fee waivers for public interest undertakings. EPA should require, in each district and/or State action on a permit application, public notification of the availability of documents through EPA under FOIA, and citation to the criteria and procedures for requesting fee waiver. Title V documentation should be routinely provided by districts to the public without charge, as the costs of public participation is properly an expense that should be recovered through the fee structure, not funded by the public. Many activists simply do not bother to attempt participation in Title V proceedings, given the difficulties in obtaining the necessary technical information from districts and other impediments. Since virtually every California APCD maintains a web site, EPA should direct the state and districts to maintain electronic, web-based "transparent files" for all Title V sources, including permanent copies of all application materials (including statements of basis and technical support documents), all District correspondance, NOVs, enforcement records, and all current permits on their web site. Access to this information must also be available at each District for persons lacking web access.

Our Response to Comment #6:

This is a general comment that does not identify a specific title V program deficiency for any particular district in California. Regarding your request that title V fees should cover the cost of copying documents for the public – the CAA, EPA's implementing regulations at part 70, and EPA guidance all require that fees collected are sufficient to fund all direct and indirect costs of the title V permit program. Both the CAA (see 502(b)(3)(A)) and part 70 (see 70.9(b)(1)) include a list of the reasonable costs that must be funded by fees collected under this program. Neither list includes the provision of copies of permit-related documents free of charge to the general public. EPA guidance on the matter (see December 18, 1992 John Seitz memo to EPA Regions "Agency Review of State Fee Schedules for Operating Permits Programs Under Title

V") provides additional specificity about the costs required to be funded by permit fees, and also does not list copying charges as a cost that needs to be recovered through title V permit fees.

EPA Region IX interprets the statutory and regulatory provisions (see CAA 503(e), 502(b)(8), and 70.4(b)(3)(viii)) to require that the permitting authorities "make available to the public" the permit application, draft permit, etc. but not to require the provision of free copies of these permit-related documents. The statute also requires that permitting authorities have "reasonable procedures" for making documents available to the public (see CAA 502(b)(8)). If permitting authorities have reasonable procedures for making documents available, which could include the imposition of reasonable copying costs, then they are meeting the statutory requirement and do not have a program deficiency.

EPA believes that permitting authorities should strive to make documents available to the public as easily and inexpensively as practicable. EPA further believes that permitting authorities could recover from title V sources the "reasonable" costs associated with providing copies of title V-related documents to members of the public, although as noted above, they are not required to do so. EPA strongly recommends that permitting authorities, where possible, put publicly available documents on the Internet so that members of the public can easily access and print these documents. At this point in time, while we think it may be helpful, we do not require state and local permitting authorities to include in their rules the public's ability to pursue information via FOIA and any FOIA fee waivers that may be available.

Comment #7:

Public involvement and outreach. EPA has recognized the importance of assisting interested members of the public in accessing and participating in Title V activities by conducting a series of training sessions throughout the country. In Region IX, a single training in Torrance, California was undertaken last year. EPA should direct CARB and individual districts to design and implement a Title V community outreach, education, and involvement program for each region of the state with Title V sources. Relationships between permitting engineers and interested members of the public are important steps to gaining access to both information and advice and direction in navigating the complex nuances of a Title V permit. District sponsored training and community outreach is necessary to develop these relationships and enhance community familiarity with Title V permitting issues. Public participation is a cornerstone of sound environmental policy, yet it is sorely missing in most Title V proceedings in the state of California.

Our Response to Comment #7:

Please see our response to Comment #4 above.

Comment #8:

Periodic Monitoring. The absence of either Region IX or statewide guidance on periodic monitoring has led to wide disparities in districts' treatment of this fundamental permit element. Uniformity in periodic monitoring through California is necessary to fulfill Title V's requirement of meaningful access to redress in state court. If state courts must apply a multitude of different District standards in enforcement actions, there is no opportunity to develop a body of law to

proscribe the appropriate content of and conduct under Title V permits. CARB has not contributed positively to this effort and EPA's oversight is sorely needed. The Legislative Analyst's Office review of the issue also found that CARB had not taken adequate steps "to ensure that the statutory requirement for districts to report on excess emissions from continuous emissions monitoring locations is met." Improving State Oversight and Direction of Local Air Districts, dated January 25, 2001 ("LAO Report") at 14-15.

Our Response to Comment #8:

Section 504 of the Act states that each Title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. §§ 7661c(a) and (c). In addition, Section 114(a) of the Act requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. 42 U.S.C. § 7414(a).

The regulations at 40 C.F.R. §70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). In addition, 40 C.F.R. § 70.6(c)(1) requires that all Part 70 permits contain, consistent with 40 C.F.R. § 70.6(a)(3), "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." These requirements are also incorporated into the various California District regulations.

Periodic monitoring decisions throughout the state – and throughout the country – are site-specific. Periodic monitoring decisions are based on a number of variables including but not limited to source size, burden or cost, reasonableness, compliance assurance, compliance margin, and variability in emissions. Although uniformity is not required and cannot be guaranteed throughout the State, we do recognize that some consistency for periodic monitoring decisions is important. To this end, EPA Region IX has worked with CAPCOA and ARB to develop recommendations for commonly permitted equipment subject to generally applicable requirements in the State. These recommendations are available on the CARB website at www.arb.ca.gov and are used by title V permit applicants and permitting authorities in selecting approvable periodic monitoring proposals for title V permits.

EPA recently clarified the scope of the Title V monitoring requirements in two Orders responding to petitions under Title V. See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, Nov. 24, 2000 ("Pacificorp") (available on the internet at http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf), and In re Fort James Camas Mill, Petition X-1999-1, December 22, 2000 (http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf) for a complete discussion of these issues. In brief, the Administrator concluded that, where the applicable requirement does not require any periodic testing or monitoring, permit conditions are

required to establish "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." See 40 C.F.R. § 70.6(a)(3)(i)(B). In contrast, where the applicable requirement already requires periodic testing or monitoring but that monitoring is not sufficient to assure compliance, the separate regulatory standard at section 70.6(c)(1) applies instead to require monitoring "sufficient to assure compliance." The Administrator's interpretation is based on recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit, specifically Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999) (reviewing EPA's compliance assurance monitoring (CAM) rulemaking (62 Fed. Reg. 54940 (1997)), and Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (addressing EPA's periodic monitoring guidance under Title V).

Finally, access to redress in State court is provided for in § 70.4(b)(3)(x) and EPA does not believe this access will be hindered by periodic monitoring decisions that may not appear to be uniform.

Comment #9:

Supercession. Integration of the requirements of an Authority to Construct (ATC) with subsequent federal permit conditions is another area of widely disparate interpretation throughout the state. Some districts have agreed to ignore conditions of an ATC when a Title V permit is issued, ignoring many relevant conditions. Other districts have recognized the need to maintain and continue ATC conditions and include them in the Title V permit. Clearly, these conditions should be incorporated into the Title V permit as they constitute binding and enforceable conditions of operation that should be included in each source's Title V permit to accomplish the Act's goal of a single, comprehensive permit so that affected and interested members of the public don't have to search through even larger and more extensive sets of documents and attempt to reconcile the "lookback" issue on their own.

Additionally, the Act imposes a broad and fundamental alternatives analysis requirement at the ATC stage which does not again reappear in the NSR and PSD stage of permitting. See 42 U.S.C. § 7503(a)(5) and 42 U.S.C. § 7475(a)(2), respectively. These requirements must be incorporated into and reflected on each Title V permit, and are relevant in the delineation of minor and major modifications, discussed *infra.*

EPA should direct CARB and each District to ensure that ATC conditions are not "lost" in the process of Part 70 permitting and are expressly included on the face of each Title V permit.

Our Response to Comment #9:

The Part 70 regulations clearly define as an applicable requirement the terms and conditions from the preconstruction (i.e., authority to construct) permit: "Applicable requirement means...any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C and D, of the Act" [40 C.F.R. § 70.2]. Thus, all ATC conditions must be included in the permit as federally enforceable applicable requirements.

Your comment is general and you did not provide any examples to support your claim. Based on our experience reviewing proposed title V permits in California, we agree that ATC conditions have not always been included in the proposed title V permits as federally enforceable applicable requirements. In those cases, we were able to work with the district such that the conditions were properly included. In some cases, we have objected to permits over this issue. Although your comment raises an important issue, we do not believe a notice of deficiency is warranted. This is a program implementation issue and we believe that it is best addressed by using our objection authority, where necessary, to require that permits include all ATC terms and conditions, as applicable federal requirements.

We disagree with your assertion that the alternatives analysis requirement must be included in the title V permit. The alternatives analysis is part of the new source review permitting requirements and typically will not result in terms and conditions of an ATC permit. In the unlikely situation that it does, such terms would be required to be included in the title V permit as applicable federal requirements.

Comment #10:

Definition of major modifications and minor revisions. The absence of clear criteria in the state to delineate when a change in a permit is considered a minor revision or a major modification has complicated and compromised the state Title V program. Inconsistent treatment of like sources among similarly situated districts undermines District determinations and gives sources the ability to play one district off another. EPA must direct CARB to adopt uniform definitions that respect the purpose and intent of the Title V program.

Our Response to Comment #10:

Your comment is relevant but we do not believe it warrants a Notice of Deficiency because California districts have correctly incorporated the criteria for what is a major versus a minor (or administrative) modification according to the requirements of part 70. Furthermore, your comment is very general and you did not provide examples to support your claims. EPA acknowledges that the existing permit modification track criteria have been subject of concern/confusion, which is partly why EPA has proposed to modify part 70 with regard to the modification tracks. To the extent that you believe that the permit modification track criteria are not clear, this would be a flaw in EPA's regulations, but not a deficiency in California programs which fully comply with the existing requirements of part 70.

Comment #11:

Agricultural sources exemptions. Agricultural sources comprise an enormous unregulated source category in California that contributes substantial quantities of both criteria and hazardous air pollutants to state airsheds. Unregulated agricultural engines in the San Joaquin Valley, for example, generate and emit over 12,000 tons of NO_x per year, exceeding the permitted stationary source NO_x inventory for that District! Title V was clearly intended to apply to these sources, as title I stationary sources, as sources subject to acid deposition controls under Title IV and as area sources under Title III. All sources that are elements of or attributable to a major source must be counted and controlled under the Title V permit.

Our Response to Comment #11:

Our treatment of this issue is addressed in the final rulemaking dated December 7, 2001 (66 FR 63503).

Comment #12:

Portable equipment exemption. CARB's implementation of the statewide portable equipment rule has allowed otherwise major sources to avoid NSR and Title V permitting requirements by facilitating segregation of a source that would otherwise be considered a single source for permit threshold purposes. All sources that are elements of or attributable to a major source must be counted and controlled under the Title V permit. This has weakened and circumvented the federal Title V program.

Our Response to Comment #12:

The majority of qualified portable engines/equipment under the statewide Rule meet EPA's definition of nonroad engine (40 CFR § 89.2). Nonroad engines are a category of units/equipment that, under the Clean Air Act Section 302(z), are excluded from the definition of "stationary source," and, hence, are exempt from stationary source permitting requirements, i.e., Title V (e.g., garden tractors, off-highway mobile cranes and bulldozers). However, there are some engines included in the State's rule that are not non-road engines. There is, for example, a very limited universe of military tactical support equipment (TSE) turbines in California. EPA has reviewed emissions data for TSE turbines and determined that they play an insignificant role in emissions from military facilities and do not affect Title V applicability. Region 9 has concluded that California's statewide portable equipment rule has not allowed sources to circumvent the Title V program. Your comment does not identify any examples of a source that has avoided Title V because of the improper exclusion of emissions from registered portable engines and equipment units that do not meet EPA's definition of nonroad engines. Therefore, EPA Region 9 does not agree that the implementation of the California Statewide Portable Equipment Registration Rule constitutes a deficiency to any of the Title V programs administered in the State.

Comment #13:

Electricity crisis issues. Throughout California's "emergency" electricity crisis, all Title V requirements have remained in effect, but have been largely ignored. Various state and federal Executive Orders have directed expedited permitted processes, but not waiver of applicable substantive or procedural Title V or state permitting requirements. Nevertheless, state responses to this situation have included deferred offsets, waived substantive requirements, and the operation of dirty peaking power stations in excess of permit limits. Each of these actions implicates substantive Title V issues which must be addressed.

Our Response to Comment #13:

Again, your comment is very general and you did not provide any examples where title V requirements have been ignored or waivers have been granted that are inconsistent with title V. EPA is not aware of any applicable substantive or procedural requirements that have been waived as part of the title V or state permitting requirements. If a District has a merged title V and NSR program (i.e., a permitting program combines the public review of proposed NSR and title V

permits), we have expedited (not waived) our 45-day review of the title V permit so it does not extend beyond the period of time allotted for the NSR review (typically 21 or 30 days).

Comment #14:
Inadequate CARB personnel and funding to administer the program. As noted above, California enjoys enormous diversity among airsheds, districts and sources. The California Air Resources Board (CARB) has state law authority to oversee local air districts and performs a central administrative and regulatory function in the federal operating permits program. CARB has promulgated "model" rules for District adoption, performed reviews and oversight of individual District programs, and related activities. Unfortunately, the personnel and other resources committed by CARB to federal operating permits program issues is woefully inadequate.

The California Legislative Analyst's Office recently examined CARB's oversight of District air programs and the allocation of responsibilities between the state and districts and issued a report entitled "Improving State Oversight and Direction of Local Air Districts" dated January 25, 2001. The LAO report concluded that CARB was not adequately engaging or reviewing District enforcement activities, including a failure to properly address severe and/or chronic Title V violators.

Our Response to Comment #14:
The CARB is not a permitting authority responsible for implementing title V and you have not alleged the deficiency for any specific district(s) in California. The districts have been implementing the part 70 program within the state of California, therefore, CARB's action does not warrant a Notice of Deficiency.

Comment #15:
CARB's philosophical perspective. CARB's view and input to the federal operating permits program has been generally antagonistic to the federal role and most of the goals of Title V. For whatever reason, CARB has declined to aggressively implement the Title V program as intended by Congress but instead fought against enhancements of the state program and routinely sided with industry representatives and anti-environmental and anti-public health interests in the shaping and enforcement of this program. Thus, not only has CARB not applied sufficient resources to the task, they have failed to embrace the very purpose and function of the program and have resisted making changes to the existing permit programs to address the additional issues implicated with Title V compliance. This "unholy alliance" with the regulated community has compromised the efficacy of the program over the past 5 years and jeopardized the public's health and economic productivity.

Our Response to Comment #15:
The CARB is not a permitting authority responsible for implementing title V and you have not alleged the deficiency for any specific district(s) in California. The districts have been implementing the part 70 program within the State of California, therefore, CARB's action does not warrant a Notice of Deficiency.

Comment #16:

Lack of Enforcement. Central to the operating permits program is an active enforcement program and effort. The state should not receive authorization to administer the Title V program under delegation if it is unwilling to actively monitor and enforce non-compliance: 1) by districts with applicable state, federal and local program requirements; and 2) by sources that fail to comply with their permits or evade the program's requirements. As noted supra, CARB has expressed disinterest in the program in general, and has specifically failed to maintain and advance an aggressive, or even meaningful enforcement program examining the implementation of and compliance with the requirements of the Title V program. See, generally, LAO report, *supra*.

Our Response to Comment #16:

See our response to Comment #18, below.

Comment #17:

Adequacy of Fees. The petitioners hereto believe that, as noted above, that the state has not applied sufficient resources to developing and administering the federal operating permits program for approval and delegation. An example is the failure of CARB to develop meaningful final BARCT/RACT guidance for stationary internal combustion engines, a very significant stationary source category for many districts. The Santa Barbara County Air Pollution Control District, for example, has sought this guidance for several years from CARB to fulfill commitments in the state ozone implementation plan under Rule 333. These sources have enormous significance in the San Joaquin Valley, as noted *supra*. Industry has evaded the application of a previous version of this rule by de-rating large internal combustion engines to a fraction of their rated capacity to avoid controls. CARB's participation is essential to fulfilling implementing SIP commitments and reducing transport of ozone and acid deposition constituents to the central valley and Sierra Nevada. CARB has delayed action to preserve the exemption enjoyed by these sources, many of whom are operated by entities subject to Title V permits at these or other facilities. CARB's inaction has allowed these sources to certify compliance, as required under Title V, while their sources are clearly not in compliance with SIP requirements. While this itself is identified herein as an independent operating permits program deficiency, CARB's likely response will be inadequate resources. In anticipation of CARB's likely response to this issue of inadequate resources, petitioners assert that inadequate fees are the source of at least a portion of the problem and must be increased to give CARB adequate resources to perform their responsibilities fully.

As noted above, fees must be adequate to underwrite the costs of providing copies of documents to the public.

Our Response to Comment #17:

See our response to comment #6 above for part 70's requirements with respect to fees. It appears that your comments address non-title V elements that generally are not required for part 70 purposes.

Comment #18:

Enforcement. A fundamental and inadequate element of the state and individual District Title V

programs is their respective enforcement programs. As noted above, the California Legislative Analyst's Office recently reviewed District air programs and the allocation of responsibilities between the state and districts. The LAO issued a report entitled Improving State Oversight and Direction of Local Air Districts, dated January 25, 2001. The LAO report had two basic findings and a series of recommendations. The LAO found that CARB's review of local District programs is "minimal" and that the lack of effective oversight and other CARB shortcomings led to inconsistent and ineffective local enforcement practices. Id., at page 1. The LAO found "significant inconsistencies among Districts in how they respond to violations . . . [which] have reduced the effectiveness of the [permitting] program."\[1]

Petitioners have observed a pattern of unbridled District discretion, and more importantly, deference to the interests of the offending sources, in undertaking enforcement. The result has been an expectation on the part of sources that enforcement will not be taken seriously and charges of recrimination any time it is. The political backlash that accompanies any serious enforcement effort (due to the ample evidence of lax enforcement elsewhere) taints the District's internal governing process and further impairs an adequate statewide enforcement effort. Consequently, sources routinely play "fast and loose" with the rules and their requirements with the knowledge that enforcement is inconsistent and, if and/or when enforcement is actually employed, the fact that a source was actually "targeted" for an "onerous" enforcement action by "overzealous district staff" may even give the source some "political credit" that can be used to secure a favorable treatment elsewhere, such as at the Hearing Board or in the SIP planning process. Uneven and lackadaisical enforcement practices throughout the state have created an environment where meaningful enforcement actions are unusual and when undertaken, are often ineffective for various reasons.

Our Response to Comment #18:

This comment is not a basis for a Notice of Deficiency because all districts in the state have the necessary enforcement authority as required by § 70.11 (e.g., to perform inspections, enforce permits, and seek penalties) and EPA does not have any evidence -- your allegations notwithstanding -- that any district in the state is inadequately performing the part 70 enforcement requirements.

Title V regulations require that state and local agencies have adequate enforcement authority to address violations of program requirements by Title V sources and that they use that authority to enforce the part 70 program. See 40 C.F.R. §§ 70.11 and 70.4(b)(5). Failure to enforce the part 70 program consistent with the regulations can be the basis for EPA to withdraw the state's part 70 permitting authority. See 40 C.F.R. § 70.10(c)(1)(iii).

At this time, EPA Region IX finds that California districts are adequately implementing the enforcement authority provided by state law. California districts conduct inspections and pursue enforcement actions, as necessary, of stationary sources (including annual inspections of

[1] While the LAO report focused on all district permitting activities, i.e., Title V and non-Title V sources, the conclusions have clear application to Title V program issues.

Title V sources). Enforcement related data is reported to EPA as required, in part, by 40 C.F.R. §70.4(b)(9). See our response to Comment #19. Neither your comment, nor the California Legislative Analyst Office Report referenced in your comment, provide additional information about enforcement-related deficiencies in specific districts in California on which to base a Notice of Deficiency. However, EPA Region IX has performed, and will continue to perform, audits of district enforcement programs.[2] In some cases, these audits identified weaknesses in districts' enforcement programs (e.g., inadequate penalties, fewer inspections performed than required). In the future, we will continue to conduct enforcement audits, seek correction of any weaknesses, and pursue additional steps in accordance with part 70 to make a finding of deficiency and withdraw program approval if necessary to remedy the situation.

Comment #19:

Annual Report on Enforcement. CARB is required to submit an annual report to EPA on the state's enforcement activities. 40 C.F.R. Part 70.4(b)(9). Petitioners believe that CARB has failed, as have many states, to compile and submit this report and use this process to critically review and enhance its enforcement programs and activities.

Our Response to Comment #19:

Your comment is not a basis for a notice of deficiency. 40 C.F.R. § 70.4(b)(9) requires state and local agencies to submit at least annually to EPA the following Title V enforcement information:

a. The number of criminal and civil, judicial and administrative enforcement actions either commenced or concluded;

b. The penalties, fines, and sentences obtained in those actions; and

c. The number of administrative orders issued.

California districts presently report all the § 70.4(b)(9) enforcement information electronically to EPA's national database, the Aerometric Information Retrieval System, or "AIRS." All districts in California have met, and EPA has every reason to believe that they will continue to meet, this important Title V enforcement reporting requirement. districts provide this information on an on-going basis which keeps the data up-to-date. You assert that states have failed to use this data to review and enhance its enforcement programs and activities. Although information collected by districts and reported to EPA could be a valuable tool to assess the overall enforcement program, the part 70 regulations do not require districts or CARB to do so.

[2] For example, in the late 1990's, the EPA Office of Inspector General conducted audits of the Bay Area AQMD, Monterey Bay AQMD, Sacramento Metropolitan AQMD, and South Coast AQMD to determine the adequacy of these District enforcement programs.

Comment #20:

Deadlines have expired for EPA's action on the submitted program and District action on all permits. The Act provides a clear and unambiguous deadline for states to complete the development and submittal of their operating permits programs to EPA for action and to complete the permitting of Title V sources. 42 U.S.C. § 7661a(g). Those deadlines have expired, as has the extension associated with interim approval status. The state has not complied with the Act's deadlines and requirements while most districts administer sub-standard operating permits programs. EPA has a non-discretionary duty under the Clean Air Act to impose highway funding and offset sanctions and to promulgate an EPA-administered federal operating permits program. 42 U.S.C. § 7661a(d)(2) & (3). In light of the severity of California's air quality problem, the millions of people needlessly suffering direct and cognizable health and economic injury from exposure to excessive air pollution from the stationary sources at issue herein, and the clear availability of a simple remedy, there is no excuse for further delay.

Our Response to Comment #20:

We agree that not all permitting authorities in California have issued all initial part 70 operating permits as required. There are some districts (listed below), however, where your comment is not true because they have issued all permits or did not have any initial permits to issue. Furthermore, other districts may have had initial permits to issue but since that time, the sources have either shutdown, or curtailed production or were able to obtain synthetic minor source status.

List of permitting authorities in California who have either no initial permits to issue or have issued all initial permits:

Amador, Butte, Calaveras, Kern, Lake, Lassen, Mariposa, Mendocino, Modoc, Monterey, North Coast, Northern Sonoma, and San Luis Obispo and Tehama.

The remaining districts in California have not issued all initial title V permits. EPA has received letters from all District APCOs committing to meet permit issuance milestones. EPA has notified the districts that EPA may issue a NOD if any of the four milestones set out in the commitment letters are not achieved.

List of permitting authorities in California where not all permits have been issued and where we have received a commitment letter (Enclosure 3) that states they will issue all permits by December 2003, at the latest.

Bay Area, Colusa, El Dorado, Feather River, Glenn, Great Basin, Imperial, Mojave, Northern Sierra, Placer, Sacramento, San Diego, San Joaquin, Santa Barbara, Shasta, Siskiyou, South Coast, Tuolumne, Ventura, and Yolo-Solano.

ENCLOSURE 2

Commitment Letters from Mojave, North Coast, San Diego, Kern, Lassen and Northern Sonoma

Regarding Prompt Reporting of Deviations

ENCLOSURE 3

<u>Commitment Letters from</u>:
Bay Area, Colusa, El Dorado,
Feather River, Glenn, Great Basin, Imperial, Mojave,
Northern Sierra, Placer, Sacramento, San Diego, San Joaquin,
Santa Barbara, Shasta, Siskiyou, South Coast,
Tuolumne, Ventura, and Yolo-Solano

Regarding Issuance of Initial Part 70 Permits by
December 2003

ENCLOSURE 4

Summary of Efforts EPA Has Performed Regarding Variances in California

Attachment 4

The following examples show how EPA has taken action to correct problematic or unnecessary language in California permitting programs regarding permit excursions.

Examples

1. Part 70 program example: As part of our evaluation of the initial part 70 programs in California, EPA Region 9 proposed to disapprove programs for Lake County AQMD, Shasta County AQMD, Glenn County APCD and Tehama County APCD. (See proposed rule: 59 FR 60931, November 29, 1994; and final rule: 60 FR 36065, July 13, 1995) because of deficiencies in the districts' enforcement authorities.[3] The primary deficiency occurred in the provisions of the districts' equipment breakdown and upset rules that stated that excess emissions during equipment breakdowns/upsets were not violations. In the proposed rule to disapprove the four programs, we stated that they could adopt the language of § 70.6(g) or revise the rules to provide that emissions exceeding emission limitations during equipment breakdowns constitute a violation of District rules. In our final interim approval rulemaking, EPA stated that Tehama and Glenn had removed the "no violation" language and Shasta and Lake County had made some corrections but needed to make a few additional changes. These changes were made allowing EPA to grant full approval to these programs.

2. Permit terms and condition example: An example of how district-issued variances can coexist with federal permit terms and conditions is provided by San Diego Title V permits which state, "The permittee may seek relief from District enforcement action in the event of a breakdown in accordance with District Rule 98. Notwithstanding the foregoing, the granting by the District of breakdown relief or the issuance by the Hearing Board of a variance does not provide relief from federal enforcement or citizen's suits." [See Section IV. Variance Procedures and Compliance Schedules].

3. SIP approved rules example: In the past, EPA has discovered problematic variance or other language stemming from state law -- either in SIP-approved rules, submitted (but not yet SIP-approved) rules, locally adopted rules not intended for the SIP, or NSR and title V permit conditions -- during our review of state air programs, and we have acted to correct the language (or remove it entirely) so that it does not inadvertently bar citizen or EPA enforcement. One example of how we have corrected problematic rules that had been SIP-approved is identified by you (see IEA v. Browner, 9th Cir., 2000). Another example is where we have requested that Districts, through ARB, withdraw submitted (but not yet SIP-approved) upset/breakdown rules that are inappropriate for the SIP (see November 7, 2000 letter from Andrew Steckel, EPA Region 9, to Harry Metzger, ARB).

---

[3]Part 70 requires permitting authorities to have adequate enforcement authority (see 40 C.F.R. § 70.10) which means, in part, that they cannot have rules (either in the SIP or local rules not intended for the SIP) that provide automatic exemption (e.g., "no violation" language) from enforcement. Examples of problematic language includes, but is not limited to, locally adopted rules that indicate or imply that any identified excursions of applicable permit conditions are not violations.