December 14, 2001

Mr. Robert Hall
Nevada Environmental Coalition
10720 Button Willow Drive
Las Vegas, Nevada 89134

Dear Mr. Hall:

Thank you for your comments dated March 12, 2001 to EPA Region IX regarding possible deficiencies in the Clark County, Nevada title V operating permits program. Your comments were submitted 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"). We have elected to respond to you directly on the comments you made for which we do not agree are either title V program or implementation deficiencies in Clark County's program. Our responses to the specific comments you raised in your letter are contained in the enclosure to this letter.

By way of background, the opportunity for citizens 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 until December 1, 2001. 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 (65 FR 77377), 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.

Again, thank you for your comment letter. Although we do not agree that the issues you raised constitute program deficiencies, we believe that your interest has made a difference in improving the part 70 program in Clark County. If you have any questions about our responses to the issues you raised, please contact Gerardo Rios, Chief of the Permits Office at (415) 972-3974.

Sincerely,

/s/

Jack P. Broadbent
Director, Air Division

cc: Christine Robinson, Clark County DAQM

EPA's Response to Comments of Robert Hall, Nevada Environmental Coalition, on the Clark County Title V Operating Permits Program

Note: As EPA noted in our proposed approval of the Clark County title V program (66 FR 51620, October 10, 2001), on August 7, 2001, the Governor of Nevada officially transferred responsibility for air quality management in Clark County from the County's Health District to the newly created Department of Air Quality Management, overseen by the Board of County Commissioners of Clark County. In a letter dated June 21, 2001 to the Clark County Commission, Governor Guinn designates "the Board of County Commissioners as the regulatory, enforcement and permitting authority for implementing applicable provisions of the federal Clean Air Act, any amendments to that Act, and any regulations adopted pursuant to that Act within Clark County." The change is essentially a shift in the organizational location of the County's air quality management program and all rules, regulations, and policies of the Health District that comprise Clark County's title V operating permits program were carried over to the new Department, pursuant to the Governor's designation. Where your comments reference "the Clark County Health District (CCHD)" or "the District," we have used the terms "Clark County Department of Air Quality Management (DAQM)," "Clark County," or "the County."

Comment 1. Alleged NSR deficiencies: Numerous study results confirm poor or weak Best Available Control Technology (BACT) determinations, non-compliance with the CAA and the 1979/81/82 State Implementation Plan (SIP) requirements for federally approved, offsetting emissions reductions, and a general failure in the overall permitting program. EPA Notice of Violations (NOVs) routinely include language to the effect that Clark County issued an invalid permit. All of this reflects on Clark County's ability to manage any program, much less a part 70 program.

EPA's Response: The commenter cites alleged deficiencies in the Clark County Department of Air Quality Management's New Source Review (NSR) program rather than in their title V operating permits program. Our current evaluation is only focused on whether Clark County DAQM has deficiencies in their title V program. See EPA's December 11, 2000 Federal Register notice (65 FR 77376) which outlines the scope of the Agency's request for comments.

In addition, our review of Clark County's proposed title V permits indicates that they do typically contain BACT limits and other requirements contained in preconstruction (NSR) permits. In some instances, proposed title V permits were withdrawn by the County in order to first sort out BACT and other NSR issues. Once the NSR issues were resolved, the title V permit then moved forward and included appropriate BACT limits.

Comment 2. FIP requirement: The EPA is violating its non-discretionary duty under CAA §110(c)(1) to promulgate a Clark County Federal Implementation Plan (FIP) in Clark County.

EPA's Response: This comment relates to Clark County's State Implementation Plan (SIP) responsibilities, and is not relevant to EPA's evaluation of Clark County's title V program.

Comment 3. Authority to grant permits: The commenter alleges that Clark County has no lawful authority to issue part 70 operating permits.

EPA's Response: EPA's disagrees with this allegation. Part 70 requires that permitting authorities demonstrate sufficient legal authority to issue permits to all part 70 sources. See 40 CFR 70.4(b)(3) As part of Clark County's revised operating permits program submittal, the County provided EPA with a description of their legal authority to issue operating permits to part 70 sources. NRS 445B.500, in conjunction with NRS 445B.300 specifically provides that the local air pollution control agency (in Clark County, that agency is the Department of Air Quality Management, overseen by the Board of County Commissioners) shall by regulation provide for the issuance, renewal, modification, revocation, and suspension of operating permits. Clark County's local rules, specifically Section 19, entitled "Part 70 Operating Permits," establish applicability of the title V operating permits program and require that all sources subject to the requirements of title V of the Clean Air Act and 40 CFR part 70 obtain operating permits.

Comment 4. 70.8(d) administrative complaint: Clark County has long issued "handshake" 40 CFR part 70 permits. Clark County executives routinely grant part 70 permits outside of all lawful permitting processes. Unfortunately, the DAQM neglects to inform the public or the EPA when it grants authority to operate in secret and without public notice. DAQM executives do not have CAA authority to issue handshake permits.

EPA's Response: The commenter styles his comment as a "40 CFR 70.8(d) administrative complaint." Regulations at 40 CFR 70.7(h) and 70.8 contain EPA's requirements for public participation in the title V permitting process and EPA review of proposed title V permits. 40 CFR 70.8(d) refers to the public's ability to petition the Administrator to object to an individual title V permit. Section 70.8(d) does not provide for administrative complaints about operating permits programs. The commenter again alleges that Clark County issues permits outside of the lawful permitting process. EPA is not aware of any title V permits issued by Clark County outside the lawful process and the commenter does not provide any specific examples. All nine title V permits issued to date by Clark County were subject to a 30-day public comment period and a 45-day EPA comment period, as is required by part 70 and Clark County Section 19 - Part 70 Operating Permits.

Comment 5. No Clean Air Act State Implementation Plan: The Clark County/Las Vegas Valley non-attainment area is not governed by any current, valid, approved Clean Air Act ("CAA") State Implementation Plan (SIP) that meets the requirements of the 1990 amendments to the CAA.

EPA's Response: This comment relates to Clark County's State Implementation Plan (SIP) responsibilities, and is not relevant to EPA's evaluation of Clark County's title V program.

Comment 6. Credible evidence: As underscored by EPA's Credible Evidence Rule, 62 FR 8314 (Feb. 24, 1997), the CAA allows citizens, Clark County, EPA, and the source itself to rely upon any credible evidence to demonstrate violations of, or compliance with, permit terms and conditions. While EPA, DAQM, sources of air pollution and concerned citizens may rely upon all credible evidence regardless of whether this condition appears in a proposed permit, we recommend that Clark County include credible evidence language in their title V permits.

EPA's Response: As the commenter notes, citizens, States, and EPA can rely upon any credible evidence to demonstrate CAA violations. Also, sources must consider all evidence in making their compliance certifications. While EPA supports the suggestion that permits contain specific credible evidence language (e.g., any credible evidence can be used to prove a violation), we believe that the County's title V permits as currently written are sufficiently clear so as not to prevent the use of any credible evidence. Thus, EPA does not consider this a program deficiency.

Comment 7. Duty to supplement and correct: 40 CFR 70.5(b) provides that "[a]ny applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information." Proposed draft permits must include an explicit provision regarding the duty to supplement and correct. Clark County has not complied with this requirement.

EPA's Response: The section 70.5(b) duty to supplement and correct permit applications, cited by the commenter, has been adopted verbatim into Clark County DAQM's operating permits program rules at Section 19.3.2. Part 70 does not require that title V operating permits include a provision specifically requiring supplementation/correction. If a source fails to supplement or correct their application, after becoming aware of the need to do so, then the source is in violation of Clark County Section 19.3.2. Also, the commenter did not provide any examples of sources in Clark County who did not supplement an insufficient application or correct an incorrect application after becoming aware of such a problem.

Comment 8. Specific permit issues: The commenter submitted comments on BACT/LAER and offset requirements for the Kerr-McGee facility in Clark County.

EPA's Response: The commenter has submitted comments alleging that Clark County has not required the Kerr-McGee facility to comply with NSR requirements in their permit, including LAER and offsets for CO emissions in the Las Vegas CO nonattainment area. The Kerr-McGee permit to which the commenter refers is an NSR permit, not a title V permit. Thus, this comment is not relevant to our evaluation of Clark County's title V operating permits program.

Comment 9. Failure to include a part 70 statement of basis: Clark County routinely fails to include a statement of basis or rationale explaining the legal and factual basis for draft permit conditions. Without a statement of basis it is virtually impossible for concerned citizens to evaluate DAQM's periodic monitoring decisions, and to prepare effective comments during the

public comment period. DAQM routinely releases draft permits without providing the public with any sort of rationale for conditions contained in the draft permit. That makes a mockery of the public comment period. The only remedy for this problem is for Clark County to develop a statement of basis for the draft permit and re-release all part 70 approvals for an additional public comment period.

EPA's Response: As the commenter notes, 40 CFR 70.7(a)(5) requires that permitting authorities "provide a statement that sets forth the legal and factual basis for the draft permit conditions...." Each draft permit submitted to EPA by Clark County includes a detailed technical support document (TSD), which provides the legal and factual basis for the draft permit conditions. In addition, Clark County makes their TSDs available to members of the general public who express an interest, thus satisfying all of the requirement in section 70.7(a)(5). The one example provided by the commenter alleging an instance where he asked to receive a part 70 permit's statement of basis and did not receive it, was actually for a non-title V permit (Kerr-McGee's NSR permit).

Comment 10. Compliance certifications and monitoring reports: For a member of the public who is concerned about air pollution in his or her community, the requirement that permittees submit annual compliance certifications and semi-annual monitoring reports is an important aspect of the title V program. Despite the importance of these two documents, AQD routinely fails to identify what information needs to be included in these documents to satisfy statutory requirements.

EPA's Response: 40 CFR part 70.6(a)(3)(iii)(A) requires sources to submit reports of any required monitoring at least every six months. Clark County Rule 19.4.1.2(c)(1) is actually more stringent than the federal requirement in that it requires sources to submit reports of required monitoring every three months. In addition, each title V permit issued by Clark County contains a list of the source-specific information that must be included in the quarterly reports.

Clark County's Rule 19.4.3.5(c) describes what information needs to be included in annual compliance certifications for title V permittees. Furthermore, the language in the County's regulations is identical to the compliance certification language in EPA's regulations at 40 CFR part 70.6(c)(5).

Comment 11. Prompt reporting of deviations: 40 CFR 70.6(a)(3)(iii)(A) requires that permittees submit a "prompt" report of any deviation from permit terms. The EPA's notice in 60 FR 36083 requires that "prompt" be defined as within two to ten days. Clark County does not meet this requirement.

EPA's Response: Part 70 allows permitting authorities to define prompt "in relation to the degree and type of deviation likely to occur and the applicable requirements." [see 70.6(a)(iii)(B)] In our FR notice granting final interim approval, we noted that prompt should typically be between 2 and 10 days. Clark County defines prompt reporting for upset, breakdown, or

emergency conditions in Section 19.4.1.3(c)(2)(a) as within one hour of the occurrence. The County defines prompt reporting of other deviations from permit requirements in individual title V permits. For example, the title V permit for Nevada Sun-Peak Limited Partnership requires the source to report any deviation from permit requirements within 3 business days. EPA's believes that the County's implementation of "prompt" reporting on a permit-by-permit basis is consistent with part 70 requirements.

Comment 12. Excessive copying fees: When a part 70 permit is public noticed, the NEC makes requests for the entire air pollution source Administrative Record. Clark County has charged the NEC from $200 to $400 per source for the information. These exorbitant fees pose a potent barrier for members of the public who have a statutory right to monitor the actions of air pollution sources. DAQM responses to public requests for air pollution source permit documents are getting thinner and thinner. When the NEC is able to obtain all or most of an administrative file, the documents almost always confirm the malfeasance alleged herein.

EPA's Response: 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 40 CFR 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 has reviewed Clark County's updated policies and procedures regarding the public's access to title V records, including their imposition of copying costs. EPA believes that the policies, procedures, and costs are reasonable and meet the statutory and regulatory requirements.

EPA also 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. Where possible, EPA strongly recommends that permitting authorities put

publicly available documents on the internet so that members of the public can easily access and print these documents.

Comment 13. Overall lack of periodic monitoring/failure to include a part 70 monitoring plan: A basic tenet of permit development, especially for that of a so-called "synthetic minor" source, is that the permit must require sufficient monitoring and record keeping to provide a reasonable assurance that the permitted facility is in compliance with lawful requirements. Unfortunately, sufficient periodic monitoring is absent from most Clark County draft permits. The commenter also notes that EPA's Periodic Monitoring Guidance ("PMG"), dated September 15, 1998 states that "in all cases, the rationale for the selected periodic monitoring method must be clear and documented in the permit record."

EPA's Response: 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 CFR 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 CFR 70.6(c)(1) requires that all part 70 permits contain, consistent with 40 CFR 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 Clark County's Section 19, their title V operating permits regulations.

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 CFR 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).

While some proposed permits submitted by Clark County initially did contain what EPA considered to be inadequate monitoring, in those cases EPA provided comments on the need for better monitoring and the County improved the monitoring accordingly. EPA also has the authority to formally object under 40 CFR 70.8(c) if a proposed permit's monitoring is not sufficient to assure compliance with all applicable requirements. Thus far, EPA has not needed to formally object to any proposed permits from Clark County.

As for EPA's Periodic Monitoring Guidance, the DC Circuit Court set aside the Guidance in April 2000 as a result of a successful legal challenge by industry. See Appalachian Power, 208 F.3d at 1028. Thus, the commenter's allegation - that Clark County does not follow the guidance- cannot be considered a deficiency in Clark County's program. However, consistent with the Appalachian Power decision, many of the basic principles contained in the guidance remain valid, such as the importance of the permitting authority documenting periodic monitoring decisions; and EPA has found that DAQM does routinely document their periodic monitoring decisions in the Technical Support Documents written for each title V permit.