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

December 19, 2001

Mr. Glen Besa, Chapter Director
Sierra Club - Virginia Chapter
6 North Sixth Street, Suite 401
Richmond, VA 23219

Mr. Alexander Sagady
Environmental Consultant to Sierra Club
657 Spartan Avenue
P.O. Box 39
East Lansing, MI 48826-0039

Dear Sirs:

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

We have carefully considered the concerns raised in your March 12, 2001 letter, and determined that these issues do not indicate any deficiencies in Virginia's title V operating permit program. Our response to each of your concerns is enclosed.

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

Sincerely,

/s/

Judith M. Katz, Director
Air Protection Division

Enclosure

cc: Mr. Dennis H. Treacy, Director
Virginia Department of Environmental Quality

Enclosure

EPA's Response to Virginia Sierra Club's March 12, 2001 Comments on Virginia's Title V Operating Permit Program

Comment 1. Virginia inappropriately designated title V permit information as confidential business information (CBI) and otherwise limited access to title V-related permit documentation, particularly with regard to the Honeywell, Inc. facility in Hopewell, Virginia.

Response 1. Section 503(e) of the Clean Air Act provides that certain information generated pursuant to a State's operating permit program must be made available to the public. See, 42 U.S.C. §7661b. This includes any permit, permit application, monitoring report, and certification created during the implementation of the program. The Clean Air Act goes on to provide that permittees may submit any information that is entitled to protection from disclosure under section 114(c) of the Act separately to the permitting authority and EPA. See, 42 U.S.C. §7414. Section 503(e) further establishes that the contents of a title V operating permit shall not be entitled to protection under section 114(c). Therefore, the only title V operating permit program documents expressly prohibited from protection under section 114(c) of the Clean Air Act are the draft, proposed and/or final permits themselves. Qualifying information in title V permit applications is entitled to protection under section 114(c) of the Act.

The Commenters have not asserted that permittees in Virginia are unlawfully claiming protection of information as "confidential business information" (CBI) (pursuant to section 114(c) of the Act) in actual draft, proposed and/or title V operating permit issued by the Commonwealth of Virginia. The Commenters allege that a potential implementation issue exists regarding the proper handling of CBI in Virginia's title V program because certain data contained in new source review (NSR) permits issued by the Commonwealth contain information protected as CBI and that information would be relevant to any title V operating permit application developed by the subject source. (Please note, in this letter the "new source review" program encompasses Virginia's minor NSR, prevention of significant deterioration, and nonattainment NSR permit programs, 9VAC5-80-10 through 30, respectively.) As stated above, information contained in title V permit applications is potentially subject to protection under sections 503(e) and 114(c) of the Clean Air Act. Emissions data, however, cannot be protected under section 114(c) of the Act.

The Virginia statutes and regulations that address the public's access to information and the treatment of confidential business information and trade secrets are generally consistent with the relevant federal laws and regulations. Any person may request information from Virginia governmental agencies pursuant to the Virginia Freedom of Information Act "VFOIA" (Va. Code §2.2-3700 et. seq.). The VFOIA is largely consistent with federal the law regarding public access to information, the federal Freedom of Information Act (5 U.S.C. §552). Virginia's laws and regulations pertaining to air pollution control and trade secrets limit the public's access to confidential business information. See, Va. Code §§10.1-1314.1 and 59.1-336 and 9VAC5-170-60. These restrictions are also consistent with the relevant federal laws and regulations that speak to the treatment of CBI in the context of implementing

federal air pollution programs. See, 42 U.S.C. §7414(c) and 40 CFR part 2. Finally, 9VAC5-80-270.C requires the Commonwealth to make available to the public all draft title V operating permits and permit modifications in their entirety with no protected information. The regulations also make available all title V operating permit applications, exclusive of any information properly deemed confidential by the applicant. This regulation is consistent with section 503(e) of the Clean Air Act and 40 CFR 70.4(b)(3)(viii).

Therefore, the concern of the Commenters relates more to program implementation than to program construction. The Commenters refer to a specific instance in which it is alleged that certain information in a single source's underlying NSR permits is inappropriately protected as CBI and that the subject NSR permits are referenced in the permittee's title V operating permit application. Again, information contained in title V permit applications is eligible for protection as CBI under sections 503(e) and 114(c) of the Clean Air Act provided it meets the criteria for protection established in the Act. Therefore, the Commenters' principal assertion is that information was inappropriately protected in the NSR permits according to section 114(c) and not that it is unlawful, as a general rule, for title V permit applications in Virginia to contain CBI.

The EPA understands that the Commenters petitioned the Commonwealth of Virginia under the VFOIA for the release of information regarding permit information associated with the Honeywell International Incorporated facility located in Hopewell, Virginia. The EPA further acknowledges that the Commenters may be dissatisfied with response of the Commonwealth regarding the provision of information as contained in NSR permits issued to the subject facility. Also, the Commenters may disagree with the Commonwealth's interpretation and implementation of Va. Code §10.1-1314.1 and 9VAC5-170-160 as it relates to what is considered "emission data". The EPA is not in a position to assess the merits of a specific claim of confidentiality made pursuant to a State statute or regulation, especially where neither party has exhausted the remedies available to each party under State law. The EPA's understanding of the Honeywell International CBI issue is that the Virginia Department of Environmental Quality has denied certain aspects of the Sierra Club of Virginia's January 16, 2001 and March 16, 2001 requests for information pertaining to the Honeywell facility. At this time, EPA is unaware of any legal action the Sierra Club has pursued in order to remedy its dispute with the Department.

The EPA may assess whether the Commonwealth is adequately implementing its title V operating permit program as a general matter with respect to its handling of confidential business information during operating permit proceedings. If the Agency determines sufficient evidence exists that Virginia is not adequately administering any part of its program in a manner consistent with its approved program, EPA will, pursuant to section 502(i) of the Clean Air Act and 40 CFR 70.10(b), identify such deficiency to the Commonwealth and require the appropriate corrective action. See, 42 U.S.C. §7661a(i). Likewise, EPA may evaluate whether the Commonwealth is adequately implementing 9VAC5-170-60 (previously 9VAC5-20-150) as approved by EPA under the Virginia State

implementation plan (SIP). See, 40 CFR 52.2420(c). Should EPA find that sufficient evidence exists that the Commonwealth is failing to implement its SIP, EPA could make a finding of such failure under sections 113(a)(2) and 179(a)(4) of the Clean Air Act. See, 42 U.S.C. §§7413 and 7509. Further, if EPA determines that the existing SIP is inadequate in terms of regulatory or programmatic construction, the Agency may require Virginia to amend its SIP pursuant to section 110(k)(5) of the Act. See, 42 U.S.C. §7409.

The EPA does not believe Virginia's title V operating permit program is structured in a manner that limits the public's access to information regarding title V permitting actions. Nor does EPA believe that there is sufficient information to indicate that Virginia is generally implementing its permit program in a manner that warrants a notice of deficiency regarding the public's access to permit information under the Commonwealth's title V operating permit program. Likewise, EPA does not believe Virginia has developed a pattern of inadequately implementing its SIP with regard to CBI, nor are the regulations pertaining to CBI as codified in the Virginia SIP alleged to be deficient.

Due to the importance of the issue of the public's access to information relevant to operating permit proceeding, the Commonwealth of Virginia provided EPA with a letter on November 30, 2001 that, in part, commits the Commonwealth to handling all confidential business information and trade secret information associated with its title V permit program in a manner that is consistent with the requirements of the Clean Air Act, including sections 503(e) and 504(a), and 40 CFR part 70. A copy of this letter is enclosed. The letter affirms the Commonwealth's position that the contents of a draft, proposed or final title V operating permit, including any term or condition of a NSR permit that is incorporated (directly or by reference) therein, shall not be entitled to confidential treatment. Furthermore, the Commonwealth has committed to developing a policy to ensure that it continues to properly handle CBI information in the context of title V operating permit proceedings. The policy will also develop procedures relevant to the Commonwealth's NSR permit programs such that terms and conditions of permits issued pursuant to those programs will not be treated as CBI when incorporated or referenced in title V operating permit programs.

The EPA will continue to evaluate the Commonwealth's handling of CBI in permit proceedings pursuant to its title V and SIP-approved NSR permit programs. Should Virginia attempt to protect confidential business information in a title V permit, including any terms and conditions from NSR permits incorporated or reference therein, EPA has a statutory obligation to object to that permit and, if warranted, issue a notice of deficiency. See, 42 U.S.C. §7661d(b). The Agency will also continue scrutinize the Commonwealth's implementation of its other SIP-approved permit programs. The development of a specific policy to address the proper handling of CBI in both permitting programs should highlight the importance of this matter and limit the potential for future issues regarding this matter. The EPA is assured that Virginia understands the Agency's position regarding the proper handling of CBI in title V operating permit proceedings. Furthermore, EPA is confident that Virginia can and will successfully adhere to the commitments contained in the November 30, 2001 letter.

Comment 2. Virginia charges excessive copying fees for title V permit-related documents.

Response 2. With regard to the allegations that Virginia charges excessive copying fees, the Clean Air Act, 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 section 502 of the Clean Air Act and part 70 include a list of the reasonable costs that must be funded by fees collected under this program. See, 42 U.S.C. §7661a(b)(3)(A) and 40 CFR 70.9(b)(1). Neither list includes the provision of copies of permit-related documents free of charge to the general public. EPA guidance on the matter 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. See, August 4, 1993 John Seitz memorandum to EPA Regions entitled, "Agency Review of State Fee Schedules for Operating Permits Programs Under Title V".

The EPA interprets the statutory and regulatory provisions 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. See, 42 U.S.C. §§7661b(e), 7661a(b)(8), and 40 CFR 70.4(b)(3)(viii). The Clean Air Act also requires that permitting authorities have "reasonable procedures" for making documents available to the public. See, 42 U.S.C. §7661a(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. It the Agency's understanding that Virginia makes readily available to the public for viewing purposes and in a timely manner, all relevant documents pertaining to a source's title V operating permit.

The EPA believes that permitting authorities should strive to make documents available to the public as easily and inexpensively as practicable. The 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.