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

December 19, 2001

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

Dear Mr. Baron:

Thank you for your letter of March 12, 2001, on behalf of the 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 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 a number of these issues do not indicate any deficiencies in Virginia's title V operating permit program. Our response to your concerns is enclosed. Please note that there is one issue for which EPA is unable to make a final determination at this time.

On December 12, 2001, Randolph A Beales, the out-going Attorney General for the Commonwealth of Virginia, sent a letter to the EPA Administrator regarding the matter of the Commonwealth's current standing statutes and "representational standing." It is EPA's position that this letter does not adequately address this issue. However, on January 12, 2002, Mr. Beales will be succeeded by the newly elected Virginia Attorney General. Thus, EPA believes that it is premature to provide a definitive response to your comment at this time. We intend to discuss this matter with the new Administration in Virginia without delay and anticipate providing you with a final, substantive response sometime in late January.

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 Earthjustice's March 12, 2001 Comments on Virginia's Title V Operating Permit Program

Comment 1. Unlawful denial of public access to records: Virginia refuses to allow public access to information that, under the Clean Air Act (the Act) and EPA rules, must be accessible to the public. Among other things, Virginia refuses to disclose emission limitations and conditions designed to limit the potential to emit. These limits and conditions are used by sources to avoid federally mandated new source review. The limits and conditions are contained in underlying new source review minor modification permits, and are referred to in the Title V permit application. Yet Virginia keeps the actual limits secret, either redacting references thereto and refusing to disclose the underlying permits in their totality.

Among such conditions are limitations placed on maximum process feedrates and maximum process production rates. Many of these conditions were put in underlying NSR minor modification permits in order to limit potential to emit so as to avoid major modification NSR permit requirements.

The nature and scope of this problem is further set forth in Sierra Club's January 16, 2001 petition to Virginia seeking information on the Honeywell Facility in Hopewell, Va. A copy of that petition is on file with Region III and is incorporated herein by reference.

Virginia has no authority to withhold this information. As fully set forth in the Sierra Club petition, limitations and conditions on potential to emit are public information that must be disclosed pursuant to the Act and EPA rules.

The Sierra Club petition also documents that Virginia charges excessive and burdensome search and copy fees that substantially impair the public's access to Title V related documents. The state's insistence on charging these excessive fees violates the Act and EPA rules. Among other things, the cost of providing copies requested by members of the public is a Title V permit program cost that must be paid for out of permit fees.

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 Commenter has 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 Commenter alleges 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 Commenter relates more to program implementation than to program construction. The Commenter refers 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 Commenter's 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 Commenter and others have petitioned the Commonwealth of Virginia under the VFIOA 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 Commenter and others 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 Commenter and others 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.

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.

Comment 2. Minor NSR: Minor New Source Review permit conditions relating to State Toxic pollutants are federally enforceable in Virginia, because the underlying substantive provisions are included in the Virginia SIP. Nevertheless, Virginia is apparently taking the position that such permit conditions should only be "state-enforceable." In recent correspondence with the state, EPA has implied that such an approach might be acceptable, provided that such permit conditions are not covered by the permit shield. We do not believe that Virginia can, consistent with Title V, list minor NSR conditions as "state enforceable only" conditions in Title V permits, when those conditions are part of the applicable State implementation plan (SIP). To the extent that Virginia is nonetheless issuing permits specifying such conditions are "state enforceable only," the state is not adequately implementing its Title V program. Title V permits must include all federally applicable requirements, and all such requirements must be federally enforceable. This deficiency is not remedied simply by saying that there is no permit shield for the excluded requirements.

Response 2. On November 30, 2001, the Commonwealth of Virginia submitted a letter to Ms. Judith Katz, Director, Air Protection Division, EPA Region III committing to taking the necessary steps to address the Commenter's concerns. Virginia commits to considering all terms and conditions in permits issued pursuant to its currently federally-approved minor NSR permit program (40 CFR 52.2465(c)(109)) as federally enforceable applicable requirements. Virginia commits to incorporating all federally enforceable applicable requirements, including any terms and conditions contained in minor NSR permits, in the federally enforceable portion of all future title V operating permits. In accordance with 9VAC5-80-240 and 40 CFR 70.7(f), Virginia commits to implementing necessary permit revision procedures as expeditiously as practicable to ensure that all existing title V operating permits reflect all federal applicable requirements.

With respect to this alleged implementation deficiency, EPA has worked with Virginia to ensure that its program is implemented in a manner consistent with the approved permitting program, the Clean Air Act and EPA's implementing regulations. This implementation deficiency does not indicate a deficiency

with the approved regulations or legislation in Virginia's title V program. Rather, Virginia allegedly is not issuing permits consistent with their approved program and federal requirements. As mentioned above, EPA has received a commitment from Virginia providing that future permits will be issued consistent with State and federal requirements. Further, the Commonwealth has committed to revising any existing permits, as necessary. EPA is not issuing a notice of deficiency because the Commonwealth's commitment that all permits will be issued consistent with State and federal requirements corrects the alleged deficiency. However, there has not yet been a sufficient number of permits issued for EPA to evaluate Virginia's compliance (primarily because there has not been enough time for Virginia to issue those permits in the time since it made the commitment). Thus, EPA will monitor the Commonwealth's compliance over the next three to six months to ensure that the Commonwealth is now implementing the program consistent with its approved program, the Clean Air Act and EPA's regulations.

As part of its continued oversight of Virginia's title V operating permit program, EPA will ensure that Virginia adheres to its commitments regarding implementation of its minor NSR and title V operating permit programs. To date, EPA has formally reviewed over 90 percent of the permits issued by Virginia and has examined each draft permit. Should Virginia fail to properly include any federal applicable requirements, including any terms and conditions from minor NSR permits, in title V permits, 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 EPA is assured that Virginia understands that terms and conditions of permits issued pursuant to SIP-approved permit programs represent federal applicable requirements and must be included as such in title V operating permits pursuant to section 504(a) of the Clean Air Act and its implementing regulations. See, 42 U.S.C. §7661c(a) and 40 CFR 70.2 (definition of "applicable requirement") and 70.6(a). Furthermore, EPA is confident that Virginia can and will successfully adhere to the commitments contained in the November 30, 2001 letter.

Comment 3. Judicial Review: EPA has consistently interpreted Title V to require that state programs provide at least the same opportunity for judicial review of permit actions as would be available in federal court under Article III of the Constitution. See, e.g., letter of October 26, 2000 from Bradley Campbell, EPA Region III, to Mark Earley, Attorney General of Virginia (incorporated by reference). The Virginia Attorney General's office is now arguing that there is no representational standing in challenge to Title V permit decisions in Virginia. Id. Virginia appellate courts have ruled that there is no right of representational standing in Virginia absent express statutory authorization. This result contrast sharply with federal court decisions which explicitly allow for representational standing. Id.

In light of the above, EPA must find the Virginia Title V program deficient because it fails to provide the same opportunity for judicial review of permit actions as available in federal court. Further reasons in support of this view are set forth in the Amended Petition for Withdrawal of Federal Environmental

Program Delegation, Commonwealth of Virginia, June 21, 1999, filed with Administrator Carol Browner by the Lawyers' Committee for Civil Rights Under Law (incorporated herein by reference).

The October 26, 2000 letter from Regional Administrator Campbell indicates that EPA will wait for further rulings from the Virginia Courts before taking action on this deficiency. That is not a permissible course. The Virginia Attorney General who is responsible for certifying the state's Title V submission has taken the position that there is no representational standing in Title V permit appeals in Virginia. There is no justification for putting citizens to the burden and expense of litigating against that position, when EPA itself is obligated to reject it.

A June 1, 1998 petition by the Lawyers' Committee, also incorporated herein by reference, further alleged that Virginia's delegated environmental programs (including Title V) should be withdrawn because Virginia caps attorneys fees in permit appeals at $25,000, requires that plaintiffs "substantially" prevail before they can recover fees, and prohibits fees unless the agency position is "not substantially justified" We concur with that petition. Virginia's restrictions on fee recovery deprive citizens of the same access to judicial review they would enjoy federal court. For all the reasons set forth in the Lawyer's Committee 6/1/98 petition, EPA must determine that Virginia's Title V program is inadequate and must so notify the state.

Response 3. On December 12, 2001, Randolph A Beales, the out-going Attorney General for the Commonwealth of Virginia, sent a letter to the EPA Administrator regarding the matter of the Commonwealth's current standing statutes and "representational standing." It is EPA's position that this letter does not adequately address this issue. However, on January 12, 2002, Mr. Beales will be succeeded by the newly elected Virginia Attorney General. Thus, EPA believes that it is premature to provide a definitive response to your comment at this time. We intend to discuss this matter with the new Administration in Virginia without delay and anticipate providing you with a final, substantive response sometime in late January.

The EPA does not believe that the Commenter's assertions regarding attorneys' fees are supportable. The Clean Air Act and 40 CFR part 70 do not establish any requirement that approvable State operating permit programs provide for attorney fees and costs in the context of appeals of State permits. Rather, both the statute and the regulations identify the categories of persons who must be granted the right to seek review of State permits. The preambles which discuss the proposed part 70 regulations and the final part 70 regulations do not provide guidance suggesting that EPA Regions should treat the provision of attorney fees and costs, without limitation, as a requirement for a State program to be approved. See, 56 FR 21712, May 10, 1991 and 57 FR 32250, July 21, 1992.

Although the Clean Air Act contains a provision for the recovery of attorney fees and costs without an explicit monetary cap for citizen suits brought in federal court to challenge violations of the Clean Air

Act, such a requirement is not part of the minimum statutory requirements for an approvable State operating permit program under title V. See, 42 U.S.C. §§7604(d) and 7607(f). Accordingly, the assertion that the Commonwealth's program is deficient because Virginia's program does not provide for the recovery of attorney fees in State court following successful challenges to State-issued permits in the same manner that the Clean Air Act provides for the recovery of attorney fees in federal court citizen suits does not appear to have any support in the plain reading of the Clean Air Act, the part 70 regulations, or in the preambles which discussed the issue of minimum rights to seek judicial review of final permits. Moreover, the Commenter has not substantiated a claim that the limitations on attorneys' fees constitute an improper State constraint in violation of the Fourteenth Amendment of the United States Constitution. Therefore, EPA does not agree that a notice of deficiency is warranted for this issue.

Comment 4. Startup, shutdown and malfunction defenses: EPA's Title V rules allow a very limited emergency defense based on sudden and unforeseeable events that cause a malfunction. Virginia's Title V rules recognize this defense, but also go beyond it to allow exceedances due to startup or shutdown conditions. The rules indicate that such exceedances are permissible if certain procedural steps are taken, e.g.: "At all times, including periods of startup, shutdown and malfunction, owners shall, **to the extent practicable**, maintain and operate any affected facility, including associated air pollution control equipment or monitoring equipment, in a manner consistent with good air pollution control practice of minimizing emissions." 9VAC5-20-180.A. See also id. 180.B, requiring reporting within 24 hours prior to planned shutdown or bypassing of air pollution equipment for scheduled maintenance, but only if excess emissions will last more than an hour.

Our concern that the above language is intended as a defense is heightened by the language in 9VAC5-20-180.F, which applies "special" provisions to certain facilities emitting air toxics. One of the special provisions is a statement that "Nothing in this section shall be understood to allow any such facility to operate in violation of applicable emission standards . . . " F.1. This strongly suggests that it is permissible for other facilities to violate emission standards due to startup or shutdown conditions.

EPA's Title V rules do not allow for any general defense based on startup or shutdown. Nor do they allow permittees to violate emission limits or other applicable requirements based on claims of impracticability. Accordingly, EPA must find the above-cited provisions of Virginia's rules to be inadequate.

Virginia also has a fuel variance provision, 9VAC5-20-50, that allows the state to issue an order granting a variance for fuel burning equipment from applicable provisions of the state's air pollution rules, based on a showing of various factors, including that the owner has substantial cause to believe he will be unable to obtain the fuel to operate the equipment in compliance with applicable provisions of these regulations. The variance can last up to 180 days. This rule appears to allow the state to waive any emission limit based on a source's prediction that it will not be able to get clean enough fuel.

Although the length of any one variance is limited to 180 days, there is no prohibition on multiple variances for the same source. Virginia also has a generic variance provision, 9VAC5-170-140, that allows the state to grant variances for literally any reason (the only standard in the rule is "where warranted").

All of the foregoing variance provisions are completely contrary to Title V and EPA's rules thereunder. Variances are not allowed in Title V permit programs except to the extent allowed by the narrow emergency defense or expressly provided for under specific applicable requirements. EPA must so notify Virginia.

In the past, EPA has asserted that variance provisions are "wholly external" to Title V programs and therefore not binding on EPA. Such a position is legally indefensible here. The above-cited variance provisions are a part of the state's law governing air pollution sources, including Title V sources. EPA cannot pretend they are not there. It is no answer to say that EPA can object to variances, because it is the state's job in the first instance to ensure that Title V requirements are met, because EPA cannot possibly police every Title V permit and every variance that might be granted. Where (as here) the state refuses to adopt a program that complies with Title V, then EPA must find it inadequate.

Response 4. The Virginia State implementation plan (SIP) has contained provisions governing facility maintenance and malfunctions since EPA's initial approval of the SIP on May 31, 1972 (37 FR 10842). See, 40 CFR 52.2465(b). The EPA approved the current codification of the provisions governing malfunctions (9 VAC 5-20-180) as part of the Virginia SIP on April 21, 2000 (65 FR 21315). See, 40 CFR 52.2420(c). Because these provisions are contained in the Virginia SIP, they represent federally enforceable applicable requirements. If the commenter believes that these or other provisions should not be in the SIP, the commenter may petition EPA to require Virginia to amend the SIP.

The general variance provision was approved into the Virginia SIP (as Virginia Air Pollution Control Regulations Section 2.05(a)) on November 9, 1977 (42 FR 58405). See, 40 CFR 5265(c)(15). The Virginia fuel variance provision was approved into the Virginia SIP (as VR120-02-05A) on October 8, 1980 (45 FR 66792). See, 40 CFR 52.2465(c)(30). Like the malfunction provisions, the SIP-approved versions of the general variance and fuel variance provisions are federally enforceable applicable requirements of Virginia's current SIP. Neither of the current codifications of the fuel or general variances is currently in the SIP.

It is worth noting that Virginia employs both variances on a very limited basis. To date, EPA is aware of a single effective variance issued by Virginia pursuant to 9VAC-5-170-140. Virginia issued the variance to the Merck & Co., Inc.'s Stonewall Plant in 1997 and codified the variance in its regulations at 9VAC5-190. It should be noted that Virginia needed to employ its general variance authority to enable the Merck facility to participate in EPA's innovative regulatory flexibility program entitled

"Project XL". The EPA approved the source-specific variance, issued as part of a prevention of deterioration (PSD) permit, at 40 CFR 52.2454. See, 62 FR 52638, October 8, 1997. With respect to the fuel variance provision, EPA is unaware of any fuel variances ever being issued by Virginia.

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

Comment 5. Public participation:

a. Notice: EPA rules require public notice of proposed permits actions by publication, notice to those on a mailing list, and "by other means if necessary to assure adequate notice to the affected public." 40 C.F.R. §70.7(h). Virginia provides for notice by publication and to a mailing list, but does not provide for notice "by other means" as necessary to assure adequate notice to the affected public. 9VAC5-80-270.B. Virginia's program therefore has inadequate public notice provisions and must be corrected. Provision for alternative forms of notice is particularly important to ensure that notice is provided to affected persons who lack ready access to published notices and are not on the mailing list.

b. Hearing: Virginia rules require persons requesting a hearing to, among other things: 1) identify the "air quality concern" that forms the basis for the hearing request; and 2) "the factual nature and the extent of the interest of the requester or of the persons for whom the requester is acting as representative, including information on how the operation of the facility under consideration affects the requester." 9VAC5-80-270.E.2. The Act and EPA rules do not allow Virginia to require this kind of information as a precondition for a hearing. Rather, they require Virginia to provide an opportunity for a hearing period.

Virginia further requires that state officials find both of the following before a public hearing is required: 1. There is significant public interest in the air quality issues raised by the permit application in question; 2. There are substantial disputed air quality issues relevant to the permit application in question. Id. E.3. Again, there are no such preconditions in the Act or EPA rules. Moreover, it is contrary to the Act to limit public hearings to "substantial disputed air quality issues." Permits and permit amendments raise all kinds of issues technical, procedural, informational which may or may not be considered "air quality" issues. Nor is there any basis for requiring the existence of a "substantial" or a "disputed" issue before a hearing is required. Members of the public might seek a hearing simply to raise questions about the proposed permit, obtain more information, or seek greater clarity in permit terms.

Response 5a. While Virginia's operating permit program regulations at 9VAC5-80-270.B do not directly articulate the Commonwealth's authority to provide public notification of permit proceedings by "other means necessary", it does not mean that Virginia's operating permit program does not fully comply with the requirements of the Clean Air Act and 40 CFR part 70. See, 42 U.S.C. §7661a(b)(6) and 40 CFR 70.7(h)(1). It is important to note that Virginia's regulations do not expressly prohibit or otherwise limit the use of "other means" for public notification of permit proceedings. In fact, Virginia currently employs other means to provide public notification of permit proceedings. Virginia posts draft operating permits and their associated public notices on its website at www.deq.state.va.us/air/permitting/pubnotice.htm. The website provides the public with another way to obtain the public notice information that is also provided through newspapers and the permit mailing list as explicitly required by 9VAC5-80-270.B. The Commonwealth is able to use the broad authorities invested in the Air Pollution Control Board and the Department of Environmental Quality pursuant to Va. Code §§10.1-1307 and 10.1-1186, respectively, to employ its website as an alternative means to publicize permit proceedings. Likewise, it is expected that the Board would be empowered to utilize different ways to publicize operating permit proceedings should it determine that such other means are necessary to assure adequate notice to the affected public.

At this time, the Commenter has not brought to our attention any specific instances when "other means" would have been necessary to assure that adequate notice was provided to the affected public regarding title V permit actions in Virginia. The need for other means should be explored when it is demonstrated that existing identified means, i.e., publication in the newspaper, the mailing list, and website, are inadequate. The EPA has received no specific or anecdotal information that citizens are routinely unaware of title V permit actions in Virginia and must conclude that existing means are adequate. Therefore, EPA does not agree that a notice of deficiency is warranted for this issue.

Response 5b. The Commenter does not dispute that Virginia provides for the opportunity for a public hearing. The Commenter alleges that Virginia's regulations are more burdensome and restrictive than federal requirements regarding public participation because they require persons requesting a hearing to provide certain information in order to substantiate their request for a hearing. The part 70 regulations state that public notices shall include "a statement of procedures to request a hearing." See, 40 CFR 70.7(h)(2). Part 70 does not go on to describe what those procedures may or may not entail. EPA does not believe that the information requested by Virginia or the criteria used to grant a hearing are overly burdensome or contrary to 40 CFR part 70 or the Clean Air Act. See, 42 U.S.C. §7661a(b)(6). Furthermore, no evidence has been provided by the Commenter or uncovered by EPA that such requests for public hearings have been onerous on the requesters, or resulted in a pattern of hearing denials. Nor has it been alleged or demonstrated that Virginia has failed to follow the prescribed procedures for publicizing and conducting public hearings. Therefore, EPA does not agree that a notice of deficiency is warranted for this issue.

The Commenter expresses concern with the Commonwealth's public hearing procedures at 9VAC5-80-270.E. The Commenter believes that the Commonwealth's public participation provisions unduly limits public hearings to "substantial, disputed air quality issues" and to "air quality issues" raised by the permit application in question. The Commenter is concerned that certain procedural, technical or informational matters intrinsic to the issuance of an operating permit could be construed as non-"air quality issues", resulting in a denial of a public hearing request.

In its oversight of the public participation procedures of the Virginia operating permit program, EPA is unaware of any public hearing requests that have been denied on the grounds that are in any way related to the operating permit application in question. The EPA is unaware of any instance in which the Commonwealth has denied a request for a hearing where the requestor sought to address air quality issues related to the permit in question. The EPA is aware of two requests that have been denied, and in both instances the requestor did not seek to raise any air quality issues related to the permit that would have been the subject of the hearing. Our examination of this matter indicates that Virginia considers any issues relevant to the operating permit, including technical, procedural, and informational matters, as "air quality issues". In the Agency's judgment, this would include, but is not limited to, such issues as periodic monitoring, practical enforceability of permit terms, recordkeeping requirements, permit revision procedures, compliance certification obligations, adequacy of the statement of legal and factual basis, etc.

The EPA will continue to review the permits issued by Virginia and seek to ensure that adequate public participation is provided for all draft permits issued by the Commonwealth. EPA expects Virginia to continue its current practice of considering the matters discussed above as "air quality issues". Pursuant to the 9VAC5-80-270.F, Virginia is required to maintain a record of all commenters and issues raised during the public participation process, including requests for public hearings. This information is available to EPA and the public. If during its oversight, the Agency determines that adequate public participation, including the granting of public hearings, is not provided for a given permit, EPA has a statutory obligation to object to that permit and, if warranted, issue a notice of deficiency. See, 42 U.S.C. §7661d(b).

Comment 6. Annual compliance certifications: Virginia's rule on annual compliance certification (9VAC5-80-110.K.5.) and its annual compliance certification form (available on the VDEQ web site at: http://www.deq.state.va.us/air/justforms.html) , do not comport with applicable law as construed by the courts. The rule and the form require permittees to indicate whether the data used to determine compliance was "continuous" or "intermittent", not whether compliance itself was continuous or intermittent. The U.S. Court of Appeals for the D.C. Circuit has ruled that the Act requires compliance certifications to state whether compliance itself was continuous or intermittent not whether the data was continuous or intermittent. Accordingly, EPA must direct Virginia to revise its rule and form to require certification of whether compliance was continuous or intermittent.

Response 6. With regard to the alleged regulatory deficiency at 9VAC5-80-110.K.5, the comment relates to Virginia's revised operating permit program regulations and not its currently EPA-approved permit program regulations which received interim approval in 1997. [See 62 FR 31516.] In the fall of 2000, Virginia revised its regulations pertaining to its operating permit program, including changes to 9VAC5-80-110.K.5. The revisions became effective in Virginia on January 1, 2001. Virginia submitted these revisions to its currently EPA-approved operating permit program to EPA for review and approval. EPA published a proposed rulemaking notice pertaining to the program revisions, including the revisions to 9VAC5-80-110.K.5, on October 3, 2001 (66 FR 50375). The December 11, 2000 Federal Register notice (65 FR 77376) that is the subject of this letter requested comments only on currently EPA-approved programs (i.e. programs as approved by EPA on or before December 11, 2001). The regulatory provision in question was not part of Virginia's currently EPA-approved permit program and will not be addressed in this letter. The EPA will respond to any comments received relevant to the October 3, 2001 proposal as appropriate in a future final rulemaking action. Therefore, EPA is not issuing a notice of deficiency or responding directly to such comments at this time. The EPA will promptly advise the Commenter of any decision it makes regarding this matter.

Section 114(a)(3) of the Clean Air Act provides that "[c]ompliance certifications shall include . . . (D) whether compliance is continuous or intermittent." See, 42 U.S.C. §7414(a)(3). Virginia's currently approved permit program states that the compliance certification shall include "[w]hether compliance was continuous or intermittent." 9VAC5-80-110-K(5)(c)(2). Thus, Virginia's currently approved regulations do not appear to be deficient in this regard.
However, Virginia's annual compliance certification form did not, until recently, explicitly direct permittees to indicate whether compliance with each permit term was intermittent or continuous over the period covered by the certification. The form did require the permittee to indicate whether the compliance data collected by the permittee was intermittent or continuous in nature. Virginia has recently modified its annual compliance certification form to expressly require permittees to also indicate whether compliance with each permit term was intermittent or continuous. Virginia requires all title V permittees to submit annual compliance certification forms by no later than March 1 of each calender year following the period that is the subject of the certification. This new form will be used for all annual compliance certifications from this time forward, unless future revisions to 40 CFR 70.6(c)(5) necessitate further changes to the form. Therefore, EPA does not agree that a notice of deficiency is warranted for this issue.

As mentioned by the Commenter, on October 29, 1999, the United States Circuit Court of Appeal issued a decision compelling EPA to revise its regulations regarding the requirements of compliance certifications. See, Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Circuit)(docket A-91-52, item VIIII-A-1)). On March 1, 2001 (66 FR 12872), EPA promulgated, as a direct final rule, revisions to 40 CFR 70.6(c)(5). EPA also issued a concurrent notice of proposed rulemaking for the same action (66 FR 12916, March 1, 2001). On November 5, 2001 (66 FR 55883), EPA published a notice withdrawing the direct final action because the Agency received adverse comments

on the proposed action. The EPA is still considering the comments received pursuant to the March 1, 2001 proposed rulemaking action. Upon finalization of any changes to part 70, permitting authorities will be required to amend their regulations, as necessary, to comport with any revisions to the part 70 regulations regarding annual compliance certifications.

Comment 7. Permitting delays: Pursuant to 42 U.S.C. §7661a, the Administrator on June 10, 1997 granted interim approval to the Virginia's operating permit program under Title V of the Act. The effective date of this action was July 10, 1997. Pursuant to 42 U.S.C. §7661b(c) the state was required to establish a phased schedule for acting on permit applications submitted within the first full year after the effective date of the permit program. Such schedule was required to assure that at least one-third of such permits would be acted on by the state annually over a period of not to exceed 3 years after such effective date. 42 U.S.C. §7661b(c). Thus, according to the statutorily mandated schedule, the state was required to complete action by July 10, 2000 on all permit applications submitted in the first year of its permit program.

Virginia is in violation of this legal mandate. EPA's own figures show that, as of February 2001, Maryland [sic] had issued Title V permits to only 50% of its initial Title V sources. See www.epa.gov/oar/oaqps/permits/aps/permtbsm.html.

Virginia is therefore failing to adequately implement its Title V program. EPA has repeatedly cited timely completion of permit issuance has a high priority in internal memoranda and correspondence to the states, and therefore must publish notice that Virginia is failing to adequately to implement its program due to this deficiency.

Response 7. The EPA believes that this alleged implementation deficiency merits special consideration. A number of permitting authorities have not issued permits at the rate required by the Clean Air Act. For many permitting authorities, 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 the permit authority to be in full compliance with the permit issuance requirements of the Clean Air Act. If the permitting authority has submitted a commitment to correct this deficiency, EPA interprets that the permit authority has already taken "significant action" to correct the problem and thus does not consider it a deficiency at this time.

On November 30, 2001, the Commonwealth of Virginia submitted a commitment letter including a schedule that provides that a proportional number of Virginia's outstanding permits will be issued during each 6-month period leading to issuance of all outstanding permits. According to Virginia's commitment letter, all outstanding permits will be issued as expeditiously as practicable, but no later than December 1, 2003. EPA will monitor Virginia's compliance with its commitment – performing semiannual evaluations. For so long as Virginia issues permits consistent with its semi-annual milestones, EPA will continue to consider that Virginia has taken "significant action" such that a notice

of deficiency is not warranted. If Virginia fails to meet its milestones, EPA will issue a notice of deficiency and determine the appropriate time to provide for the State to issue the outstanding permits. A copy of Virginia's commitment letter, including the permit issuance schedule is enclosed.

Comment 8. Measurement of particulate matter: Virginia rules prohibit measurement of total particulate matter in determining major source status. The rules allow only consideration of PM-10 emissions. This conflicts with the Act and EPA rules, which define "major source" as any source that emits or has the potential to emit 100 tons per year of any air pollutant.

Response 8. With regard to the alleged regulatory deficiency at 9VAC5-80-50.F, the comment relates to Virginia's revised operating permit program regulations and not its currently EPA-approved permit program regulations which received interim approval in 1997. See, 62 FR 31516. In the fall of 2000, Virginia revised its regulations pertaining to its operating permit program, including 9VAC5-80-50.F. The revisions became effective in Virginia on January 1, 2001. Virginia submitted these revisions to its currently EPA-approved operating permit program to EPA for review and approval. EPA proposed action with regard to these program revisions, including revisions to 9VAC5-80-50.F, on October 3, 2001 (66 FR 50375). The December 11, 2000 Federal Register notice (65 FR 77376) that is the subject of this letter requested comments only on currently EPA-approved programs (i.e. programs as approved by EPA on or before December 11, 2001). The regulatory provision in question was not part of Virginia's currently EPA-approved permit program and will not be addressed in this letter. The EPA will respond to any comments received relevant to the October 3, 2001 proposal as appropriate in a future final rulemaking action. Therefore, EPA is not issuing a notice of deficiency or responding directly to such comments at this time. The EPA will promptly advise the Commenter of any decision it makes regarding this matter.

Comment 9. Insignificant emissions: Virginia rules list more than 100 types of activities that are deemed "insignificant" and therefore do not need to be disclosed in the permit application. The rules do not provide the criteria or justifications for excluding these units from permit applications, and therefore do not comply with Title V. See 40 CFR 70.4 (b) (2), 70. 5(c). Moreover, many of these exemptions are overly broad and/or unjustifiable on substantive grounds. For example (numbers correspond to those in the Virginia rule):

1. Gas flares or flares used solely to indicate danger to the public: The exemption of "Gas flares" is overly broad. Sometimes, natural gas is used as a supplemental fuel for emergency process release destruction flares to ensure adequate BTU content of flared gases. The exemption might be read as allowing these types of sources to be dropped as insignificant. Also, "gas" is too general. What kinds of gases? Burned in what kind of flare? This could potentially allow emergency "shut in" flares at source gas processing plants to be considered insignificant.

2. Ventilation systems not used to remove air contaminants generated by or released from specific units of equipment: This exemption would appear to exclude as insignificant all "roof monitors" releasing fugitive emissions from a metal melting cupola building that escape to building ventilation sources. These are potentially very significant emissions.

6. Space heaters operating by direct heat or radiant heat transfer or both: This exemption has no size limitation, and therefore is overly broad on its face.

10. Architectural maintenance and repair activities conducted to take care of the buildings and structures at the facility, including repainting, reroofing and sandblasting, where no structural repairs are made in conjunction with the installation of new or permanent facilities: This exemption is overly broad, as the activities referenced can generate significant emissions at large facilities. Sandblasting, for example, can release significant lead and silica emissions.

11. Repair or maintenance shop activities not related to the source's primary business activity, not including emissions from surface coating or de-greasing (solvent metal cleaning) activities, and not otherwise triggering a permit modification: "Repair shop" emissions could conceivably cover body repair and recoating operations at a motor vehicle assembly plant, activities that could involve very significant emissions.

12. Exterior maintenance activities conducted to take care of the grounds of the source, including lawn maintenance: This exemption is overly broad. For example, is soil remediation and vapor extraction an "exterior maintenance activity?" What about activities that generate large quantities of fugitive particulate matter?

17. Blueprint copiers and photographic processes used as an auxiliary to the principal equipment at the source: Some types of blueprint processes may emit significant quantities of ammonia.

19. Equipment used exclusively to slaughter animals, but not including other equipment at slaughterhouses, such as rendering cookers, boilers, heating plants, incinerators, and electrical power generating equipment: This provision is overly broad, and could conceivably exempt process units that emit hydrogen sulfide from decomposition.

20. Safety devices: This exemption is particularly unjustified. A pressure operated safety valve that can release tons of emissions in a few seconds could be a "safety device" Emergency relief flares might be deemed "safety devices" More fundamentally, the fact that an emission unit is deemed to be for safety purposes has no bearing whatsoever on whether it must be disclosed in the Title V permit application.

27. Fire suppression systems: Halon involvement may trigger stratospheric ozone protection issues under CAA.

28. Laboratories used solely for the purpose of quality control or environmental compliance testing that are associated with manufacturing, production or other industrial or commercial facilities: There is no basis for a blanket exemption of such units. For example, a "pilot" demonstration facility for automobile coating can have significant emissions. The fact that a facility is called a "testing" laboratory does not mean its emissions are necessarily unimportant.

29. Laboratories in primary and secondary schools and in schools of higher education used for instructional purposes: University labs are sometimes used for both instructional and research purposes. The latter can involve potential emissions of substantial concern, such as, for example, radionuclide releases at university nuclear research reactors. Moreover, boilers that are major Nox sources cannot be deemed insignificant merely because they are affiliated with a laboratory.

36. Grinding or abrasive blasting for nondestructive testing of metals. This exemption has no justification. These activities could involve release of toxic metals and other pollutants.

47. Non-routine clean out of tanks and equipment for the purposes of worker entry or in preparation for maintenance or decommissioning: Again, there is no justification for this exemption. It could authorize non-disclosure of activities that release significant amounts of pollutants e.g., tank degassing emissions at petroleum refineries.

48. Sampling connections and systems used exclusively to withdraw materials for testing and analysis including air contaminant detectors and vent lines. This exemption is overly broad, and could undermine leak detection and repair requirements that deal with cap requirements on open ended lines at subject facilities.

54. Equipment used for surface coating, painting, dipping, or spraying operations, except those that emit volatile organic compounds or hazardous air pollutants: What if these operations release PM emissions as aerosals?

58. Cooling ponds: What about cooling systems involving VOC contaminated cooling waters?

61. Equipment for steam cleaning or brushing dust off equipment: "Brushing dust off equipment" may have some connection to required fugitive dust control plans.

63. Farm equipment, with the exception of grain elevators or combustion devices not already listed as insignificant activities: This exemption is flatly contrary to Title V, which allows no blanket exemption of farm equipment.

71. Water cooling tower except for systems including contact process water or water treated with chromium-based chemicals: Cooling towers can emit particulate matter from calcium/magnesium compounds from evaporation of aerosols and must be considered PM sources in many types of permit reviews.

72. Spill collection tank: This exemption is grossly over broad. Such tanks could emit significant quantities of VOCs or HAPs.

73. Steam vents and leaks from boilers and steam distribution systems: Again, far too broad. This might include contaminated process steam from a kraft mill digestor.

77. Nonhazardous boiler cleaning solutions: Such solutions may contain VOCs and HAPs.

78. Portable or mobile containers: Is a cement power silo at a portable cement batch plant exempted under this language?

79. Vent or exhaust system for: a. Transformer vaults and buildings; b. Electric motor and control panel vents; c. Deaerators and decarbonators. Decarbonization is a term of art for venting at certain types of coke ovens and cannot be presumed insignificant because of potential for PM, VOC and HAP emissions.

80. Vents or stacks for sewer lines or enclosed areas required for safety or by code: This appears to contravene certain aspects of regulations applicable to Municipal WWTP systems. Also, what if these are industrial sewers at an industrial process operation, like a refinery or kraft mill?

81. Pump seals: Pump seals fugitive emissions are regulated in leak detection and repair programs required under MACT and NSPS standards in petroleum, petrochemical and other industrial applications. Therefore, the exemption of such units is unlawful.

82. Rupture discs for gas handling systems: This exemption is far too broad. A kraft mill, for example, may have significant emissions out of rupture disk vents during process upsets causing breach of ruptured disks.

97. Relief valves, excluding air pollution equipment bypass valves. This exemption is far too broad. It could include almost any kind of pressure operated relief valve or other emergency process emission vent.

98. Steam vents and safety relief valves. Again overly broad. Steam could be contaminated with VOCs or total reduced sulfur.

99. Steam leaks: See 98.

Virginia also has the following quantity based categories of insignificant units that conflict with Title V:

a. Emissions units with uncontrolled emissions of less than five tons per year of volatile organic compounds. In a serious non-attainment area, such as the Washington, D.C. nonattainment area (which includes portions of Virginia), multiple five ton sources of VOCs or Nox at a large industrial site could be very important.

b. Emissions units with uncontrolled emissions of less than 0.6 tons per year of lead.: 0.6 tons per year is the PSD significance level for new or modified sources to require BACT analysis. Treating such units as insignificant is therefore unlawful and irrational.

c. Emissions units with uncontrolled emissions of hazardous air pollutants at or below 1000 pounds per year. This threshold is plainly not appropriate for PCDD/PCDF, toxic metals, PCBs, mercury, pesticides, sensitizers, and similar pollutants.

d. Emissions units with uncontrolled emissions of any pollutant regulated under Subpart C of 40 CFR Part 68 if those emissions are below the accidental release threshold levels set forth at 40 CFR 68.130, or 1000 pounds per year, whichever is less: This unlawfully attempts to escape Title V compliance certification on uncontrolled emission events at sources experiencing upsets/malfunctions when the amounts are less than reportable quantities.

Response 9. The EPA does not dispute that additional clarification or justification of those insignificant activities cited by the Commenter may improve the public's understanding of the implementation of Virginia's operating permit program. However, Virginia's existing regulations addressing insignificant emission units (IEUs) provide adequate assurances that all major sources that are subject to title V will receive a title V permit, including that adequate information is provided in permit applications to make "major source" determinations, and that all applicable requirements are included in operating permits. EPA is unaware, nor has it been demonstrated, that Virginia's treatment of IEUs has lead to any improper major source determinations or the exclusion of applicable requirement from permits. EPA believes that the most appropriate course of action is to request Virginia to provide clarifying guidance on how to interpret and implement its insignificant activities list.

Section 502(b) of the Clean Air Act and 40 CFR part 70 allows States, subject to EPA review, to promulgate lists of insignificant activities and emission levels in their permit programs. See, 42 U.S.C. §7661a and 40 CFR 70.5(c). The purpose of these lists is to let permit applicants streamline their applications by allowing them to exclude information and emissions data for emission units that are not needed to determine which applicable requirements may apply or whether the source is a "major source." Virginia generated its insignificant activities list using existing approved lists as models; EPA's

July 10, 1995 policy memorandum entitled, "White Paper for Streamlined Development of Part 70 Permit Applications" (White Paper 1) and its attached list of "trivial activities"; along with, its own programmatic and engineering judgement and experience. Virginia's list attempts to identify certain types of activities or sources of potential emissions that typically generate minimal levels of emissions and that are not generally subject to any applicable requirements. The challenge in developing an effective insignificant activity list is to provide categories that are broad enough to encompass the target activity, but with sufficient specificity such that applicability is not in question. The EPA supports the States' authority to develop and implement aspects of its operating permit program that are based on the States' expertise and experience and to do so in a manner that is consistent with the States' priorities. In general, EPA believes that the insignificant activities provisions developed by Virginia are appropriate on their face and do not need extensive additional justification or substantiation.

Virginia addresses insignificant emission units (IEUs) in three ways. See, 9VAC5-80-270. First, Virginia's regulations provide a specific list of activities for which the permit applicant does not have to include descriptive information, including emission levels, in the application. The adequacy of this list is the primary focus of the Commenter. Second, Virginia allows permit applicants to identify units which fall below certain small emission thresholds as IEUs. The source categories suitable for IEU treatment under this provision are not identified in the Commonwealth's rule, but the applicant is required to identify them in the permit application. Third, Virginia's regulation lists certain categories of units with specific size or production rate thresholds. This type of IEU must be listed in the application. See, 9VAC5-80-90.D.1(a)(1) and 9VAC5-80-440.D.1(a)(1).

To ensure that the use of these IEU provisions by applicants will not lead to defective permits, Virginia's IEU regulations also contain a provision (or gatekeeper) that requires applicants to include in their applications any emissions data or other information for IEUs that is necessary to determine applicability of title V or of any applicable requirement. See, 9VAC5-80-90.D.1(a)(2) and 9VAC5-80-440.D.1(a)(2). In other words, the application must include any information that is critical to a major source determination or that is needed to determinate all the applicable requirements that apply to a major source. In most cases, the omission of detailed information on IEUs will not interfere with such determinations. However, in those cases where such information about IEUs is critical to such determinations, it must be included in the application. For example, if an IEU is subject to the requirements of a standard promulgated under 40 CFR part 63 at a particular source, the application for that source must include whatever information is necessary to write a practically enforceable permit that imposes the 40 CFR part 63 requirements on that IEU. In EPA's view, use of such a gatekeeper is a reasonable way to reconcile State authority to create IEUs with the part 70 mandate to put all applicable requirements in the permit. If the applicable requirements gatekeeper could not be relied upon to serve this function, EPA would need to scrutinize IEU lists much more closely, and more continually, and would need to reject categories of IEUs that could even potentially interfere to the slightest degree with identifying applicable requirements and imposing them in title V permits. Again,

the EPA has provided permitting authorities with broad authority to develop and implement programs and regulations to address IEUs.

As a further safeguard to the integrity of its IEU provisions, Virginia revised its regulations to address an interim approval issue to clarify that permit applicants are obligated to provide this type of information where necessary for all types of IEUs. Virginia also revised its regulations to explicitly require that all applicable requirements for all emission units, including those for IEUs must be contained in the title V permit. This clarification was also made to address an interim approval issue. See, October 10, 2001, 66 FR 51620 and December 4, 2001, 66 FR 62961.

As discussed above, these additional safeguards in the Virginia's IEU regulations significantly minimize the potential for inappropriate use of the insignificant activities list and the other mechanisms for identifying IEUs provided in Virginia's regulations. The purpose of the title V permit application is to provide all of the information necessary to develop a title V permit that contains all of a given source's applicable requirements. Virginia's regulations with regard to IEUs provide that all information necessary to determine applicable requirements for inclusion in title V permits must be provided by the applicant even if that information pertains to an IEU. Therefore, the various mechanisms to identify IEUs may be used by the applicant at its discretion with assumed liability for failure to provide complete and accurate information to Virginia. Pursuant to 9VAC5-800-80.G, 9VAC5-20-230, and 9VAC 5-80-440.I, all applicants must certify, subject to civil and criminal penalty, that all information contained in its application is complete, accurate and true.

The comments provided regarding specific insignificant activities on Virginia's list are not without merit. Simply the fact that a number of the activities are not clearly understood or interpreted by the knowledgeable public is indication that additional clarification may be necessary. However, the issuance of a notice of deficiency is not a commensurate response to the potential shortcomings of a less-than ideal insignificant activities list that has the safeguards described above. In this case, an appropriate corrective action is for Virginia to issue clarifying guidance on the manner in which its insignificant activities list shall be implemented. EPA urges Virginia to develop such guidance. EPA will closely monitor the development of such guidance and retains the authority to issue a notice of deficiency in the future should the Commonwealth fail to develop adequate guidance on this subject.

As part of its continued oversight of Virginia's title V operating permit program, EPA will also ensure that Virginia, and permittees in Virginia, adhere to the regulations regarding insignificant activities. To date, EPA has formally reviewed over 90 percent of the permits and associated documentation issued by Virginia and has examined each draft permit and has not identified any issues regarding the inappropriate classification of IEUs. Should Virginia or permittees fail to properly include any IEUs or information regarding IEUs in title V permit applications or permits, 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).