November 30, 2001

4APT-APB

Mr. George Hayes
Attorney at Law
236 West Portal Avenue #110
San Francisco, California 94127

Dear Mr. Hayes:

Thank you for your letter of March 12, 2001, on behalf of the National Parks Conservation Association (NPCA) concerning potential deficiencies in Tennessee's administration of its title V operating permit program. Based on our review of your comments and the relevant Tennessee regulations, we believe that the issues you raised are not deficiencies in the State's title V program pursuant to 40 CFR 70.10(b). Our reasoning is explained below.

The primary concern expressed in your letter is that Tennessee is issuing title V permits that do not provide for compliance with all applicable requirements, which conflicts with the requirements in 40 CFR part 70 and the regulations in the State's approved title V program. The title V permit issued by the State in 1998 to the Tennessee Valley Authority (TVA) Bull Run Steam Plant was cited as an example of a problematic permit. Specifically, a provision in the TVA Bull Run permit states that no automatic notice of violation shall be issued if the plant exceeds the applicable opacity standard for less than 2 percent of the total amount of time it operates in a calendar quarter. The permit condition further states that "[w]ritten responses to the quarterly reports of excess emissions shall constitute *prima facie* evidence of compliance with the applicable visible emission standard." Your concern is that this permit condition, and the State's underlying Rule 1200-3-20-.06, weaken the applicable opacity standard, thereby allowing Tennessee to issue title V permits that do not provide for compliance with all applicable requirements.

The Environmental Protection Agency (EPA) does not agree with this interpretation of the provisions in the TVA Bull Run title V permit. The condition stating that "no notice of violation shall be automatically issued..." refers to the automatic issuance provision in Rule 1200-3-20-.06, which notifies the regulated community how Tennessee will proceed when it receives monitoring information demonstrating that a violation has occurred. Paragraph 1200-3-20-.06(5) clearly states that "[w]here the violations are determined from properly certified and operated continuous emission monitors, no notice of violation(s) will be automatically issued unless the specified *de minimis* emission levels are exceeded." The regulation stipulates that all excess emissions be viewed as violations of the applicable opacity standard, which is consistent with EPA's policy as articulated in the November 2, 1999, guidance memorandum entitled "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." EPA does not believe that Tennessee can use the language in the TVA Bull Run permit, or in the underlying regulation, to excuse violations at the

facility. Based on our review of correspondence between the State and TVA, Tennessee is applying the *de minimis* criterion in Paragraph 1200-3-20-.06(5) to determine whether to take an immediate enforcement action, not to determine whether the exceedance constitutes a violation. We will, however, continue to monitor the State's implementation of Rule 1200-3-20-.06 to ensure that violations are not excused.

Furthermore, we do not believe that the language in the TVA Bull Run permit regarding Tennessee's findings of compliance restricts the ability of EPA and citizens under the Clean Air Act (CAA) to independently enforce title V permit limitations and conditions, or to call into question the State's analyses. The Tennessee Department of Environment and Conservation (TDEC) is the primary enforcement authority of the title V operating permit program in the state, and TDEC's properly conducted analysis of a facility's compliance status would be considered *prima facie* evidence of the facility's compliance status. Under the CAA, EPA or citizens may use direct emissions monitoring data generated by continuous emission monitors (CEMs), as well as any other credible evidence, to establish or support an independent effort to determine a facility's compliance status. In addition, facilities are obligated to consider any credible evidence in making compliance certifications for purposes of title V, and EPA believes that the "*prima facie* evidence" condition in the TVA Bull Run permit does not alter this obligation.

As part of our oversight role, we have conducted a detailed review of 10 percent of Tennessee's title V permits prior to their issuance and a less-detailed review of numerous other title V permits issued by the State. Although we have not found any other permits containing the "*prima facie* evidence" language found in the TVA Bull Run permit, we will continue to monitor Tennessee's use of this language. Should we find the "*prima facie* evidence" condition in the TVA Bull Run permit to be problematic with respect to the facility's compliance certifications or enforcement of the permit conditions by EPA or citizens under the CAA, remedies are available in the State's title V regulations, including the permit reopening provisions in Subparagraphs 1200-3-9-.02(11)(f)6(i)(III) and 1200-3-9-.02(11)(f)7. This permit condition can also be revised when it is renewed in 2003. However, we do not regard the inclusion of the "*prima facie* evidence" condition in the TVA Bull Run permit as the basis for an implementation deficiency in Tennessee's title V program at this time.

We appreciate your efforts to bring these issues to EPA's attention. Public involvement is an integral element of the title V program, and essential for its effectiveness. If you have additional questions regarding the Tennessee title V program, please contact Mr. Gregg Worley, Chief, Air Permits Section, at (404) 562-9141.

Sincerely,

/s/

Winston A. Smith
Director
Air, Pesticides, & Toxics

Management Division