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

OCT 26, 2000

The Honorable Mark Earley
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219

Dear Mr. Earley:

I have carefully reviewed the letter written by Roger L. Chaffe, Senior Assistant Attorney General, dated January 12, 2000, concerning, among other things, the recognition of representational standing in challenges to decisions made by the Virginia Department of Environmental Quality. Mr. Chaffe's letter maintains that representational standing is not part and parcel of Article III of the United States Constitution and that the Commonwealth of Virginia has argued against the recognition ofrepresentational standing in a number of actions concerning the State Air Pollution Control Board and the State Water Control Board.

EPA has consistently interpreted Title V of the Clean Air Act to require that an approvable operating permit program provide at least the same opportunity for judicial review of permit actions as would be available in federal court under Article III. This interpretation has been upheld as both authorized by Congress and reasonable. Commonwealth of Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997). Article III generally requires that, to obtain judicial review, a person must suffer an actual or threatened injury. However, an. organization that does not suffer actual or threatened injury to itself may obtain review on behalf of its members when (1) the members would otherwise have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to its purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. In such a case, the organization itself need not show actual or threatened injury and is deemed to have representational standing. Hunt v. Washington Apple Advertising Comm'n. 432 U.S. 333, 341-345 (1977).

I am deeply troubled by the position taken by the Commonwealth of Virginia on the issue of representational standing, particularly in light of the considerable effort EPA and the Commonwealth undertook to resolve Virginia's prior impediments to program approval relating to citizen standing to challenge Title V permits and to address citizen petitions for withdrawal of the State-administered National Pollutant Discharge Elimination System (NPDES) program. Representational standing affords the public a mechanism to challenge environmental permits in those situations where only an organization has the resources and expertise to bring such an

action. EPA believes that the right of the public to be involved in environmental permitting decisions necessarily entails the right of representative organizations to bring judicial challenges to permits. As then-Regional Administrator Michael McCabe explained in his August 31, 1999, letter to you, EPA has previously stated ,that representational standing is a requirement for maintaining EPA approval of a State's Title V program under the Clean Air Act. See 63 Fed. Reg. 65783 (November 30, 1998) (Notice of deficiency for Clean Air Act operating permits program in Oregon). EPA also considers representational standing an essential feature of the NPDES permitting program under the Clean Water Act. As set forth in Section 101 (e) of the Clean Water Act, 33 U.S.C. § 1251(e), EPA's encouragement and assistance of vigorous public participation in the administration of water quality programs across the board is statutorily mandated.

Mr. Chaffe's letter asserted that, given pending appeals in various cases in the state courts in Virginia, the state of the law in the Commonwealth concerning representational standing is still uncertain. If the Virginia courts ultimately fail to recognize representational standing, I believe that the Commonwealth's Title V and NPDES programs will have difficulty meeting the public participation and judicial review requirements of the Clean Air Act and the Clean Water Act. Even in advance of such ill-advised state court rulings, the fact that Virginia is actively arguing against representational standing in its courts raises serious questions about the adequacy of the Commonwealth's Title,V and NPDES programs. I would, therefore, strongly urge the Office of Attorney General and the Virginia Department of Environmental Quality to discontinue arguments that representational standing is available only as expressly authorized by State statute or is otherwise precluded by State law.

I would like to engage in meaningful dialogue with your office on this issue so that a prompt resolution can be reached. I look forward to hearing from you on this matter.

Sincerely,

Bradley M. Campbell
Regional Administrator

cc: John Paul Woodley, Jr., Secretary of Natural Resources
Dennis Treacy, Director, Virginia Department of Environmental Quality
David Bailey, Esquire
Roy Hoagland, Esquire
Kay Slaughter, Esquire
Steve Hitte (OAQPS)
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