BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of Anchor Glass Container Corporation Title V Operating Permit 3221-153-0014-V-02-0 Issued by the Georgia Environmental Protection Division	)))))))))	Petition No: 04-01-_____

PETITION TO HAVE THE ADMINISTRATOR OBJECT TO ANCHOR GLASS' TITLE V PERMIT

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I. INTRODUCTION

A recent scientific study claims that air pollution from just one industrial segment shortens the lives of over 1,600 people in Georgia each year.[1] 2,581,516 Georgians live in areas that the United States Environmental Protection Agency (US EPA) has designated as failing to meet the health based ambient air quality standard for ground level ozone.[2] Ozone is a powerful lung irritant that can cause shortness of breath, coughing, burning eyes, chest pain, asthma attacks and other respiratory problems and a lessened ability to fight off disease and infection.[3] There are also significant economic consequences of air pollution. For example, the US EPA has concluded that the direct benefits for the Clean Air Act from 1970 to 1990 has a central tendency estimate of $22.2 trillion dollars. During the same period, implementing the Clean Air Act had a direct cost of $523 billion. This means that the economic benefit of the Clean Air Act outweighed the costs by more than a factor of 42.[4] Georgia's air pollution problems have reached such levels as to catch the attention of the media including major local newspapers. *See e.g.* May 1, 2001 Atlanta Journal, "Bad air days: Atlanta ranks sixth in pollution."

Interposed between Georgians and the air pollution is the Clean Air Act. In simple terms, the Clean Air Act has the US EPA set standards for safe ambient air and then requires air pollution control agencies to issue permits to major stationary sources of air pollution as well as implement regulations to control pollution from mobile sources. The permits for

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[1] Death, Disease and Dirty Power, Clean Air Task Force, October 2000, at 22 available at http://www.cleartheair.org/fact/mortality/mortalitystudy.vtml?PROACTIVE_ID=cecfcfcecfccc6cdccc5cecfcfcfc5cecfc9cbcccac6c6c7c9c5cf.

[2] Smog Watch 2000, Clean Air Network, June, 2000 at 11 available at http://www.cleartheair.org/fact/SmogWatch2000.pdf?PROACTIVE_ID=cecfcfcfcacacac8c6c5cecfcfcfc5cecfcacfc9c6c8cecec9c5cf.

[3] *Id*. at 16.

major stationary sources are designed to ensure that aggregate air pollution does not exceed ambient air quality standards.

A major component of the Clean Air Act is the Title V permitting program. According to the US EPA:

> The purpose of title V permits is to reduce violations of air pollution laws and improve enforcement of those laws. Title V permits do this by:
>
> 1. recording in one document all of the air pollution control requirements that apply to the source. This gives members of the public, regulators, and the source a clear picture of what the facility is required to do to keep its air pollution under the legal limits.
>
> 2. requiring the source to make regular reports on how it is tracking its emissions of pollution and the controls it is using to limit its emissions. These reports are public information, and you can get them from the permitting authority.
>
> 3. adding monitoring, testing, or record keeping requirements, where needed to assure that the source complies with its emission limits or other pollution control requirements.
>
> 4. requiring the source to certify each year whether or not it has met the air pollution requirements in its title V permit. These certifications are public information.
>
> 5. making the terms of the title V permit federally enforceable. This means that EPA and the public can enforce the terms of the permit, along with the State.

See http://www.epa.gov/oar/oaqps/permits/index.html. However, the Georgia Environmental Protection Division (EPD) has derailed this purpose by issuing a Title V permit with numerous flaws that are discussed in more detail below.

II. PARTIES

[4] EPA, The Benefit and Costs of the Clean Air Act: 1970 to 1990 EPA Report to Congress, EPA-410-R-97-002, Oct. 1997 at Abstract.

The Sierra Club, a non-profit corporation, is one of the nation's oldest and largest environmental organizations. The Sierra Club has long been involved in air pollution issues in Georgia and throughout the nation. The Georgia Chapter of the Sierra Club has over 14,000 members. Sierra Club members live, work, farm, recreate, grow food, own land and structures, and obtain spiritual and aesthetic pleasure from locations that are adversely affected by the air pollution from this facility. In addition, the Sierra Club requires the monitoring information mandated by final Title V permits in order to conduct its work to clean up the air in Georgia. However, if the permit does not contain complete monitoring and reporting, the Sierra Club will not be able to obtain all of the information that it needs to do its work.

III. PREVIOUS PROCEEDINGS

The US EPA granted final approval of the Georgia Title V operating permit program on June 8, 2000. 65 FR 36398 (June 8, 2000). The Environmental Protection Division (EPD) of the Georgia Department of Natural Resources is the agency responsible for issuing Title V operating permits in Georgia. O.C.G.A. §§12-9-3(12), 12-9-4, 12-9-6(b)(3).

EPD issued a draft Title V operating permit for Anchor Glass Container Corporation ("Anchor" or "Facility"). EPD granted the public a thirty-day period to comment on this draft permit. This public comment period ended on March 26, 2001 as March 24, 2001 was a Saturday. *See* Ex. 1 at Addendum Page 4. EPD misinformed the public, via its web page, that the public comment period ended on March 24, 2001. *See* Ex. 2 at 1. On March 23, 2001, the Sierra Club submitted comments to EPD on the Anchor draft Title V permit. *See* Ex. 3. *See also* Ex. 1 at Addendum Page 3.

On April 2, 2001, Jimmy Johnston, who is the Program Manager for EPD's Air Protection Branch Stationary Source Permitting Program, and thus is responsible as a practical matter for issuing Title V permits, informed Sierra Club, through its counsel, that EPD intended to re-propose to EPA the Anchor Title V permit. *See* Ex. 4. On June 26, 2001, EPD re-proposed the Anchor Title V permit to US EPA. *See* Ex. 5. Art Hofmeister, the US EPA Region 4 person responsible for reviewing Georgia issued Title V permits, confirmed that EPD re-proposed the Anchor permit on June 26, 2001. *See* Ex. 6. According to US EPA and EPD, the public's petition requesting that US EPA object to a Title V permit is due 105 days after EPD re-proposes a permit to US EPA. *See* Ex. 1 at Addendum Page 5. *see also In re: Orange Recycling & Ethanol Production Facility*, II-2000-07 (EPA Administrator May 2, 2001) at 3. Thus, this petition is due no earlier than October 11, 2001. Therefore, this petition is timely.

EPD issued the final permit on July 9, 2001. *See* Ex. 7. We note that this was before US EPA's 45 day comment period had expired. Thus, EPD violated 40 CFR § 70.7(a)(1)(v) by issuing this permit before the Administrator's review period had expired.

IV. FACTS

The operation of the Facility, which is the subject of this Petition, is described as follows:

> Anchor Glass Container Corporation manufactures various types and colors of container glass primarily used for the packaging of food and beverages.

Ex. 7 at 1.

This Facility is located slightly south of Macon, between Augusta and Columbus and has the potential to emit more than 250 tons per year (tpy) of Nitrogen Oxides (NOx), Sulfur Dioxide (SO_2) and Particulate Matter (PM). This is a major concern because the Macon, Augusta and Columbus regions have ambient air concentration above the safe levels for PM and for ozone. Ground level ozone is formed by a chemical reaction involving NOx. PM is harmful in its own right. Sulfur Dioxide can also be a source of PM.

V. SUMMARY OF THE ARGUMENT

1. EPD's public participation process for this permit was inadequate because EPD did not notify people, via a mailing list, of the public comment period, did not explain to the public in the public notice where they can obtain all of the relevant documents, and provided incorrect information in the public notice such as when the public comment period ends and who can enforce this permit.

2. The language in Facility's permit appears to limit what credible evidence can be used to prove a violation. Such a limitation is contrary to the US EPA's "any credible evidence" rule and therefore must be removed and replaced with language that makes clear that any credible evidence can be used.

3. The permit impermissibly limits who may take enforcement actions to "citizens of the United States" in contrast to the Clean Air Act, which provides that any person may take an enforcement action.

4. The permit does not require the permittee to report the results of all monitoring to the state agency.

VI. ARGUMENT

A. LEGAL BACKGROUND AND STANDARD OF REVIEW

The Clean Air Act is "Congress's response to well-documented scientific and social concerns about the quality of the air that sustains life on earth and protects it from . . . degradation and pollution caused by modern industrial society." *Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 260 (3rd Cir. 1991). A key component of achieving the Clean Air Act's goal of protecting our precious air is the Title V operating permit program. Title V permits are supposed to consolidate all of the requirements for a facility into a single permit and provide for adequate monitoring and reporting to ensure the regulatory agencies and the public that the permittee is complying with its permit. *See generally* S. Rep. No. 101-228 at 346-47; *see also In re: Roosevelt Regional Landfill*, (EPA Administrator May 11, 1999) at 64 FR 25336.

When a state or local air quality permitting authority issues a Title V operating permit, the US EPA will object if the permit is not in compliance with any applicable requirement or requirements under 40 CFR Part 70. 40 CFR § 70.8(c). However, if the US EPA does not object, then "any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to make such objection." 40 CFR § 70.8(d); 42 U.S.C. § 7661d(b)(2)(CAAA § 505(b)(2)). "To justify exercise of an objection by US EPA to a [T]itle V permit pursuant to Section 505(b)(2), a petitioner must demonstrate that the permit is not in compliance with applicable requirements of the Act, including the requirements of Part 70. [40 CFR] § 70.8(d)." *In re: Pacificorp's Jim Bridger and Naughton Plants*, VIII-00-1 (EPA Administrator Nov. 16, 2000) at 4.

B. THE FACILITY'S PERMIT IS NOT IN COMPLIANCE WITH APPLICABLE REQUIREMENTS OF THE CLEAN AIR ACT.

1. EPD'S PUBLIC PARTICIPATION PROCEDURES DID NOT COMPORT WITH PART 70 REQUIREMENTS.[5]

"Public participation is an important part of the title V process, and is an appropriate subject of an objection by EPA pursuant to 40 CFR § 70.8(c)(3)(iii)." *In Re: Orange Recycling & Ethanol Production Facility*, II-2000-07 (EPA Admin. May 2, 2001) at 4. In this case, EPD did not undertake the required public participation activities for this permit. Therefore, the Part 70 regulations make it illegal for EPD to issue the final permit. 40 CFR § 70.7(a)(1)(ii). Rather, based on the reasons below, US EPA should object to this permit and require EPD to re-notice the draft permit for a new public comment period that follows, at a minimum, the public participation processes specified in the law.

a. EPD DID NOT PROVIDE NOTICE OF THIS PERMIT VIA A MAILING TO PEOPLE ON ITS MAILING LIST.

40 CFR § 70.7(h)(1) requires that EPD give notice of the draft permit by mailing such notice to a mailing list that includes people who have requested to be on that mailing list. EPD did not mail notice of this draft permit to people on the mailing list. EPD does not

dispute this point. See Ex. 1 at Addendum Page 3. Therefore, because EPD did not comply with the requirements for public participation under paragraph (h), EPA should object to the permit and require EPD to re-notice this permit for a new 30-day comment period. 40 CFR § 70.7(a)(1)(ii).

b. THE PUBLIC NOTICE DOES NOT INFORM THE PUBLIC WHERE THEY CAN OBTAIN ALL RELEVANT SUPPORTING MATERIALS AND ALL OTHER MATERIALS AVAILABLE TO THE PERMITTING AUTHORITY.

40 CFR § 70.7(h)(2) states that the public notice will explain where the public can review all relevant supporting documents and all documents available to the permitting authority.

> As the Administrator stated in the Borden Chemical Inc. petition response, petition VI-01-01, available at http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions (under Borden_response1999), "access to information is a necessary prerequisite to meaningful public participation." Public involvement is required throughout the CAA title V permit process (see, e.g., CAA section 502(b), 503)(e) and 505(b)), EPA's implementing regulations (see 40 CFR §§ 70.7 and 70.8) and New York regulations (6 NYCRR 621).

In re: Orange Recycling & Ethanol Production Facility at 5.

EPD's public notice states that "all information used to develop the draft permit are available for review." Ex. 8 at 1. Although EPD's use of the passive voice creates confusion, it appears that what EPD is saying is that all information that it used to develop the draft permit is available for review at its office. While this may be true, Part 70 requires EPD to make available "all relevant supporting materials, including those set forth in §

[5] This issue was raised in Petitioner's Comment 1 at pages 2-4, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision[.]" 40 CFR § 70.7(h)(2). Thus, the standard as set forth in the regulations is that EPD notify the public of where they can obtain all of the materials that EPD could have used, as opposed to materials that EPD did use. EPD mis-interpretation of this requirement is unfortunately symptomatic of EPD's attitude towards public participation. EPD generally views public participation as something they are forced to do by law rather than as an opportunity to better protect the environment. With such an attitude, it is not surprising that EPD does not believe the public should view any documents that it did not use. After all, in EPD's way of thinking, what could be gained by the public reviewing addition documents? Fortunately, the drafters of the Part 70 regulations did not suffer from EPD's lack of understanding of the value of public participation.

Much of the information the public needs to review to determine whether a compliance schedule is required or whether conditions are adequate are actually maintained at the permittee's facility rather than at EPD's office. For example, much of the monitoring information required under the pre-construction permit is maintained at the facility. EPD must notify the public of this fact so they can review this information. In addition, the Risk Management Plan, to the extent that it exists, would be at the RMP Reporting Center in Virginia. *See* Ex. 7 at 14. The public should be able to review this critical document.

c. THE PUBLIC NOTICE CONTAINS INACCURATE INFORMATION.

The public notice also contains inaccurate information. Providing the public with inaccurate information can hardly be considered the adequate notice required by 40 CFR § 70.7(h). For example, the notice states "[t]his permit will be enforceable by the Georgia EPD

and the U.S. Environmental Protection Agency." *See* Ex. 8. This statement is incomplete. The permit will also be enforceable by any "person." 42 U.S.C. § 7604(a). The Clean Air Act defines "person" to include an individual, corporation, partnership, association, State, municipality, and a political subdivision of a state. 42 U.S.C. § 7602(e).

While this oversight may appear insignificant, correcting this misstatement is important for at least two reasons. To begin with, it is inherently important for the government to always provide the public with accurate information. In addition, EPD has recognized that public involvement in the Operating Permit program has been limited. The onus is on the state agency to involve people in this regulatory process. 40 CFR. § 70.7(h). It is only with full and meaningful public participation that we can hope to have clean air here in Georgia. *See generally* Ashley Schannauer, Science and Policy in Risk Assessment: The Need for Effective Public Participation, 24 Vermont Law Review 31 (1999). In order to involve the public in the Operating Permit program, an important first step is to convince the public that this program is a legitimate means by which the public can participate to achieve the goal of attaining clean air. If the public is aware of their right to enforce a permit, they are more likely to put effort into ensuring that the permit is adequately protective of the environment.

Furthermore, the public notice states that "[a]fter the comment period has expired, the EPD will consider all comments, make any necessary changes and issue the Title V operating permit." Ex. 8 at 2. This statement is inaccurate. Specifically, the statement suggests that, while EPD may make changes, in the end, EPD *will* issue the permit. However, under certain circumstances, EPD is required to refuse to issue a Title V permit. *See* 40 CFR § 70.7(a). As such, the aforementioned statement could be interpreted as an indication of

EPD's predisposition to issue Title V permits regardless of whether the permit complies with the law. *See American Wildlands v. Forest Service*, CV 97-160-M-DWM (D.Mont. Apr. 16, 1999)(Denying government deference because of evidence of predisposition towards a predetermined outcome).

In addition, as noted above, the EPD Web Page stated that the public comment period ends on March 24, 2001. *See* Ex. 2. However, since March 24, 2001 was a Saturday, comments were due on the following Monday, March 26, 2001. *See* O.C.G.A. § 1-3-1(d)(3)(public comment periods must end on the next business day if the time period lands on a non-business day). Therefore, because the public notice was inadequate EPA should object to the permit and require EPD to hold another public comment period after EPD gives adequate notice.

2. THE PERMIT APPEARS TO LIMIT CREDIBLE EVIDENCE FROM BEING USED IN AN ENFORCEMENT ACTION.[6]

As emphasized by the US EPA's Credible Evidence Rule, 62 FR 8314 (Feb. 24, 1997), the Clean Air Act (CAA) allows the public, EPD, US EPA, and the regulated facility to rely upon any credible evidence to demonstrate violations of or compliance with the terms and conditions of a Title V operating permit. Specifically, US EPA revised 40 CFR § 51.212, 51.12. 52.30, 60.11 and 61.12 to "make clear that enforcement authorities can prosecute actions based exclusively on any credible evidence, without the need to rely on any data from a particular reference test." 62 FR at 8316. EPD has failed to ensure that no

[6] This issue was raised in Petitioner's Comment 5 at pages 5-6, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

permit condition purports to limit the use of credible evidence. Moreover, EPD failed to include standard language in the permit stating that all credible evidence may be used.

a. EPD MUST REMOVE LANGUAGE THAT PURPORTS TO LIMIT THE USE OF CREDIBLE EVIDENCE.

US EPA has made it very clear that Title V permits must contain no language that could be interpreted to limit credible evidence. However, this permit does contain language that could easily be understood as limiting credible evidence. For example, condition 4.1.3. in the permit states that "[t]he methods for the determination of compliance with emissions limits listed under Sections 3.4 and 3.5, which pertain to the emission units listed in Section 3.1 are as follows:" Ex. 7 at 5. One could read this provision to stand for the proposition that when a government agency or member of the public takes an enforcement action for a permittee violating its permit, the enforcer can only rely on information from the methods of determination listed in the permit. This position is directly contrary to the Clean Air Act requirements in CAA §§ 113(a), 113(e)(1) and 40 CFR § 51.212, 51.12. 52.30, 60.11 and 61.12 which allow anyone taking an enforcement action to rely on any credible evidence. Therefore, the aforementioned sentence in Section 4.1.3 should be stricken.

Another example of the permit's attempt to limit credible evidence is found in the second sentence of condition 18.17.1. Ex. 7 at 23. This condition claims to limit the usable evidence to information that is available to EPD. Of course, the public or US EPA may

obtain information about a facility from sources other than EPD, such as information from a whistleblower or from people that live near the facility. As such, it is inappropriate to limit credible evidence to exclude such information. Therefore, the aforementioned provision must be removed from the permit. Of course, the preferred option is to simply remove the sentence. A less desirable option is to re-write it to state that "EPD may determine . . .."

Similarly, Condition 6.1.3 of the permit, which states that "failures shall be determined through observation, data from any monitoring protocol, or by any other monitoring which is required by the permit," could be considered to limit the use of credible evidence. Ex. 7 at 8. To correct the problem, this Condition should include an additional clause requiring reporting of any failure based on any credible evidence, including observation, data from monitoring protocols and other monitoring required by the permit.

EPD claims that Rule 391-3-1.02(3)(a) and the Procedures for Testing and Monitoring Sources of Air Pollutants ("Procedures Manual") at Section 1.3(g) remove any limitation on the use of any credible evidence in enforcement actions. *See* Ex. 1 at Addendum Page 8. Even if these two items stood for the proposition for which EPD offers them, EPD ignores the permit shield provision in the permit. EPD also fails to explain why burying such a critical issue by incorporation by reference to a testing manual or Georgia state rules make this permit practicably enforceable. As the Administrator has recently stated,

> One purpose of the title V program is to enable the source, EPA, States, and the public to **clearly** understand the regulatory requirements applicable to the source and whether the source is meeting those requirements. Thus, the title V operating permits program is a vehicle for assuring that existing air quality control requirements are appropriately applied to facility emission units in a **single** document and assuring compliance with these requirements.

In re: Orange Recycling, at 3 (emphasis added). Not only is EPD's approach contrary to this purpose, it is difficult to see any rational basis for this approach and EPD has certainly not offered one. *See also Id.* at 36 (rejecting incorporation by reference).

As mentioned above, EPD relies upon two items to support its position. The first, Rule 391-3-1-.02(3)(a), works to apparently limit credible evidence rather than remove such a limitation. It states:

> Any sampling, computation and analysis to determine the compliance with any of the emissions limitations or standards set forth herein shall be in accordance with the applicable procedures and methods specified in the Georgia Department of Natural Resources **Procedures for Testing and Monitoring Sources of Air Pollution**.

Rule 391-3-1-.02(3)(a)(emphasis in the original). A straightforward reading of this provision supports an interpretation that would exclude any evidence to determine compliance except evidence obtained through methods set forth in the Procedures Manual. The fact that, with the exception of the undersigned, the only people in possession of this Procedures Manual are regulated entities, their contractors and a few other government agencies, does nothing to strengthen EPD's position.

Turning to Section 1.3(g), it states:

> Notwithstanding any other provision of any applicable rule or regulation or requirement of this text, for the purpose of submission of compliance certifications or establishing whether or not a person has violated or is in violation of any emissions limitation or standard, nothing in these Procedures for Testing and Monitoring Sources of Air Pollutants or any Emission Limitation or Standard to which it pertains, shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.

Again, even if we assume that this Section supported EPD's position, we would nevertheless have to overcome the seemingly insurmountable due process obstacle that a Procedures Manual cannot overcome the language of a permit with a permit shield provision and a rule that has been promulgated following notice and comment. If we were able to overcome this obstacle, it is nevertheless extremely unclear that Section 1.3(g) helps to remove limitations on the use of credible evidence. The Section states that "nothing in these Procedures . . . or any Emissions Limitation or Standard." Thus, this Section applies to the Procedures Manual and Emissions Limitations and Standards. This Section does not appear to apply to Title V permits. Worse yet, the Section does not state that one can use any credible evidence. It only states that one can use any credible evidence to show whether a source would have been in compliance "if the appropriate performance or compliance test or procedure had been performed." Section 1.3(g). Whether the credible evidence one wants to use is the "**appropriate** performance or compliance test or procedure" is anyone's guess. However, Title V was not created to encourage guessing. Therefore, rather than this morass, US EPA should require EPD to remove the language that appears to limit credible evidence.

b. EPD SHOULD INCLUDE STANDARD LANGUAGE IN ITS PERMITS THAT EXPLICITLY STATES THAT ANYONE CAN USE ANY CREDIBLE EVIDENCE.

US EPA should further require EPD to affirmatively state in the permit that any credible evidence may be used in an enforcement action. US EPA supports the inclusion of

credible evidence language in all Title V permits. As explained by the Acting Chief of US EPA's Air Programs branch:

> It is the United States Environmental Protection Agency's position that the general language addressing the use of credible evidence is necessary to make it clear that despite any other language contained in the permit, credible evidence can be used to show compliance or noncompliance with applicable requirements. . . . [A] regulated entity could construe the language to mean that the methods for demonstrating compliance specified in the permit are the only methods admissible to demonstrate violation of the permit terms. It is important that Title V permits not lend themselves to this improper construction.

Letter from Cheryl L. Newton, Acting Chief, Air Programs Branch, EPA, to Robert F. Hodanbosi, Chief, Division of Air Pollution Control, Ohio Environmental Protection Agency, dated October 30, 1998. In fact, US EPA apparently sent a letter in May 1998 specifically directing EPD to amend its SIP to include language clarifying that any credible evidence may be used. *See* Ex. 9. Nevertheless, while three years have elapsed since US EPA's request, the permit does not contain the necessary language.

While anyone may rely on *all* credible evidence regardless of whether this condition appears in the permit, EPD should include credible evidence language in the permits and permit template to make the point clear. Specifically, US EPA has recommended that the following language be included in all Title V permits:

> Notwithstanding the conditions of this permit that state specific methods that may be used to assess compliance or noncompliance with applicable requirements, other credible evidence may be used to demonstrate compliance or noncompliance.

Letter from Stephen Rothblatt, Acting Director, Air and Radiation Division, US EPA, to Paul Deubenetzky, Indiana Department of Environmental Management, dated July 28, 1998. We request that US EPA object to this permit and modify the permit to include this provision to

clarify the availability of any credible evidence to demonstrate noncompliance with permit requirements.

3. THE PERMIT IMPERMISSIBLY LIMITS ENFORCEMENT TO "CITIZENS OF THE UNITED STATES."[7]

"The Title V operating permits program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these requirements is assured." *In re: Roosevelt Regional Landfill*, (EPA Administrator May 11, 1999) at 64 FR 25336. There are three types of entities that are permitted to take action to assure compliance with a Title V permit: the EPA pursuant to 42 U.S.C. § 7413; the State pursuant to state law or 42 U.S.C. § 7604; and any "person" pursuant to 42 U.S.C. § 7604. Of course, 42 U.S.C. § 7604 is labeled "citizen suits." However, "citizen" in this context includes all members of the public.

"Citizen suits," as they have come to be know, are a particularly important method of assuring compliance with Title V permits. As the Supreme Court has noted:

> Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency, which in time develops, between the regulator and the regulated. As early as 1894, Attorney General Olney predicted that regulatory agencies might become 'industry-minded,' as illustrated by his forecast concerning the Interstate Commerce Commission:
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> > 'The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely

[7] This issue was raised in Petitioner's Comment 2 at pages 4, attached as Ex. 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

> nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things.' M. Josephson, The Politicos 526 (1938).
>
> Years later a court of appeals observed, 'the recurring question which has plagued public regulation of industry (is) whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.' Moss v. CAB, 430 F.2d 891, 893.

Sierra Club v. Morton, 405 U.S. 727, 745-47 (1972). *See also Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1402 (D. Haw. 1995) (Congress intended that citizen suits would serve as "an integral part of [the Clean Water Act's] overall enforcement scheme"); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987) ("citizens should be unconstrained to bring [Clean Water Act] actions") (quoting S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3746); *see also id.* ("Congress intended Clean Water Act citizen suits to be "handled liberally, because they perform an important public function"); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1095 (9th Cir. 1999) (noting Congress' intent to promote citizen enforcement of ESA); *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 560, 106 S.Ct. 3088 (1986) (Congress enacted Clean Air Act's attorney's fees provision "to promote citizen enforcement of important federal policies.").

EPD's Title V permit seriously undermines the citizen suit provision of the Clean Air Act. Condition 8.2.1 of the permit states:

> Except as identified as "State-only enforceable" requirements in this Permit, all terms and conditions contained herein shall be enforceable by the EPA and citizens **of the United States** under the Clean Air Act[.]

Ex. 9 at Condition 8.2.1 (Emphasis added). However, the relevant section of Part 70 provides that "all terms and conditions in a part 70 permit, are enforceable by the

Administrator and citizens under the Act." 40 CFR § 70.6(b)(1). This section clearly does not limit who may bring enforcement actions to citizens "of the United States." Furthermore, the Clean Air Act ends any debate on this issue. It provides that "any person" may bring a citizen suit. 42 U.S.C. § 7604(a). The Act goes on to define person as including "an individual, corporation, partnership, association, State, municipality, political subdivision of a state . . . ." 42 U.S.C. § 7602(e). Thus, the impact of this oversight is significant. Specifically, "citizens of the United States" represents a small subset of those who fall under the statutory definition of "person." As written, the EPD permit excludes corporations, both for and non-profit, counties, not to mention resident aliens and others whose immigration status is other than citizens of the United States.[8]

Nevertheless, EPD has argued that the use of the term "citizens of the United States," does not affect the fact that any person, as authorized by the Act, can enforce the permit. Ex. 1 at Addendum Page 7. EPD cites no authority for its argument. In addition, EPD ignores the permit shield in condition 8.16.1. Even assuming that EPD's position is correct, a plaintiff may be forced to litigate the issue. Even if a court would ultimately rule that any person, and not only a citizen of the United States, can enforce this permit, what could possibly be the value of forcing parties to expend valuable resources litigating an issue that could have been expeditiously addressed in the context of the permit? Surely draining public and private resources through protracted litigation does nothing to assure compliance with the provisions of a Title V permit. Moreover, given the misleading language contained in the permit, an individual untrained in the law may actually conclude that he or she cannot enforce the permit based on the plain language of the permit. Again, there is no value in

[8] The fact that Georgia's Title V permits claim to limit the rights of non-citizens of the United States raises serious environmental justice and equal protection issues.

allowing room for this confusion. Rather, the purpose of Title V permits assuring compliance is served by modifying the language.

Of course, the remedy is so simple that it is difficult to conceive any legitimate reasons for EPD to refuse Petitioner's request to modify the language. EPD simply needs to delete the phrase "of the United States," out of condition 8.2.1.

Furthermore, the permit is misleading by including mention of the public's right to sue under a section entitled "EPA Authority." We recommend that EPD create a separate section, which discusses the public's right to sue under a heading such as "Public's Enforcement Authority."

4. THE FACILITY'S PERMIT DOES NOT REQUIRE IT TO REPORT THE RESULTS OF ALL ITS MONITORING[9]

42 U.S.C. § 7661c(a) requires that all Title V permits require "the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring[.]" *Id.* 40 CFR § 70.6(a)(3)(iii)(A) requires that permit require "reports of any required monitoring at least every 6 months." *Id.* Anchor's permit does not contain any such requirement. *See* Ex. 7.

EPD claims that condition 5.3.1 of the permit satisfies the requirements of 42 U.S.C. § 7661c(a) and 40 CFR § 70.6(a)(3)(iii)(A). Ex. 1 at Addendum Page 7-8. However, condition 5.3.1, which references Condition 6.1.4, requires reporting of excess emissions, exceedances and/or excursions. Ex. 7 at 8-9. The reporting of these deviations is required by § 70.6(a)(3)(iii)(**B**). However, § 70.6(a)(3)(iii)(**A**) requires reporting of all monitoring. It is

[9] This issue was raised in Petitioner's Comment 4 at page 4-5, attached as Exhibit 3. Therefore, Petitioner has satisfied the requirement of 40 CFR § 70.8(d) that the petition points were raised with reasonable specificity during the public comment period.

a cardinal rule of statutory and regulatory interpretation that a regulation should be interpreted in such a manner as to not render any provision of the regulation meaningless. However, EPD's claim that reporting of deviations constitutes reporting of any required monitoring renders § 70.6(a)(3)(iii)(A) meaningless as it would be redundant to § 70.6(a)(3)(iii)(B).

It is true that Condition 6.1.4.b does require bi-annual reporting of total process operating time during each reporting period. Ex. 7 at 8. However, the Clean Air Act and Part 70 require reporting of *all* monitoring. For example, Condition 6.2.1 requires the permittee to measure, record and maintain records of the hourly production rates for each glass melting furnace. This is exactly the type of monitoring that § 70.6(a)(3)(iii)(A) requires to be reported at least bi-annually and that the Facility's permit does not require. Therefore, EPA should object to this permit and re-write the permit to require reporting of all monitoring ever six months.

VII. CONCLUSION

For the reasons explained above, pursuant to 40 CFR § 70.8(d) the US EPA should object to this permit and modify it as explained above.

Respectfully Submitted,

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CC: Sierra Club
Acting Regional Administrator, Region 4