

December 18, 2001

Joy Herr-Cardillo
Arizona Center for Law in the Public Interest
18 E. Ochoa Street
Tucson, Arizona 85701-1915

Dear Ms. Herr-Cardillo:

This is in response to your letter of March 12, 2001 in which you requested that the EPA make a determination that the Arizona Department of Environmental Quality (ADEQ) and Pima County Department of Environmental Quality (PDEQ) are inadequately administering Arizona's title V permit program. We are also responding to the correction and addendum to that letter, which you submitted on March 26, 2001. In your letters you identified a number of areas in ADEQ's and Pima's programs that you believe have serious deficiencies. We have researched each of your comments and enclosed with this letter our responses and a description of any additional action we will be taking. In summary, we have determined that the issues you raised do not constitute program deficiencies for the ADEQ or PDEQ title V programs. Our conclusions are more fully explained in the enclosed document.

Thank you for your interest and involvement in this process. We believe that one of the great contributions of the title V program is that it facilitates public participation in the permitting process. We hope that you will continue your involvement with the Arizona title V programs and take part in the review of title V permits.

Sincerely,

/s/

Jack P. Broadbent
Director, Air Division

Enclosure

EPA Response to ACLPI Request for a Determination Regarding the Administration by the Arizona Department of Environmental Quality and the Pima County Department of Environmental Quality of Arizona's Title V Permit Program

1. ACLPI comment: Arizona law restricts public access to title V permit documents in violation of the CAA. The trade secret and confidentiality provisions in ARS section 49-432 are overly broad.

EPA response: ACLPI originally raised this issue during the comment period on EPA's proposed interim approval of the Arizona programs (60 FR 36083, July 13, 1995). The Arizona Attorney General submitted a legal opinion to EPA stating that Arizona's confidentiality provisions would not interfere with the public's access to information. EPA deferred to the Attorney General's opinion and, in our final notice granting interim approval of the Arizona programs (61 FR 55915, October 30, 1996), we said that if we found that Arizona routinely withheld information that EPA would release under federal confidentiality provisions, we would revisit this portion of program approval.

On June 13, 2001, Ginger Vagenas of EPA Region 9 spoke with Joy Herr-Cardillo of ACLPI regarding ACLPI's concerns. Ms. Herr-Cardillo clarified that the purpose of ACLPI's comment was to request that EPA review the type of information ADEQ withholds rather than to make a specific allegation that ADEQ is withholding information that should be released.

EPA then contacted ADEQ regarding information it may have withheld from the public pursuant to these confidentiality provisions. ADEQ informed EPA that its policy governing public access to records provides that requesters should be notified in writing when a request is denied. When we requested copies of such notifications, ADEQ was unable to provide any such documents. Therefore, the paper trail that might allow us to determine the validity of ACLPI's comment does not appear to exist. However, ADEQ has indicated to EPA that it will fully comply with its policy to inform the public in writing when it withholds information it deems to be confidential. ADEQ has also agreed to send copies of such letters to EPA, which will enable us to monitor the type of information the State is withholding from the public and to determine if it is information that EPA would release under federal confidentiality provisions.

Because it is not currently possible to determine if information EPA would consider releasable has been withheld by ADEQ in the past, we do not have sufficient information to evaluate ADEQ's past implementation of this portion of its title V program. However as a result of this comment, EPA is committed to monitor ADEQ's compliance with the federal confidentiality provisions thus ensuring that all information the State withholds from the public is not information that EPA would otherwise release.

2. ACLPI comment: PDEQ and ADEQ charge excessive fees for the public to obtain copies of relevant documents. There is no legitimate justification for charging the public for time spent by a government employee. These fees [read expenses] should be absorbed by the program to ensure compliance with the CAA

EPA response: The CAA, 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 the CAA (see 502(b)(3)(A)) and part 70 (see 70.9(b)(1)) include a list of the reasonable costs that must be funded by fees collected under this program. Neither list includes the provision of copies of permit-related documents free of charge to the general public. EPA guidance on the matter (see August 4, 1993 John Seitz memo to EPA Regions “Agency Review of State Fee Schedules for Operating Permits Programs Under Title V”) 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.

EPA Region IX interprets the statutory and regulatory provisions (see CAA 503(e), 502(b)(8), and 70.4(b)(3)(viii)) 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. The statute also requires that permitting authorities have “reasonable procedures” for making documents available to the public (see CAA 502(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 is our understanding that ADEQ and PDEQ make readily available to the public for viewing purposes and in a timely manner, all relevant documents pertaining to a source’s title V permit.

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

3. ACLPI comment: Public notice under Arizona law fails to include the procedures required by 40 CFR 70.7(h)(1).

EPA response: ADEQ’s rules do not include the phrase “or any other means necessary to assure adequate notice to the affected public,” as set out in 40 CFR 70.7(h)(1). We identified this as a problem in our proposal to grant interim approval. In response, the Arizona Attorney General submitted an opinion citing ARS 49-104(B)(3), which gives ADEQ the power to utilize any medium of communication, publication and exhibition in disseminating information, advertising, and publicity in any field of its purposes, objectives and duties. In our final notice granting interim approval, we discussed this issue (61 FR 55914) and deferred to the Attorney General’s opinion that ADEQ has the power to provide notice by any means as necessary to assure adequate public notice.

When we contacted the commenter to ask if they could provide any specific examples they were unable to. They stated that the comment was made because of the discrepancy between the Arizona rules and the requirements of part 70 rather than because they knew of

instances where notice had been inadequate. EPA is not aware of evidence that suggests ADEQ is failing to provide adequate notice, however, we will continue to monitor ADEQ's public notice procedures.

In our final notice granting interim approval we explained our rationale for finding the Arizona rules adequate in this regard. Neither ACLPI nor any other commenter took issue with our determination at that time, so unless we find evidence that ADEQ is not providing adequate notice, there is no basis for reversing the position we took in our earlier interim approval notice in which we deemed the ADEQ rule acceptable

4. ACLPI comment: Public participation under Arizona law does not adhere to the minimum requirements of 40 CFR 70.7(a)(1)(ii). Federal law requires public notice and comment for all permit revisions except for modifications qualifying for minor permit modification procedures. Arizona law, however, allows public notice and comment only for a significant permit revision.

EPA response: Under part 70, there are three types of permit revisions: administrative, minor, and significant. Administrative and minor revisions do not require public notice. See 40 CFR 70.7(a)(1)(ii) and 70.7(h). Only significant revisions must be subject to public review. ADEQ Rule R18-2-330(A) provides: "The Director shall provide public notice, an opportunity for public comment, and an opportunity for a hearing before taking any of the following actions: 1) A permit issuance or renewal of a permit, 2) **A significant permit revision**, 3) Revocation and reissuance or reopening of a permit, 4) Any conditional orders pursuant to R18-2-328, 5) Granting a variance from a general permit pursuant to A.R.S. 49-426.06(E) and R18-2-507," (emphasis added). EPA finds this rule consistent with the public participation requirement in section 70.7(h).

5. ACLPI comment: Arizona's excess emissions allowance (R18-2-310) violates federal law. EPA should order ADEQ to repeal R18-2-310 and preclude ADEQ and PDEQ from issuing any permits that contain the excess emissions language of R18-2-310.

EPA response: In addition to provisions implementing section 70.6(g), (regarding an affirmative defense for "emergencies"), the Arizona program included an excess emissions rule (Rule 310) that was broader than 70.6(g). The inclusion of this rule, which is the subject of the ACLPI comment, was identified by EPA as an interim approval issue (See 61 FR 55910, October 30, 1996). In order to correct this interim approval issue, ADEQ removed R18-2-310 from its program. EPA subsequently approved its removal and granted full approval to ADEQ's title V program (see 66 FR 63175, December 5, 2001). Therefore, this deficiency is no longer in Arizona's program.

6. ACLPI comment: Arizona's excess emissions allowance fails to comply with EPA's policy regarding excess emissions. It therefore does not meet section 70.6(g).

EPA response: As noted above, ADEQ has deleted Rule 301 from its Title V operating permit program and submitted this revision to EPA for approval. EPA believes that this action

eliminated the deficiency and we approved this revision to the State's program on November 28, 2001 (See 66 FR 63175, December 5, 2001).

7. ACLPI comment: Arizona's blanket exemption of an entire source category (agricultural equipment used in normal farm operations) is unlawful.

EPA response: This issue was discussed in Arizona's interim approval notice. See 61 FR 55915 (October 30, 1996). During the public comment period for EPA's 1996 proposed interim approval, ACLPI commented that any attempt to permit an agricultural source could be challenged in court. The Arizona Attorney General provided an opinion stating that the statutory exemption for agricultural sources does not include equipment that requires a permit under title V or is subject to a regulation under parts 60 or 61.

EPA's final action granting interim approval deferred to the Attorney General's opinion but stated it would revisit the issue if there was a successful legal challenge to the regulation. So far there has not been a legal challenge. Therefore, EPA will continue to defer to the Attorney General's legal opinion on this matter.

8. ACLPI comment: Operations during start-up, shutdown, and malfunction are excluded from the definition of "representative operational conditions." Therefore, no testing or monitoring is required during those periods. EPA should require that ADEQ change its definition of operation conditions to allow for monitoring and emission limitations during start-up, shutdown, and malfunction. This exemption allows a permitted facility to exceed air quality standards in clear violation of 70.6(a)(6)(i). Federal law requires at a minimum that facilities operate so as to minimize emissions during startup, shutdown, and malfunction. 40 CFR 60.11(c).

EPA response: Both ADEQ and PDEQ permits contain a general condition that requires that source tests be conducted under representative operational conditions. This is a standard approach to source testing, and is in fact what EPA requires in its NSPS general provisions. This provision ensures that source tests are not conducted while a unit is operating in a mode that is not representative of typical operations. EPA disagrees with the commenter's contention that this language prohibits imposition or enforcement of monitoring or emissions limitations during non-representative operating conditions. Such violations are subject to enforcement action and may be proven by any credible evidence. Furthermore, in the preamble to the Federal Register notice that finalized EPA's credible evidence revisions (62 FR 8319, February 24, 1997), EPA discussed the use of credible evidence in compliance certifications:

"... if a source becomes aware of other material information that indicates that an emission unit has experienced deviations ... or may otherwise be out of compliance with an applicable requirement even though the unit's permit identified data indicates compliance, the source must consider this information, identify and address it in the compliance certification, and certify accordingly. This ensures, among other things, that sources will not certify compliance in circumstances where doing so would constitute a violation of CAA section 113(c) and 18 U.S.C. 1001, which prohibits a source from

knowingly making a false certification or omitting material information, or a violation of other prohibitions on fraud. EPA emphasizes, however, that its purpose here is to make clear that sources may not ignore obvious relevant information.

With regard to the federal requirement to minimize emissions during startup, shutdown, and malfunction, the commenter cites a requirement from EPA's NSPS regulations' general provisions. Section 60.11(c) applies only to NSPS standards.

9. ACLPI comment: Title V permits issued by PDEQ fail to require Method 9 testing as required by federal law. Regulations promulgated by EPA require that "compliance with opacity standards in this part **shall** be determined by conducting observations in accordance with Reference Method 9." 40 C.F.R § 60.11(b) (emphasis added); see also 40 C.F.R. § 60.48a(b)(3) (requiring the use of Method 9 for opacity determinations). ADEQ regulations also require that opacity be determined by Method 9. See A.A.C. R18-2-702(B)(2). However, in writing Title V permits, PDEQ has violated federal and state law by merely suggesting that permittees may use Method 9 for opacity determinations. See PDEQ Title V Permit Number 1571 (Draft) for Brush Wellman, Inc. at 17 (stating that "the permittee **may** use EPA Test Method 9 to monitor compliance with the 40% opacity standard." (emphasis added)).

EPA response: The Brush Wellman Permit cited by the commenter is not a title V permit. However, in order to address the commenter's concern with PDEQ's implementation of the applicable opacity testing requirements in title V permits, EPA reviewed all title V permits issued by PDEQ. In its original comment, ACLPI cites the NSPS requirement in the general provisions (40 CFR § 60.11(b)) as well as A.A.C. R18-2-702 (B)(2) as the applicable requirements which would require a source to perform a method 9 opacity test to assure compliance with an applicable opacity standard. PDEQ has issued seven title V permits to this date. None of those seven sources are subject to an applicable NSPS opacity standard. Only one of the seven sources, Tucson Electric Power-Irvington Station (TEP), is subject to ADEQ's opacity standard in A.A.C R18-2-702 (B)(2). In our review of the TEP permit, PDEQ does in fact require that opacity tests be conducted in accordance with EPA Reference Method 9.

The remaining six sources are subject to Pima County SIP Rule 321. Section A.2. of Rule 321 specifies how a violation of Rule 321's opacity standard may be determined, but does not refer specifically to EPA Method 9. PDEQ's title V permits, however, do provide that compliance with Rule 321 may be determined by EPA Method 9. Given EPA's policy on the use of "any credible evidence" to determine compliance, we believe PDEQ is specifying opacity test methods in an appropriate manner.