

December 14, 2001

Ms. Jessica Hodge
Clean Air Project
Sierra Club - Southern Nevada Group
1700 E. Desert Inn Rd., Suite 113
Las Vegas, Nevada 89109

Dear Ms. Hodge:

Thank you for your letter dated March 12, 2001 to EPA Region IX regarding possible deficiencies in the Clark County, Nevada title V operating permit program. Your letter was in response to EPA's announcement made in the Federal Register on December 11, 2000, that members of the public, during the 90-day period that followed our announcement, could identify deficiencies they perceive exist in State and local agency operating permits programs required by title V of the Clean Air Act ("Act"). We have elected to respond to you directly on the comments you made for which we do not agree are either title V program or implementation deficiencies in Clark County's program. Our responses to the specific comments you raised in your letter are contained in the enclosure to this letter.

By way of background, the opportunity for citizens to comment on the title V programs was the result of a settlement between EPA and the Sierra Club and New York Public Interest Group (NYPIRG) resolving a challenge to EPA's extension of the interim approval period for 86 operating permit programs until December 1, 2001. In the context of discussing settlement of that litigation, Sierra Club and NYPIRG raised concerns that many programs with interim approval, as well as those with full approval, have program and or implementation deficiencies.

In our December 11, 2000 Federal Register (65 FR 77377), we had asked members of the public to be as specific as possible in their comments and to not include in the comments any program deficiencies that were already identified as such by EPA when we granted the program interim approval. Further, we stated that comments that generically assert deficiencies for multiple programs would not be considered.

Your letter described eighteen (18) deficiencies that you believe exist in the Clark County, Nevada part 70 operating permits program. In general, your comments raised concerns in four areas: 1) permitting; 2) compliance and enforcement; 3) personnel and funding; and 4) public access to information. The attachment responds to all eighteen issues you raised as alleged deficiencies.

Again, thank you for your comment letter. Although we do not agree that the issues you raised constitute program deficiencies, we believe that your interest has made a difference in improving the part 70 program in Clark County. If you have any questions, please contact Gerardo Rios, Chief of the Permits Office at (415) 972-3974.

Sincerely,

/s/

Jack P. Broadbent
Director, Air Division

Enclosures

cc: Christine Robinson, Clark County DAQM

**EPA's Response to the Comments of Jessica Hodge, Sierra Club - Southern Nevada Group,
on the Clark County Title V Operating Permits Program**

Note: As EPA noted in our proposed approval of the Clark County title V program (66 FR 51620, October 10, 2001), on August 7, 2001, the Governor of Nevada officially transferred responsibility for air quality management in Clark County from the County's Health District to the newly created Department of Air Quality Management, overseen by the Board of County Commissioners of Clark County. In a letter dated June 21, 2001 to the Clark County Commission, Governor Guinn designates "the Board of County Commissioners as the regulatory, enforcement and permitting authority for implementing applicable provisions of the federal Clean Air Act, any amendments to that Act, and any regulations adopted pursuant to that Act within Clark County." The change is essentially a shift in the organizational location of the County's air quality management program and all rules, regulations, and policies of the Health District that comprise Clark County's title V operating permits program were carried over to the new Department, pursuant to the Governor's designation. Where your comments reference "the Clark County Health District (CCHD)" or "the District," we have used the terms "Clark County Department of Air Quality Management (DAQM)," "Clark County," or "the County."

Comment 1. Failure to meet statutory deadlines for acting on permit applications: Clark County has not issued all of their permits, as required by the Clean Air Act. The County has issued only one-third of their initial title V permits.

EPA's Response: A number of permitting authorities have not issued permits at the rate required by the CAA. EPA has determined that if a permitting authority submits a commitment to address this issue, the permitting authority will have taken "significant action" such that a notice of deficiency (NOD) is not warranted at this time. The commitment must establish semiannual milestones for permit issuance and provide that a proportional number of the outstanding permits will be issued during each 6-month period leading to issuance of all outstanding permits. All outstanding permits must be issued as expeditiously as practicable, but no later than December 1, 2003.

Clark County DAQM submitted a commitment and a schedule providing for the issuance of their remaining eleven permits no later than December 1, 2003. Clark County's commitment letter includes milestones that reflect a proportional rate of permit issuance for each semiannual period. A copy of Clark County DAQM's commitment letter is attached. Therefore, EPA believes that Clark County has taken "significant action" to correct the problem and thus does not consider it a deficiency at this time.

EPA will monitor Clark County's compliance with its commitment – performing semiannual evaluations. For so long as Clark County issues permits consistent with its semi-annual milestones, EPA will continue to consider that the County has taken "significant action" such that a notice of deficiency is not warranted. If the County fails to meet its milestones, EPA

will issue an NOD and determine the appropriate time to provide for the County to issue the outstanding permits.

Comment 2. 40 CFR 70.7(a)(2) requirement: Clark County's Section 19 (Part 70 Operating Permits) has no deadline for the County to take action on an initial title V permit application.

EPA's Response: Since the time that the commenter submitted her comment, Clark County has revised Section 19 to contain the following requirement at Section 19.5.1.4 (as adopted on May 24, 2001):

The Control Officer shall take final action on each permit application (including application for permit modification or renewal) within eighteen (18) months after receiving a complete application.

Clark County submitted revised Section 19.5.1.4 to EPA on June 1, 2001. EPA took final action incorporating this version of Section 19.5.1.4 into Clark County's approved operating permits program on November 30, 2001 (66 FR 63188). Since this section of Clark County's regulations is consistent with the federal requirements of part 70, there is no program deficiency.

Comment 3. Synthetic minor sources: Clark County does not take any action on title V permit applications submitted by facilities seeking status as synthetic minor sources.

EPA's Response: This comment is related to comment #2 above, in that the commenter cites the lack of a requirement for the County to take action on permit applications within a specified time period as a specific problem in dealing with sources requesting synthetic minor source status. Given that Clark County's Section 19 now requires action on any application within 18 months of receipt (including sources seeking synthetic minor status), EPA believes that the Clark County program is not deficient as alleged by the commenter. EPA agrees with the commenter's statement that sources initially identified as major who are seeking synthetic minor status must be issued a valid synthetic minor permit in order to be removed from consideration as a major part 70 source.

Comment 4. Failure to Issue Permits that Meet Act Requirements: Clark County often fails to require BACT in title V permits.

EPA's Response: EPA does not agree with the commenter's allegation. Our review of Clark County's proposed title V permits indicates that they do typically contain BACT limits and other requirements contained in preconstruction (NSR) permits. In some instances, proposed title V permits were withdrawn by the County in order to first sort out BACT and other NSR issues. Once the NSR issues were resolved, the title V permit then moved forward and included appropriate BACT limits. For the specific permit cited by the commenter (Simplot Silica Products), the final permit included a compliance schedule to correct an NSR issue and impose BACT, consistent with the County's title V program and EPA's part 70 regulations. The

compliance schedule does not absolve the company of liability for any violations of the Clean Air Act. EPA issued a notice of violation to the facility on September 24, 1999 and the Agency is currently in the final stages of negotiation with the facility to impose an appropriate BACT limit and penalties.

Comment 5. Inadequate monitoring: Another common deficiency in title V permits issued by the County is the failure to require monitoring adequate to ensure compliance with permit conditions.

EPA's Response: Section 504 of the Act states that each title V permit must include "conditions as are necessary to assure compliance with applicable requirements of [the Act], including the requirements of the applicable implementation plan" and "inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions." 42 U.S.C. §§ 7661c(a) and (c). In addition, section 114(a) of the Act requires "enhanced monitoring" at major stationary sources, and authorizes EPA to establish periodic monitoring, recordkeeping, and reporting requirements at such sources. 42 U.S.C. § 7414(a).

The regulations at 40 CFR 70.6(a)(3) specifically require that each permit contain "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit" where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring). In addition, 40 CFR 70.6(c)(1) requires that all part 70 permits contain, consistent with 40 CFR 70.6(a)(3), "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." These requirements are also incorporated into Clark County's Section 19, their title V operating permit regulations.

EPA recently clarified the scope of the title V monitoring requirements in two Orders responding to petitions under title V. See In re Pacificorp's Jim Bridger and Naughton Electric Utility Steam Generating Plants, Petition No. VIII-00-1, Nov. 24, 2000 ("Pacificorp") (available on the internet at <http://www.epa.gov/region07/programs/artd/air/title5/t5memos/woc020.pdf>), and In re Fort James Camas Mill, Petition X-1999-1, December 22, 2000 (http://www.epa.gov/region07/programs/artd/air/title5/petitiondb/petitions/fort_james_decision1999.pdf) for a complete discussion of these issues. In brief, the Administrator concluded that, where the applicable requirement does not require any periodic testing or monitoring, permit conditions are required to establish "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit." See 40 CFR 70.6(a)(3)(i)(B). In contrast, where the applicable requirement already requires periodic testing or monitoring but that monitoring is not sufficient to assure compliance, the separate regulatory standard at section 70.6(c)(1) applies instead to require monitoring "sufficient to assure compliance." The Administrator's interpretation is based on recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit, specifically Natural Resources Defense Council v. EPA, 194 F.3d 130 (D.C. Cir. 1999) (reviewing EPA's compliance assurance monitoring (CAM)

rulemaking (62 Fed. Reg. 54940 (1997)), and Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (addressing EPA's periodic monitoring guidance under Title V).

While some proposed permits submitted by Clark County initially did contain what EPA considered to be inadequate monitoring, in those cases EPA provided comments on the need for better monitoring and the County improved the monitoring accordingly. EPA also has the authority to formally object under 40 CFR part 70.8(c) if a proposed permit's monitoring is not sufficient to assure compliance with all applicable requirements. Thus far, EPA has not needed to formally object to any proposed permits from Clark County.

Comment 6. Lack of criminal enforcement authority: The County lacks the authority to provide for criminal enforcement of its title V program, contrary to the express requirements of the Act and part 70 regulations. Section 445B.500 of the Nevada Revised Statutes (NRS) requires the County to establish and administer an air pollution control program and grants certain powers to the County to carry out that program. In granting these powers, Section 445B.500(1)(d) specifically enumerates statutory provisions originally applicable to the Nevada Department of Conservation and Natural Resources that the County is empowered to carry out. Deliberately omitted from these specified provisions is NRS 445B.470, the statute that contains the criminal enforcement authority necessary to comply with the Act and part 70 regulations. Thus, the County has no authority under Nevada law to criminally enforce permits and other title V requirements.

EPA's Response: Since the commenter submitted her comment, the Nevada legislature revised NRS 445B.500 to clarify that the County has all necessary enforcement authority, including criminal enforcement authority required by part 70 regulations. NRS 445B.500 now reads, in pertinent part, as follows:

(c) The district board of health, county board of health or board of county commissioners is designated as the air pollution control agency of the county for the purposes of NRS 445B.100 to 445B.640, inclusive, and the federal act insofar as it pertains to local programs, and that agency is authorized to take all action necessary to secure for the county the benefits of the federal act.

(d) Powers and responsibilities provided for in NRS 445B.210, 445B.240 to **445B.470**, inclusive, 445B.560, 445B.570, 445B.580 and 445B.640 are binding upon and inure to the benefit of local air pollution control authorities within their jurisdiction. (emphasis added)

NRS 445B.460 provides authority to obtain injunctive relief and NRS 445B.470 provides criminal enforcement authority. Thus, NRS 445B.500, together with NRS 445B.470, provides the Clark County Board of Commissioners with the necessary criminal enforcement authority required by part 70. Clark County submitted revised NRS 445B.460, 445B.470, and 445B.500

as part of its revised title V program on June 1, 2001, and EPA incorporated these revisions into Clark County's approved operating permits program on November 30, 2001 (66 FR 63188).

Comment 7. Inability to obtain injunctive relief: The County also lacks adequate authority to obtain injunctive relief against violations of program requirements by part 70 sources. NRS 445B.560 provides for the authority to issue an order of abatement if "a generalized condition of air pollution exists or emissions from one or more air contaminant sources occur and the condition or sources create, or are likely to create, an imminent and substantial danger to health requiring immediate action to protect human health and safety." This statute is one of the provisions specifically enumerated in NRS 445B.500 as a power granted to the County. However, NRS 445B.560 does not provide such emergency powers in the event of a danger to the public welfare or the environment, as required by part 70 regulations. In addition, the County is not vested with the power to seek injunctive relief in court granted to the Department under NRS 445B.560. See NRS 445B.500(1)(d) (omitting NRS 445B.560 from list of powers granted to County).

EPA's Response: As noted in response to Comment #6 above, the Nevada Revised Statutes were modified to clarify the scope of the County's enforcement authority. The modification described in response to Comment #6 (which was submitted by Clark County to EPA on June 1, 2001 and incorporated into Clark County's operating permits program on November 30, 2001) also clarified that the County has the necessary authority to obtain injunctive relief as required by EPA's part 70 regulations.

Comment 8. Improper delegation of civil penalty authority: The County has improperly delegated its authority to recover civil penalties to the Air Pollution Control Hearing Board, an independent board composed of private citizens. Under title V of the Act, a permitting authority must have authority "to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation." CAA section 502(b)(5)(E).

EPA's Response: As noted by the commenter, section 502(b)(5)(E) of the CAA requires title V permitting agencies to have the "authority to recover civil penalties in a maximum amount of not less than \$10,000 per day for each violation." EPA's regulations stipulate that programs to be approved under part 70 shall have the authority "to assess or sue to recover in court civil penalties," and that "these penalties shall be recoverable in a maximum amount of not less than \$10,000 per day per violation." See 40 CFR 70.11(a)(3). Pursuant to NRS sections 445B.275 and 445B.500(3), the Clark County Board of County Commissioners has appointed a local air pollution control hearing board and provided them "authority to determine violations and levy administrative penalties." According to the Clark County Office of the District Attorney, the air pollution control hearing board is a branch under the Board of County Commissioners and is not a separate, independent entity. See Clark County Bill No. 7-10-01-1. EPA disagrees that the Board of County Commissioners' use of an appointed hearing board to adjudicate enforcement proceedings is an unlawful delegation of their enforcement authority. EPA believes that Clark

County's enforcement authority is consistent with the title V program requirements of the Act and part 70 regulations.

Comment 9. Audit/privilege law: Nevada's environmental audit privilege law unduly restricts what little authority the County has to enforce the provisions of its title V program. In addition, these laws potentially limit public access to information in a manner that is inconsistent with title V and part 70 regulations.

EPA's Response: On May 30, 2001, the Nevada Attorney General's Office issued a statement clarifying that the audit/privilege authority does not extend to any federally enforceable requirements, such as applicable requirements under the title V program. (See attached letter from William J. Frey, Deputy Attorney General, to Nancy Marvel, Regional Counsel, EPA Region IX) As for the issue of limiting public access to information, the Nevada AG's statement clarifies that "the privilege created by Nevada's Audit Law extends only to the self-critical analysis in the audit report and not the underlying facts and does not include any information required by law or regulation to be collected, maintained, reported, and/or otherwise made available to the public." EPA responded to the State's letter that the Deputy AG's opinion resolves any concerns EPA has with respect to the State's Audit Law and the approval of federal programs. (See attached letter, dated June 11, 2001, from Laura Yoshii, Acting Regional Administrator, EPA Region IX, to Allen Biaggi, Administrator, Nevada Division of Environmental Protection)

Comment 10. Personnel and funding: The County fails to provide for adequate personnel and funding to administer the title V program.

EPA's Response: There have been numerous changes in personnel at Clark County over the last year, as well as the recent re-organization which moved control of the Air Quality Division from the Health District to the Clark County Board of Commissioners. While it is difficult at this stage to gauge the impact of these changes, EPA believes the changes indicate a renewed commitment on the part of Clark County to ensure an adequate level of staff and funding for administration of the County's air quality programs, including the title V permitting program. In addition, EPA will continue to conduct active oversight of the Clark County title V program to ensure that their implementation of the program meets all federal requirements.

Comment 11. Preconstruction permit errors: Inadequate permit requirements in pre-construction permits are often carried over to part 70 permits because the County does not require that these problems be addressed before issuance of an operating permit.

EPA's Response: This is similar to the issue raised by the commenter in Comment #4 above that BACT limits are not carried over into Clark County's title V permits. EPA disagrees that inadequate permit requirements in pre-construction permits are often carried over to part 70 permits. For some proposed title V permits, the process of developing the permit has brought to light some concerns about the pre-construction permitting history at the source. In these instances, the County has worked to resolve the NSR issues before issuing the title V permit. In

addition, where a facility identifies a compliance problem, Clark County's regulations and part 70 allow permitting of the source to go forward as long as the permit contains a compliance schedule, which includes specific milestones and progress reporting. Of course, issuance of a compliance schedule does not absolve the facility of liability for violations of preconstruction requirements.

Comment 12. Confidential business information: Nevada law contains an overly broad definition of confidential information; while District regulations were changed to match federal requirements, Nevada law must be similarly revised to reflect EPA's more restrictive definition of confidential business information.

EPA's Response: EPA's definition of confidential information at 40 CFR 2.301 states that "emissions data" may not be considered confidential. Nevada law and the County's regulations state that "emissions" may not be considered confidential and, as an interim approval issue, EPA required that the County adopt EPA's narrower definition or provide a legal opinion that the Clark County program does not contain more restrictions on public access to information than federal regulations. As described in EPA's proposed approval of Clark County's title V program revisions (See 66 FR 51620), on May 24, 2001, Clark County revised section 19.3.1.3(a) to clarify that the County may not consider "emissions data" (rather than just "emissions") as confidential information which is not available to the public, which is what EPA instructed them to do in our final notice granting interim program approval. Clark County submitted revised Section 19.3.1.3(a) to EPA as a revision to its title V program. EPA approved this revision as part of our approval of Clark County's title V program on November 30, 2001 (66 FR 63188).

EPA does not believe that Nevada law needs to be changed to match the federal definition of confidential information. The Nevada State Attorney General's opinion supports this view in its interpretation that the state's laws are consistent with federal regulations regarding confidential information. (See Nevada Attorney General's Opinion issued November 13, 1993 and submitted with Clark County's original title V program submittal).

Comment 13. Annual enforcement reports: The County fails to submit annual reports of enforcement activities, as required by part 70.

EPA's Response: 40 CFR 70.4(b)(9) requires state and local agencies to submit at least annually to EPA the following title V enforcement information:

- a. The number of criminal and civil, judicial and administrative enforcement actions either commenced or concluded;
- b. The penalties, fines, and sentences obtained in those actions; and
- c. The number of administrative orders issued.

Clark County presently reports all of the section 70.4(b)(9) enforcement information electronically

to EPA's national enforcement database, the Aerometric Information Retrieval System, or AIRS. Clark County has met, and EPA has every reason to believe that they will continue to meet, this important title V enforcement reporting requirement. Moreover, the County provides this information on an on-going basis which keeps the data more up-to-date than it would be if they provided only a single, annual report. Given Clark County's record of providing the information required by part 70, as well as the County's commitment to continue submitting the required enforcement information through AIRS, EPA does not agree that this comment is the basis for a notice of deficiency.

Comment 14. Monitoring reports: The County's permit files lack the required monitoring reports for part 70 sources.

EPA's Response: 40 CFR 70.6(a)(3)(iii)(A) requires sources to submit reports of any required monitoring at least every six months. Clark County Section 19.4.1.2(c)(1) is actually more stringent than the federal requirement in that it requires sources to submit reports of required monitoring every three months. Clark County has informed EPA that it does require its title V permitted facilities to submit quarterly monitoring reports, and those reports are contained in the County's title V source files. The commenter alleges that their inspection of the County's files did not reveal the presence of such quarterly monitoring reports. According to Clark County, the commenter may have mistakenly reviewed NSR files rather than title V files. This is supported by the commenter's reference to the PABCO monitoring reports for the first and second quarters of 1997. PABCO's title V permit was not issued until 1999, which indicates that the monitoring reports reviewed by the commenter are not reports submitted pursuant to title V requirements. Although EPA does not agree that the commenter has identified an implementation deficiency in Clark County's title V program, the Region will continue to monitor compliance by Clark County and sources with this requirement since the quarterly monitoring reports required by the County's local rules (and part 70 regulations) are also submitted to the Region.

Comment 15. Lack of inspection: Based on the inspection histories reviewed by the commenter, the County fails to adequately inspect part 70 permittees.

EPA's Response: While the commenter alleges that Clark County fails to adequately inspect part 70 permittees, EPA records do not support this allegation. According to EPA records, the County has inspected all of the sources with final title V permits within the last 12 months. In Clark County's Compliance Monitoring Strategic Plan, included as part of the County's revised operating permits program submittal, the County has committed to continue inspecting all part 70 sources once or twice per year.

Comment 16. Compliance certifications: The County's permit files reviewed by the commenter lack the required compliance certifications for part 70 sources. Annual compliance certifications are an integral part of an approvable title V program.

EPA's Response: The County has issued 9 final title V permits and each of the permits contains

the part 70 and Section 19 mandated requirement that the source submit an annual compliance certification. According to enforcement staff at Clark County, they have received compliance certifications from 6 of the 9 sources issued title V permits. (EPA Region IX does not yet have a copy of all of these compliance certifications, but we have requested them from the County). Two sources have not had their title V permits for a year, so they have not yet had to submit the annual certification. The County is pursuing an enforcement action against the one title V source that should have, but has not, submitted a compliance certification. As noted in our response to Comment # 14, it also appears that the commenter may have mistakenly reviewed NSR rather than title V files, which would explain their claim that the files did not contain compliance certifications.

Comment 17. Public access to information: The County's policies and practices with respect to public access to title V records are inconsistent with title V, part 70 regulations, and Nevada law.

EPA's Response: As part of their revised program submittal, Clark County provided their Interim Policy for Title V Records, dated June 1, 2001. This policy states that it is the County's policy "that all Title V records, except the contents which are entitled to protection under Section 114(c) of the Clean Air Act or declared by law to be confidential, are available for public inspection at all times during office hours, and may be fully copied at the actual cost to the requestor." This policy is consistent with title V, part 70, and Nevada Revised Statutes sections 239.010 and 239.052 (as cited by the commenter).

Comment 18. Lack of enforcement: The County fails to require compliance with permit conditions and does not adequately enforce violations of program requirements.

EPA's Response: As part of their title V program revision, Clark County submitted a title V Compliance Monitoring Strategic Plan. This strategic plan outlines and explains the County's standard procedures and commitments for targeting and conducting inspections, evaluating source compliance, addressing various types of violations, and reporting compliance and enforcement data to EPA. The Plan contains the enforcement policies, descriptions of the County's enforcement program, compliance tracking activities, and inspection strategies that are required by 40 CFR 70.4(b)(4) and (5) (70.4(b)(4) requires the submittal of criteria for monitoring source compliance (e.g., inspection strategies) and 70.4(b)(5) requires submittal of a complete description of the State's compliance tracking and enforcement program or reference to any agreement the State has with EPA that provides this information).

Furthermore, the District's commitments, as outlined in their Compliance Monitoring Strategic Plan, demonstrate that the State is enforcing the part 70 program consistent with the requirements of part 70. Part 70.10(c)(iii) notes criteria for a finding that a State is failing to adequately enforce their part 70 program. These criteria include:

- (A) Failure to act on violations of permits or other program requirements;

- (B) Failure to seek adequate enforcement penalties and fines and collect all assessed penalties and fines; or
- (C) Failure to inspect and monitor activities subject to regulation.

EPA believes that the criteria in part 70.10(c)(iii) are not present given the District's implementation of their submitted Plan.