November 29, 2001

(A-18J)

John Blair
Valley Watch, Inc.
800 Adams Avenue
Evansville, Indiana 47713

Dear Mr. Blair

Thank you for your March 12, 2001, letter regarding Valley Watch, Inc.'s comments on Indiana's Clean Air Act title V operating permit program. You submitted your comments in response to the United States Environmental Protection Agency's (U.S. EPA's) Notice of Comment Period on operating permit program deficiencies, published in the Federal Register on December 11, 2000. Pursuant to the settlement agreement discussed in that notice, U.S. EPA is issuing notices of program deficiencies for individual operating permit programs, based on the issues raised that U.S. EPA agrees are deficiencies, and is responding to other concerns that U.S. EPA does not agree are deficiencies within the meaning of part 70.

We reviewed the issues that you raised in your March 12, 2001, letter and determined that some issues indicate permit-specific deficiencies. However, we have determined that these issues are not systemic and therefore do not constitute deficiencies within the meaning of part 70. U.S. EPA's response to each of your program concerns is enclosed.

We appreciate your interest and efforts in ensuring that Indiana's title V operating permit program meets all Federal requirements. If you have any questions regarding our analysis, please contact Sam Portanova at (312) 886-3189.

Sincerely,

/s/

Bharat Mathur, Director
Air and Radiation Division

Enclosure

cc: Janet McCabe, Assistant Commissioner
Office of Air Quality
Indiana Department of Environmental Management

Enclosure

U.S. EPA's Response to Valley Watch, Inc.'s Comments on Indiana's Title V Operating Permit Program

1. Comment: *IDEM is using Title V permits to make certain major sources "minor" with respect to the Clean Air Act's nonattainment New Source Review (NSR) and Prevention of Significant Deterioration (PSD) programs, even though these sources were required to apply for PSD/NSR permits long ago. It appears that the Title V permit for Fort Wayne Foundry Corp. Pontiac Street Division (operating permit number T003-6027-00070) makes the facility minor for PSD even though it appears that the facility should have applied for a PSD permit in 1986. The Title V permit for Hamilton Foundry and Machine Co. also allows the source to avoid PSD in the same manner. This is not an isolated case.*

   Indiana's policy of excusing NSR and PSD violations is in conflict with U.S. EPA's "Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements." In that guidance, U.S. EPA explains that when a case involves a source that failed to obtain any type of permit or limit at the time of construction, the source should not be allowed to avoid the installation and operation of pollution control equipment or process changes by obtaining a 'synthetic' minor limit after the fact unless compelling circumstances exist.

The identified problem is a permit-specific issue, not a Title V program deficiency. Although you have identified this problem in the two foundry permits mentioned above, U.S. EPA has not seen this as a recurring issue in our review of Indiana permits. U.S. EPA will continue to monitor this issue as part of its permit oversight responsibilities.

Regarding your allegation that Indiana is excusing NSR and PSD violations by inappropriately making certain major sources "minor," we agree that the Fort Wayne Foundry and Hamilton Foundry permits do not adequately demonstrate that these sources meet the limited requirements, as set forth in U.S. EPA guidance, for qualifying for a synthetic minor permit after the source failed to obtain the proper construction permits. U.S. EPA generally does not allow sources that should obtain pre-construction permits to avoid that obligation after the fact. However, U.S. EPA's injunctive relief guidance memorandum provides for limited circumstances under which a source that has failed to obtain a construction permit may obtain a synthetic minor limit after it achieves BACT/LAER equivalent emission reductions. This scenario is limited to instances where a

source's actual emissions have never exceeded the major source threshold. The Fort Wayne Foundry and Hamilton Foundry permits do not adequately demonstrate that these sources meet this limited scenario. Therefore, we have referred these sources to the U.S. EPA Region 5 air enforcement staff to investigate whether the sources have avoided compliance with the PSD requirements. After the conclusion of this investigation, U.S. EPA will discuss any remaining deficiencies in these two permits with IDEM and will take appropriate action if we cannot resolve the issues satisfactorily .

2. Comment: *Indiana has recently passed a statute that limits the liability of companies that have violated PSD/NSR requirements. Under that statute and associated policies, IDEM is generally excusing most facilities that failed to apply for a PSD or NSR permit at the time that they performed a major modification.*

The limited liability statute, IC 13-17-7, addresses failure to obtain a permit. According to IC 13-17-7-3, this provision does not limit a source’s liability for failure to obtain, in advance, a PSD or NSR construction permit as required under the Clean Air Act. However, this statute does provide a limit of $3,000 on civil penalties that the state can impose on a source for failure to obtain a construction permit. U.S. EPA agrees that this limit on penalties is a restriction on enforcement authority required by 40 CFR 70.11. However, this limit is only available to sources that submitted a complete Title V or Federally Enforceable State Operating Permit application by November 16, 1996. The statute states that the unpermitted activity must have been included in this application for a source to be able to use this provision. Indiana's statute of limitations, required IDEM to commence enforcement action against these facilities within 3 years of notification of these violations, or November 16, 1999 at the latest. Since this statute was only available to sources that identified unpermitted activities to IDEM by November 16, 1996, and IDEM was required to take action on these sources by November 16, 1999, this statute is no longer available for sources which have failed to obtain a permit. Since this statute can no longer restrict civil penalties against Title V sources, U.S. EPA does not consider this to be a deficiency of the Indiana Title V program. However, in order to eliminate any confusion regarding the use of this statutory provision, Indiana has agreed to delete the limited liability provision from its statutes.

3. Comment: *The limits included in the Fort Wayne Foundry permit that are designed to keep the facility's emissions below major source levels are ineffective. The monitoring*

required under the permit to assure compliance is very poor. There is no ongoing monitoring, record keeping, or reporting required to assure that the facility's furnaces comply with particulate matter (PM) limits. A one-time stack test would not satisfy monitoring requirements under 40 CFR Part 70.

Section 504 of the Clean Air 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 C.F.R. §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 C.F.R. § 70.6(c)(1) requires that all Part 70 permits contain, consistent with 40 C.F.R. § 70.6(a)(3), "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit." Indiana has incorporated these requirements into its regulations at 326 IAC 2-7-5(3).

U.S. 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") (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 C.F.R. § 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).

As applied to the Fort Wayne Foundry permit, for the units permitted in section D.2, the infrequent testing in condition D.2.3. is supplemented by more frequent monitoring, recordkeeping, and reporting requirements in permit conditions D.2.4. and D.2.5, and therefore satisfies the requirement of section 70.6(c)(1) that monitoring be sufficient to assure compliance. However, we agree that the monitoring requirements of permit condition D.2.4. are not sufficient to assure compliance. This condition defines normal as "conditions prevailing, or expected to prevail, eighty percent (80%) of the time the process is in operation, not counting startup or shut down time." We do not believe that recording "normal" visible emissions adequately demonstrates compliance with the emission limits of permit condition D.2.1. This permit is currently under appeal by the facility. After the conclusion of this appeal process, U.S. EPA will discuss any remaining deficiencies with IDEM and will take appropriate action if we cannot resolve the issues satisfactorily.

The identified problem, however, is a case-by-case permit issue and not a Title V program administration deficiency. Moreover, U.S. EPA has not seen this as a recurring issue in our review of Indiana permits, and therefore, we have no basis at this time for finding that Indiana is inadequately administering its Title V program. U.S. EPA will continue to monitor this issue as part of its permit oversight responsibilities. In accordance with the Clean Air Act section 505(b) and 40 CFR § 70.8(c), U.S. EPA may object to any proposed permit we determine not to be in compliance with applicable requirements or the requirements of part 70.

4. Comment: *The required one-time testing in the Fort Wayne Foundry will only measure PM, rather than PM-10 (which is particulate matter with a diameter of 10 microns or less).*

The testing requirements in question apply to emission units that are not subject to PM-10 emission limits. These units were constructed before U.S. EPA established PM-10 as a regulated pollutant, and therefore would not have been subject to PM-10 requirements for PSD at the time of construction. As stated in items 1 and 3 of this letter, U.S. EPA has concerns about establishing synthetic minor limits for these emission units and about the adequacy of the periodic monitoring for these emission units. However, U.S. EPA does not find the lack of a PM-10 testing requirement to be a deficiency of the Indiana Title V program.

5. Comment: *The Fort Wayne Foundry permit allows the facility to rely on AP-42 emission factors to demonstrate compliance with permit limits, even though AP-42 emission factors are only rough estimates of potential emissions and are not designed for measuring a facility's compliance with applicable emission limits.*

We were not able to find instances in the Fort Wayne Foundry permit which relied on AP-42 emission factors to demonstrate compliance with permit limits. Moreover, U.S. EPA has not seen this as a recurring issue in our review of Indiana permits, and therefore, we have no basis at this time for finding that Indiana is inadequately administering its Title V program. We agree that this practice would not be acceptable. Sources do have the option of relying on AP-42 emission factors to predict future potential emissions. However, such emission factors are only estimates and cannot be relied upon to demonstrate compliance. As discussed herein, U.S. EPA will continue to monitor this issue as part of its permit oversight responsibilities. In accordance with the Clean Air Act section 505(b) and 40 CFR § 70.8(c), U.S. EPA may object to any proposed permit we determine not to be in compliance with applicable requirements or the requirements of part 70.