

**United States Environmental Protection Agency – Region III  
Air Protection Division**

---

In the matter of: )  
)  
Federal Clean Air Act Title V )  
Operating Permit Program Conducted by )  
Department of Environmental Quality, )  
Commonwealth of Virginia; and )  
)  
Proposed CAA Title V Federal Operating )  
Permit for Honeywell, Inc., Hopewell, VA )  

---

**Comments and Petition Concerning Selected Deficiencies in  
the Virginia Title V Federal Operating Permit Program and its Implementation  
in a Proceeding Involving an Operating Permit for Honeywell, Inc.**

**PETITIONERS AND COMMENTORS:**

SIERRA CLUB - VIRGINIA CHAPTER  
Glen Besa, Chapter Director  
6 North Sixth St., Suite 401  
Richmond VA 23219  
(804)225 9113; (804)225 9114 (fax)

ALEXANDER J. SAGADY  
Environmental Consultant to Sierra Club  
657 Spartan Ave., PO Box 39  
East Lansing, MI 48826-0039  
(517)332-6971; (517)332-8987 (fax)

## Table of Contents

|     |   |    |
|-----|---|----|
| 1   | Introduction .....  | 1  |
| 2   | Facts Concerning the Virginia Department of Environmental Quality’s<br>Impermissible Failure to Disclose Information Related to a Title V Permit<br>Proceeding .....  | 1  |
| 2.1 | Introductory Facts .....  | 1  |
| 2.2 | Virginia DEQ Withholds Information on Federally Enforceable Applicable<br>Requirements as Confidential Business Information .....   | 3  |
| 2.3 | Virginia DEQ Withholds “Emission Data” Information Elements as<br>Confidential Business Information .....   | 5  |
| 2.4 | Example Exhibits Showing Virginia DEQ’s Unlawful Non-Disclosure of<br>the Mandatory Disclosure Information Elements Cited Above .....   | 6  |
| 3   | Facts Concerning the Virginia Department of Environmental Quality’s Excessive<br>Fees for Copying Documents Related to Title V Permit Proceedings .....   | 7  |
| 4   | Petitioner’s Statutory and Regulatory Analysis of Virginia DEQ’s Obligations on<br>Public Documents and Public Disclosure Under the Federally Approved Title V<br>Operating Permit Program .....  | 7  |
| 4.1 | A Title V Operating Permit May Not Contain Confidential Provisions and<br>the Contents of Such a Permit Must be Disclosed in its Entirety .....   | 7  |
| 4.2 | The Effect of the Title V Permit Confidentiality Prohibition on Required<br>Disclosures in the Underlying Permit Application .....  | 8  |
| 4.3 | Required State Submittal of Federal Operating Permit Applications to EPA<br>Ensures that DEQ May Not Afford Applications More Protection for<br>Confidential Business Information Under DEQ Confidentiality Rules than<br>EPA Provides for Such Information ..... | 9  |
| 4.4 | Clean Air Act Title V Provisions Mitigate for Fee Waivers on Duplication<br>of Documents Needed for the Public to Participate in Title V Permit<br>Proceedings .....  | 11 |

5 Petitioner’s Argument and Analysis that Virginia DEQ Has Violated Public Disclosure Requirements and Required Program Operational Elements Under the Federal Clean Air Act, the Virginia Air Statute and Under Related Federal and State Air Pollution Administrative Regulations . . . . . 12

5.1 Petitioner’s Determinations Concerning the Nature of Material that Virginia DEQ has Impermissibly Failed to Disclose in the Context of Federal and State Clean Air Program Operational Elements and Public Disclosure Requirements . . . . . 12

5.2 Virginia DEQ’s Violation of Requirements Related to the Federal Operating Permit Program . . . . . 13

6 Commentor’s and Petitioner’s Request for Relief . . . . . 15

## **Exhibit List**

| Exhibit | Description  |
|---------|--|
| 1       | Petitioner's August 5, 2000 Freedom of Information Act request to the Virginia Department of Environmental Quality Piedmont Office   |
| 2       | Petitioner's January 16, 2001 Petition, Notice of Violation, Motion for Compliance and Director's Final Order and Comment in the Honeywell Title V Operating Permit Proceeding   |
| 3.      | February 1, 2001 letter from Thomas M Felvey, VFOIA Officer, Virginia Department of Environmental Quality to Glen Besa, Sierra Club of Virginia  |
| 4       | EPA Policy on Disclosure of Emission Data Claimed as Confidential under Sections 110 and 114(c) of the Clean Air Act, February 21, 1991 Federal Register notice; 56 FR 7042-7043   |
| 5       | Pages from the June 30, 1998 Honeywell Title V Federal Operating Permit Application for its Hopewell, VA Complex with Information Claimed by Honeywell as Confidential Redacted; This Information Provided by Virginia DEQ on February 1, 2001 |
| 6       | Minor Source Modification Permit Issued by Virginia DEQ to Honeywell, Inc. on January 23, 1998 (Extensively cited in Title V Application)  |
| 7       | Minor Source Modification Permit Issued by Virginia DEQ to Honeywell, Inc. on April 18, 2000   |
| 8       | Engineering and Netting Analysis for the April 18, 2000 NSR Permit Showing Redacted Information in the Netting Analysis  |
| 9       | September 28, 2000 invoice of Virginia DEQ for duplication charges   |
| 10      | Undated invoice of Virginia DEQ for duplication charges on Smurfit-Stone Container file  |

## **1 Introduction**

On December 11, 2000, the U.S. Environmental Protection Agency published a notice at 65 FR 77376 requesting comments concerning program deficiencies in state operating permit programs. The notice sought comment on:

“The deficiencies the public claims exist can be either deficiencies in the substance of the approved program or deficiencies in how a permitting authority is implementing its program.”<sup>1</sup>

In this Comment and Petition, Petitioners raise two issues concerning the Federal Operating Permit program of the Department of Environmental Quality (DEQ), Commonwealth of Virginia that have arisen during Petitioner's reasonable and valid attempts to participate in a Virginia DEQ Federal Operating Permit proceeding involving Honeywell, Inc. of Hopewell, VA.

The first issue involves the failure of Virginia DEQ to disclose information relevant to public review of the Honeywell Title V application. The second issue involves exorbitant fees for the duplication of documents needed for public review of federal operating permit applications.

Petitioners and commentors lay out the facts of these two matters in subsequent sections of this document and attachments. Petitioners provide statutory and regulatory analysis addressing issues of mandatory information disclosure in this document and in the attached Petition to the Virginia DEQ which is incorporated by reference. Finally, Petitioners argue that Virginia DEQ has violated these mandatory disclosure requirements and Petitioners make their request of EPA Region III to take action to resolve this matter.

## **2 Facts Concerning the Virginia Department of Environmental Quality's Impermissible Failure to Disclose Information Related to a Title V Permit Proceeding**

### **2.1 Introductory Facts**

On August 5, 2000 petitioners submitted a public document request to the DEQ Piedmont Regional Office FOIA Officer pursuant to applicable provisions of the Virginia Freedom of Information Act and the Federal Clean Air Act (See Exhibit 1) . The request

---

<sup>1</sup> 65 FR 77376

involved requested disclosure of documents relating to industrial facilities operated in Hopewell, VA by Honeywell, Inc. and Smurfitt-Stone Container.

Among other documents requested, Petitioner's request to Virginia DEQ involved a request for access to the Honeywell, Inc. (previously Allied-Signal, Inc.) application for a Title V permit and the underlying new and modified source review documents (such as applications, major and minor source permits, staff reports, statement of staff conclusions and netting analysis).

On August 10, 2000, Zelda M. Hurdy, DEQ Piedmont Office FOIA Officer responded in writing to the request. Subsequently, by mutual agreement, an appointment was made to allow petitioner's inspection of documents to take place during the week of September 11-15, 2000. Petitioner's actual review of the documents began on September 12 because of a travel delay and continued the rest of the week.

As a result, Virginia DEQ had a time interval from about August 10, 2000 until September 11, 2000 to ensure that all documents that were requested were available for disclosure to Petitioners.

At the September 12-15 file review by petitioner, it soon became apparent that many documents and significant information were not provided by Virginia DEQ staff in response to Petitioner's request. Entire file jackets for new source review permits were missing or otherwise not provided. Some permit files contained sheets substituted for the text of new source review permits that stated that the entire text of the permit was confidential.

After Petitioners took time to review documents that were provided and were requested for duplication, Petitioners filed an extensive document on January 16, 2001 (See Exhibit 2) with the Director of the Virginia Department of Environmental Quality as Respondent entitled:

“Petitioner's Notice to Respondent of DEQ Violation of Virginia Freedom of Information Act, Federal Clean Air Act, Applicable Federal Regulations, Virginia Air Statute and Applicable DEQ Administrative Regulations

Motion for DEQ Compliance, Director's Final Orders and Requested Relief

Public Comment for the Record Concerning the Application by Honeywell, Inc. for a Federal Operating Permit and Several Previous NSR Permits”

Petitioners incorporate the entire text of their January 16, 2001 Petition to the Virginia DEQ Director into this Petition to U.S. EPA Region III. Petitioner's ask that U.S. EPA review the extensive statutory references and factual basis articulated by Petitioners in the January 16, 2001 document.

Petitioner's filing with the Virginia DEQ listed the materials which should have been disclosed but had not been provided as of the date of the petition and notified that agency that Petitioners regarded the agency conduct to be in violation of federal and state law. Petitioners asked for a formal response and Director's final order under the Virginia Administrative Process Act in compliance with the Virginia Freedom of Information Act that identified the statutory basis for documents that Virginia DEQ withheld from disclosure.

More specifically, Petitioner's filing with the Virginia DEQ identified the federal and state statutory basis that required mandatory disclosure for information constituting "emissions data" and "federally enforceable applicable requirements."

On February 1, 2001, the Virginia DEQ responded to the January 16, 2001 Petition and Notice of Violation (See Exhibit 3). This letter was accompanied by a significant amount of additional disclosed information. With this disclosure, in general, Virginia DEQ was no longer in the posture of withholding the text of entire new source review permits that are underlying to the Title V application as confidential. However, Virginia DEQ's response clearly articulated the agency's intent to make other information confidential for which both federal and state mandatory disclosure requirements apply.

Virginia DEQ attempted to justify its denials of information elements that were "federally enforceable applicable requirements" and "emissions data" in its February 1, 2001 letter by citation to 9 VAC 5-170-60. However, nothing in this regulation shows how Virginia DEQ could possibly have construed information that is plainly "emission data" and "federally enforceable applicable requirements" as meriting confidential treatment under this regulation.

## **2.2 Virginia DEQ Withholds Information on Federally Enforceable Applicable Requirements as Confidential Business Information**

The February 1, 2001 Virginia DEQ letter and the materials provided (along with specific redactions made in these additional materials) made it clear to Petitioners that the Virginia DEQ is continuing to insist that it will provide confidential status at Honeywell's request to "federally enforceable applicable requirements" designed to limit the potential to emit as such information is contained in the Honeywell's June 30, 1998 CAA Title V

operating permit application, underlying minor modification new source review permits and materials supporting to such NSR permitting.

The federally enforceable applicable requirements limiting potential to emit primarily include limitations on maximum production rates and maximum throughput rates that are cited in the Title V operating permit application and which are extensively cited in the underlying minor modification NSR permits.

For a detailed regulatory argument on why such conditions must not be held confidential, Petitioners refer EPA Region III to the briefing discussion on this issue in the attached January 16, 2001 Petition to the Virginia DEQ (See Exhibit 2).

Virginia DEQ's letter of February 1, 2001 contains the following passage in most of the sections on denial of permit information describing how the agency is holding legally enforceable maximum production and throughput rates contained in the permits as confidential:

“The requested information is attached with confidential information redacted. The process feed and production rate limitations in the permit were deemed confidential, since the revelation of such throughputs could potentially reveal formulations or process trade secrets. All emissions limitations were listed in the permit since these values cannot be held confidential by law.”<sup>2</sup>

This response is an oxymoron since all conditions that limit potential to emit are deemed as “federally enforceable applicable requirements” under the Clean Air Act that are enforceable not only by EPA, but also by citizens. Since the limitations on production rate and throughput limits have been placed into the permit to limit the potential to emit on equipment that would otherwise be deemed as a major modification source subject to PSD BACT and public notice or that would otherwise be needed for netting considerations, these must be federally enforceable limitations. However, Virginia DEQ has decided that it will not disclose this information to the public.

---

<sup>2</sup> See, for example, the denial language regarding disclosure of the October 13, 1995 permit. Similar or identical denial language is used for several of the other permits and their redacted limitations on the potential to emit.



### **2.3 Virginia DEQ Withholds “Emission Data” Information Elements as Confidential Business Information**

The February 1, 2001 Virginia DEQ letter and the materials provided (along with specific redactions made in these additional materials) also made it clear to Petitioners that the Virginia DEQ is continuing to insist that it will provide confidential status to information elements that EPA presently considers to constitute disclosable “emissions data” within the meaning of 40 CFR §2.301(a)(2)(I).

The most frequently withheld “emission data” information element which VDEQ still continues to hold as confidential is information on maximum equipment production and throughput capacities. Other emission data elements withheld include controlled and uncontrolled emission factors, emission control equipment efficiencies and identification of process vents and emission control equipment. Still other withheld information elements (particularly from application materials) include maximum fuel burning rates, gas heating values, inlet conditions for air pollution control equipment, maximum hourly tank filling rates, etc. All of these information elements are required under EPA policy. For example, maximum equipment production and throughput capacities are an element of “process design capacity” which EPA identified as “emission data” in its February 21, 1991 Federal Register notice on the matter of what constitutes “emissions data”<sup>3</sup> (See Exhibit 4).

In addition, there appears to be other unlisted information that Virginia DEQ is withholding that should be disclosed. On page 5-6 of Virginia DEQ’s February 1, 2001 letter, the agency admits the existence of other “emissions data” which it did not disclose:

“In many cases emissions are calculated by complex non-linear material balances which cannot be reduced to a ‘throughput x emissions factor X (1-control efficiency) = emissions’ type equation, so it may be perfectly acceptable that no control efficiencies are listed.”

Such information was inherently part of the Honeywell’s CAA Title V operating permit application as the company’s 1997 emission statement was incorporated in this application by reference. These distillation calculation methods would also be “emission data” elements which were not disclosed to Petitioners.

### **2.4 Example Exhibits Showing Virginia DEQ’s Unlawful Non-Disclosure of the Mandatory Disclosure Information Elements Cited Above**

---

<sup>3</sup> See 56 FR 7042-7043

Exhibit 5 is a package of documents which are pages from the Honeywell June 30, 1998 CAA Title V operating permit application provided by Virginia DEQ on February 1, 2001 which were previously denied in their entirety to Petitioners and claimed confidential by Honeywell. This package of documents shows extensive redaction of both “federally enforceable applicable requirements” limiting potential to emit and “emissions data” in the form of information on maximum process production rates and maximum throughput rates. Also redacted is sufficient information needed to determine whether processes have a potential to emit both criteria and hazardous air pollutants, identification of group 2 process vents under the Hazardous Organic NESHAPS and identification of air pollution control equipment.

Exhibit 6 is an 89 page minor new source review permit issued to Honeywell on January 23, 1998 which was extensively referenced in the company's June 30, 1998 CAA Title V operating permit application. Information elements redacted as confidential and not showing in this permit that are either “emissions data” or “federally enforceable applicable requirements” that limit the potential to emit can be found on pages 3, 4, 5, 6, 7, 8, 9, 10, 11, 20, 21, 33, 34, 35, 49, 50, 59, 71, 72, 79, 81, 84 and 88. This Exhibit is merely intended to be illustrative and not a complete exposition of all of the withheld permit information from the many underlying minor modification NSR permits. Most of these new source review permits issued to the Honeywell facility contain similar types of redactions and confidential provisions that withhold both “federally enforceable applicable requirements” that limit the potential to emit and “emission data.” To the best of our knowledge, information and belief, many of these limitations on the potential to emit are the precise conditions that allowed the company to escape major modification review, PSD BACT reviews and public notice of their planned changes.

Virginia DEQ's proclivity for allowing Honeywell to continue to shield mandatory public disclosure information from public view continues to the present. Exhibit 7 is the most recent minor modification NSR permit issued to Honeywell on April 18, 2000. This permit contains redacted information elements on mandatory disclosure items at pages 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 22, 23, 24, 35, 36, 37, 48, 49, 57, 58, 67, 68, 76, 78, 81, 82 and 85.

A similar effort to withhold information extends to all application materials, staff analysis and netting analysis information supporting NSR permit issuance, such as that shown in the netting analysis for the April 18, 2000 permit (See Exhibit 8).

### **3 Facts Concerning the Virginia Department of Environmental Quality's Excessive Fees for Copying Documents Related to Title V Permit Proceedings**

Exhibits 9 and 10 are document duplication invoices from the Virginia DEQ Piedmont Office. These invoices were for duplication requested by Petitioners of Virginia DEQ files concerning Honeywell, Inc. and Stone Container. The invoices show the policy of Virginia DEQ in charging citizens for documents necessary for citizen review of CAA Title V operating permit proceedings. Under Virginia DEQ's policy, the first 50 pages and the first half hour of staff time are free. However, Virginia DEQ charges in aggregate \$5.57 per half hour of staff time and \$0.20 per page of duplication.

The aggregation of both a staff charge equivalent to \$11.14 per hour and a fee of \$0.20 for every page duplicated is an unreasonable and exorbitant charge for duplication of documents needed by citizens to review and participate in Title V operating permit proceedings. These aggregate charges are the highest fees charged by an air pollution regulatory agency that Petitioner Alex Sagady, Environmental Consultant, has ever encountered in decades of environmental work. These fees, in aggregate, are significantly higher than commercial copying charges.

#### **4 Petitioner's Statutory and Regulatory Analysis of Virginia DEQ's Obligations on Public Documents and Public Disclosure Under the Federally Approved Title V Operating Permit Program**

Title V of the Federal Clean Air Act Amendments of 1990 established a requirement for renewable operating permits for major stationary sources and further established a process whereby individual states could gain approval for administration of programs to issues such federal permits.

##### **4.1 A Title V Operating Permit May Not Contain Confidential Provisions and the Contents of Such a Permit Must be Disclosed in its Entirety**

Under its program, DEQ must ultimately issue federal operating permits that must be available to the public in their entirety with no confidential provisions:

“The contents of a permit shall not be entitled to protection under section 7414(c) of this section.” 42 USC §7661b(e), in part.

As such, all contents of a finally issued permit, including all applicable requirements, emission limitations, limitations on potential to emit inherent with “applicable requirements” from underlying minor modification pre-construction source permitting, compliance plans and other information must be publicly disclosed and may not be subject to protection from disclosure as confidential business information, as this treatment is specifically prohibited under federal law. This would also include everything

defined under Virginia regulations as an “applicable federal requirement.” 9 VAC 5-80-60, definition of “applicable federal requirement.”

#### **4.2 The Effect of the Title V Permit Confidentiality Prohibition on Required Disclosures in the Underlying Permit Application**

As a result of the above prohibition on Title V permit confidentiality, it follows that all “applicable requirements” of a prospective DEQ-issued federal operating permit must be disclosed in the application. The public could not knowledgeably comment about “applicable requirements” and an “applicable federal requirement” without having a detailed exposition of all such requirements in the permit application. Federally approved DEQ regulations also provide a requirement to disclose all such applicable requirements, including all requirements arising from the Federal Clean Air Act. 9 VAC 5-80-90(E) & (F). These “applicable requirements” include all emission limitations and permit conditions that limit potential to emit (such as production rate and feedstock throughput limitations) contained in underlying minor modification pre-construction permits that must be incorporated into a federal operating permit for a major stationary source.

Under federal regulations binding on DEQ, applications for federal operating permits must contain “required information:”

“An application may not omit information needed to determine the applicability of, or to impose any applicable requirement...” 40 CFR §70.5(c)

Finally, we note that in order for DEQ to have gained EPA approval to run the federal operating permit program in Virginia, the Virginia Attorney General certified a demonstration of adequate legal authority to carry out the requirements of this part, including the authority ensuring that DEQ would:

“Make available to the public any permit application, compliance plan, permit, and monitoring and compliance plan certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit shall not be entitled to protection under section 114(c) of the Act.” 40 CFR §70.4(b)(3)(viii).

In issuing the 40 CFR Part 70 regulations and in approving DEQ’s federal operating permit program, EPA’s would never have intended that DEQ could hold information confidential in the application that was a required element for disclosure in the final operating permits as issued. Any contrary interpretation would destroy the entire purpose of the federal operating permit program as articulated in the legislative

history of the act and the purposes for which the Title V program and the rest of the Clean Air Act was enacted.

**4.3 Required State Submittal of Federal Operating Permit Applications to EPA Ensures that DEQ May Not Afford Applications More Protection for Confidential Business Information Under DEQ Confidentiality Rules than EPA Provides for Such Information**

DEQ's federally approved operating permit program rules require that copies of operating permit applications be transmitted to U.S. EPA. 9 VAC 5-80-290(A)(1) Under EPA operating permit program regulations:

“Where the State submits information to the Administrator under a claim of confidentiality, the State shall submit that claim to EPA when providing information to EPA under this Section. Any information obtained from a State or part 70 source accompanied by a claim of confidentiality will be treated in accordance with the regulations in part 2 of this chapter.” 40 CFR §70.4(j), in part.

The specific regulations cited are at 40 CFR §2.201, *et seq.* In general, these regulations at 40 CFR §2.301 specifically ensure that “emissions data” may not be considered as confidential business information. Under this regulation:

“(2)(i) *Emission data* means, with reference to any source of emission of any substance into the air –

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identify, amount, frequency, concentrations, or other characteristics (to the extent related to air quality) of the emission which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source), or any combination of the forgoing:

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including,

to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source)." 40 CFR §2.301(a)(2)(i).<sup>4</sup>

Under this regulation, emission limitations and conditions, emissions information, maximum process design and throughput and other conditions designed to limit potential to emit and/or to determine emissions are considered "emissions data" for which mandatory disclosure applies.

DEQ regulations explicitly address mandatory disclosure requirements for "emission data:"

"Emission data in the possession of the board shall be available to the public without exception." 9 VAC 5-170-60(A).

However, there are no DEQ regulations that define "emissions data." In the absence of such a specific definition, Virginia must defer to the EPA definition found at 40 CFR §2.301, particularly since the DEQ regulation was adopted in response to federal regulations on necessary state program elements for operating permit and state implementation plan programs.

In light of both federal and state requirements for disclosure of "emission data," and the fact that DEQ rules have ensured that the Honeywell, Inc. application (including all of its information implicitly included by reference) was submitted to U.S. EPA, Petitioners note one of DEQ's rule-based criteria for designation of confidential business information:

"In order to be exempt from disclosure to the public under subsection V of this section, the record, report or information must satisfy the following criteria:

....Information which is not publicly available from sources other than the owner...." 9 VAC 5-170-60(C), in part.

Since federal operating permit applications will always be available from EPA by design of the DEQ program, DEQ confidentiality regulations ensure that such material

---

<sup>4</sup> See also 56 FR 7042 which provides EPA's additional interpretive information on the meaning of "emissions data" which specifically cites "emission point, device or operation description, information," "boiler or process design capacity," "emission estimation method," and "hourly maximum design rate (e.g. the greatest operating rate that would be expected for a source in a 1-hr period)." This federal register notice was attached to Petitioner's original VA FOIA request document, dated August 5, 2000.

may not be afforded more confidential business information non-disclosure protection than would be afforded this same information by U.S. EPA under 40 CFR 2.201, *et seq.*

**4.4 Clean Air Act Title V Provisions Mitigate for Fee Waivers on Duplication of Documents Needed for the Public to Participate in Title V Permit Proceedings**

Under the Federal Clean Air Act, fees paid by industrial dischargers subject to federal operating permit requirements that the Virginia DEQ charges related to Title V permit program must be:

“...sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter.....including the reasonable costs of (I) reviewing and acting upon any application for such a permit.” 42 USC §7661a(b)(3)(A)

The thrust of the Title V provisions of the act were to encourage and facilitate public participation in the Title V permitting process. Accordingly, the cost of providing Title V-related documents to the public is an essential part of administering the permit program for the purpose of “reviewing and acting upon” Title V permit applications. Under the plain language of Title V, the costs to provide public participation, including disclosure of Title V related documents for public review in permit proceedings, should be paid for by Title V source industrial discharger permit fees. Such fees should have been set under the Act at a sufficient level so as to support costs for documents disclosure needed by the public to review and comment upon proposed Title V permit applications.

Thus, to impose onerous and excessive costs on the public for public disclosure essential to public participation in Title V permit proceedings effectively frustrates the requirements of the Clean Air Act that all such costs be covered by Title V permit fees paid by industrial permit holders.

**5 Petitioner's Argument and Analysis that Virginia DEQ Has Violated Public Disclosure Requirements and Required Program Operational Elements Under the Federal Clean Air Act, the Virginia Air Statute and Under Related Federal and State Air Pollution Administrative Regulations**

**5.1 Petitioner's Determinations Concerning the Nature of Material that Virginia DEQ has Impermissibly Failed to Disclose in the Context of Federal and State Clean Air Program Operational Elements and Public Disclosure Requirements**

The contested material that DEQ ultimately failed to provide to Petitioners falls into two general categories.

First, there is withheld information which falls under the category of "applicable requirements" subject to "federal enforceability" by citizens under the federal operating permit program or the new source review program. Such applicable requirements include enforceable conditions limiting the potential to emit that are contained in Honeywell's Title V permit application and all of the underlying alleged "minor modification" permits. The most frequently withheld "applicable requirement" information elements are enforceable conditions that limit maximum production rates and/or maximum process feedrates. Non-disclosure redactions for "applicable requirement" information subject to "federal enforceability" have been extensively imposed in incomplete, defective versions of alleged "minor modification" review permits that have been provided to Petitioners. In addition, some of the applications for such permits, the DEQ engineering analysis documents and the netting analysis documents contain impermissible redactions on information of this nature. Finally, the Honeywell Title V application also contains withheld information of this nature.

In addition, DEQ withheld information concerning the names of process units and the dates that such process units were installed and modified. This information is necessary to determine whether Honeywell, Inc. has complied with New Source Review requirements and whether alleged "minor modification" permits were properly issued. Such material is also covered for disclosure under the requirement that all federally enforceable applicable requirements be disclosed. In addition, this material is needed by Petitioners to determine whether Honeywell, Inc. has improperly disaggregated projects into separate multiple minor modification permits when the company should have been subjected to full major modification review on an aggregation of such minor modifications.

Second, there is withheld information which is mandatory-disclosure "emission data" under 42 USC §7414(c), 40 CFR §2.301(a)(2)(I), 9 VAC 5-170-60(A) and 40 CFR



§52.2423(o). Some of the impermissibly withheld emission data includes information needed to calculate the potential to emit of process equipment so that such information can be compared to any “applicable requirements” subject to “federal enforceability” that limit the potential to emit. For example, DEQ extensively withheld information on the maximum design capacity, maximum production rate and maximum feedstock rate for process equipment at the Honeywell site. Also withheld was information on emission factors, example emission calculations, process descriptions necessary to determine whether such processes emitted regulated air contaminants, stack exhaust gas parameters, emission factors used in emission calculations, information on the efficiency of air pollution control equipment, etc. All of these information elements are necessary to determine potential to emit and actual emissions, both of which are covered by federal and state assurances for the disclosure of “emissions data.”

## **5.2 Virginia DEQ's Violation of Requirements Related to the Federal Operating Permit Program**

On July 21, 1998, Virginia DEQ's determined<sup>5</sup> that Honeywell's application was “...complete within the meaning of 9 VAC 5-80-80 and 5-80-90.” However, this determination violated the requirements of DEQ's own application for a federal operating permit which indicates, among other requirements, that a complete application must include:

“CONFIDENTIAL INFORMATION JUSTIFICATION Justification for claiming confidentiality of any information in the application or attachments, based on the criteria given on page iv of this form.”<sup>6</sup>

The Allied Signal [now Honeywell, Inc.] application of June 30, 1998 contains no such justification for the many confidential information claims made. As a result, DEQ's July 21, 1998 determination that the company's application is complete must necessarily violate requirements for information constituting a complete application at 9 VAC 5-80-90(F) & (L) which are federally approve rules.

Given that “applicable requirements” and “emission data” contained in the June 30, 1998 Honeywell, Inc. federal operating permit application and underlying new source review documents have not been disclosed to Petitioners, DEQ's failure to disclose violates requirements found at 40 CFR §70.5(c) and 40 CFR §70.4(b)(3)(viii). Virginia

---

<sup>5</sup> July 21, 1998 letter from Charles L. Turner, Senior Environmental Engineer, DEQ Piedmont Office to Glen Coulter, Plant Manager, Allied Signal

<sup>6</sup> DEQ Form 805 – Air Operating Permit Application

DEQ's conduct violates 40 CFR §70.5(c) because it has allowed Honeywell to evade requirements to publicly disclose all "applicable requirements" in their Title V application in view of DEQ's unlawful completeness determination. DEQ's conduct violates 40 CFR §70.4(b)(3)(viii) because it has failed to make available all required elements of "applicable requirements" and "emission data" inherent with mandatory disclosure requirements binding on Honeywell through its Title V permit application.

In view of Virginia DEQ's history of issuing alleged "minor modification" review permits to Honeywell containing many confidential provisions, Petitioners provide this advance notice that any attempt to continue this practice by issuance of confidential provisions in a future Honeywell's federal operating permit would grossly violate prohibitions found at 42 USC §7661b(e). As a result, Virginia DEQ's failure to properly disclose "emission data" and "applicable requirements" in the application for such a permit can only be construed as also violating the clear prohibition contained in 42 USC §7661b(e) that prohibits granting confidential treatment for such information under 42 USC §7414(c). DEQ must not attempt to hold information in the Title V application confidential when it clearly must be disclosed as an element of a finally issued permit.

It is Petitioner's belief that Virginia DEQ intends, in fact, to issue in the future a federal operating permit to Honeywell that will illegally contain confidential limitations on the potential to emit, barring determined outside intervention from Petitioners, EPA or the Federal Judiciary.

Finally, DEQ submits all federal operating permit applications to EPA Region III under 9 VAC 5-80-290(A)(1). This material is thus disclosable within the provisions of EPA's rule on confidentiality found at 40 CFR §2.201, *et seq.* See also 40 CFR §70.4(j). As a result, DEQ's attempt to hold "applicable requirements" and "emission data" contained in the Honeywell federal operating permit application as confidential violates both the mandatory "emission data" disclosure rule at 9 VAC 5-170-60(A) and the requirement at 9 VAC 5-170-60(C) that disclosure of such information held by DEQ cannot be limited to a greater degree than what would be afforded such material by EPA Region III.

The insistence so far by Virginia DEQ to hold information on "applicable requirements" and "emission data" in the Title V application and the underlying alleged minor modification permits as confidential also creates a cause of action for Petitioners to subject this application to a pre-emptive appeal to the EPA Administrator under 42 USC §7661d(b). Such an appeal may become necessary in order for Petitioners to protect their rights to disclosure prior to any proceeding to actually approve a Title V permit for the Honeywell, Inc. facility.

Finally, in charging Petitioners exorbitant fees for disclosure of documents needed by the public to review Title V permitting materials (including applications, underlying NSR permits, etc.), Virginia DEQ has violated requirements at 42 USC 7661a(b)(3)(A) that require that all of the costs of administering and reviewing title V permits (including administration and public disclosure of documents for the purposes of public participation in reviewing and approving Title V permit applications) be paid for by the required annual Title V permit fees.

## **6 Commentors and Petitioner's Request for Relief**

With this Petition, Commentors and Petitioners seek the following relief and actions from U.S. EPA Region III, Air and Radiation Division:

Petitioners seek a finding by EPA Region III that the Virginia Department of Environmental Quality's Title V Federal Operating Program is deficient in practice because of its failure to disclose information elements that are either "federally enforceable applicable requirements" and/or "emission data" to the public, and to properly carry out its duties to disclose mandatory disclosure items..

Petitioners ask that EPA Region III issue a notice of violation to Virginia DEQ for its violation of required program elements in its CAA Title V operating permit program and an administrative corrective order to Virginia DEQ requiring disclosure to Petitioners of all Honeywell information that is emission data and federally enforceable applicable requirements limiting potential to emit.

Petitioners ask that EPA Region III issue an administrative corrective order to Virginia DEQ that it properly carry out its duties to disclose federally enforceable applicable requirements and emission data for all other sources under its jurisdiction when the public requests such disclosure.

This petition and the incorporated petition to the Virginia DEQ Director note significant irregularities in Virginia's State Implementation Plan New Source Review program involving public disclosure and public notice of minor source permits; Petitioners ask EPA to issue deficiency findings and notices of violation to Virginia DEQ on these matters.

Petitioners seek an EPA program deficiency finding and program element disapproval on the matter of Virginia DEQ's excessive and onerous fees for copying documents needed by citizens reviewing CAA Title V proceedings.

In the event that the Virginia DEQ does not act to resolve the illegal agency conduct identified herein, Petitioners ask that EPA Region III withdraw, suspend or limit applicable program delegation and authorization until such time that the Virginia DEQ agrees in a written enforceable order to abate its illegal conduct.

Respectfully submitted,

SIERRA CLUB VIRGINIA CHAPTER

---

Glen Besa, Chapter Director

Filed March 12, 2001

---

Alexander J. Sagady, Environmental  
Consultant to Sierra Club Virginia Chapter