**Commonwealth of Virginia**
**Virginia Department of Environmental Quality**

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| In the Matter of: | ) |
| | ) |
| Sierra Club of Virginia August 5, 2000 | ) |
| Freedom of Information Act Request Concerning | ) |
| Honeywell, Inc., Hopewell, VA; and | ) |
| | ) |
| DEQ Compliance with Federal Clean Air Act, | ) |
| Applicable Federal Regulations and | ) |
| State of Virginia Air Pollution, Public Disclosure | ) |
| and Public Participation Requirements; and | ) |
| | ) |
| DEQ Federal Operating Permit and New | ) |
| Source Review Proceedings Concerning | ) |
| Honeywell, Inc. Hopewell Facility | ) |
| | ) |

**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 AND COMMENTORS:**

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# 1 Introduction

This document is a petition to the Virginia Department of Environmental Quality [hereafter DEQ] by Petitioners Sierra Club Virginia Chapter, a unit of the Sierra Club, which is a California non-profit corporation, and Alexander J. Sagady, who serves as environmental consultant to the Sierra Club Virginia Chapter [hereafter jointly as "Petitioners"]. This petition concerns matters which have arisen in regard to a Virginia Freedom of Information Act request by petitioners made in August, 2000 for DEQ documents held by the DEQ Piedmont Office concerning air pollution regulation of Honeywell, Inc. and Smurfit-Stone Container, both of Hopewell, VA.

In this document, Petitioners lay out applicable requirements binding on DEQ for disclosure of information under Federal and State requirements, state certain facts and findings concerning the matter at hand, provide certain notices regarding unlawful actions and inactions by Respondent and petition for certain requested relief.

# 2 Respondent DEQ's Legally Enforceable Obligations Concerning Disclosure of Public Documents and Program Operation Relating to Air Pollution Regulation of Honeywell, Inc., Hopewell, VA

## 2.1 Review of DEQ Obligations to Petitioners under the Virginia Freedom of Information Act

Virginia's Freedom of Information Act establishes the primary framework for respondent's disclosure obligations to Petitioners. VA Code Ch. 21, §§2.1-340, *et seq.* The legislative policy stated under the statute is to provide:

> "....ready access to records in the custody of public officials....."
>
> "The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or public official specifically elects to exercise an exemption provided by this chapter or any other statute....all public records shall be available for inspection and copying upon request. All public records....shall be presumed open, unless an exemption is properly invoked."
>
> "The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records .....shall be narrowly construed and no record shall be withheld .....to the public unless specifically made exempt pursuant to this chapter or other

> provision of law....All public bodies and public officials shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested...." VA Code Ch 21, §2.1-340.1

Where a request for records has been made and the records contain information which is determined to be statutorily exempt from disclosure, DEQ must follow a specific procedure involving notice to the requestor clarifying the basis for such denial:

> "The requested records will be entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with this chapter. Such response shall (i) be in writing, (ii) identify with reasonable particularity the volume and subject matter of withheld records, and (iii) cite, as to each category of withheld records, the specific Code section which authorizes the withholding of the records."
>
> "The requested records will be provided in part and withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with this chapter. Such response shall (i) be in writing, (ii) identify with reasonable particularity the subject matter of withheld portions, and (iii) cite, as to each category of withheld records, the specific Code section which authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record." VA Code Ch 21, §2.1-342(B)(2) & (3)

In providing copies of documents Respondent DEQ must not charge unreasonable copying fees and such fees shall not exceed the cost of making such copies:

> "A public body **may** make reasonable charges for its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. No public body shall impose any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Any duplicating fee charged by a public body shall not exceed the actual cost of duplication." VA Code Ch 21, §2.1-342(F), in part. (Emphasis added)

Note that imposition of "reasonable charges" is actually a discretionary matter and nothing in the Act prohibits DEQ from making a decision to waive all such fees in providing information to the public.

## 2.2 Review of Respondent DEQ's Obligations for Creation of, Maintenance of and Public Disclosure of Documents and Requirements on Permit Issuance Pursuant to Federal Clean Air Act Program Requirements

### 2.2.1 Introductory Discussion of Federal Clean Air Act Requirements

Federal Court of Appeals rulings have long recognized the fundamental importance of public availability of emission data under the Federal Clean Air Act and the relation of this concept to the Act's provision on citizen enforcement:

> "The public information and disclosure requirements of section 1857c-5(a)(2)(F)(iii), (iv)[1] have an important function under the 1970 Amendments. The Amendments embraced the concept of "citizen enforcement" of anti-pollution laws. 42 U.S.C. §1857h-2 permits "any person" to bring a civil action in the federal district courts to enforce compliance with "any emission standard or limitation" promulgated under the Clean Air Act. The public information requirements play a crucial role in assuring effective citizen enforcement. They are designed to ensure that "citizen enforcers" will have access to any and all information they will need in prosecuting enforcement suits or in deciding whether to bring them....."
>
> "In holding as we do, we are not insensitive to private interests in protection confidential trade information. We view that interest, however, as subordinate to the public interest in full disclosure of emission data. This was the balance Congress itself struck in the 1970 Amendments. The Amendments provide for the confidentiality of trade secrets contained in information supplied to federal officials, but expressly state that emission data is not entitled to trade secret protection. See 42 U.S.C. §1857c-9(c). The statute is not similarly explicit where information supplied to state officials is concerned, but there is no reason to strike the balance differently in that context." Natural Resources Defense Council, Inc., et al v. Environmental Protection Agency 489 F.2d 390 (1974) at 397, 398.

The importance of public disclosure of emission data was also recognized in the legislative history of the Clean Air Act:

> "Section 209 of the Committee bill is substantially similar to section 207 of existing law except the trade secrets protection language would be modified to place the burden of showing the need for confidentiality on the person filing the report with the Secretary.

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[1] Codified later at 42 USC §7410(a)(2)(F)

> The Committee believes that requiring the person filing records and reports to prove the need for proprietary protection would avoid abuse of section 1905 of title 18 of the United States Code and facilitate the availability of information related to air pollution to the public. In addition, the Committee bill would exempt emission data from proprietary protection. The Committee believes public knowledge of emissions overrides the private interest in proprietary information.
>
> The purpose of 18 U.S. Code 1905 is to prevent the unauthorized disclosure by Federal employees of data obtained in connection with any authorized Federal activity which would, if divulged, reveal trade secrets or secret processes. It is not aimed at preventing the disclosure of such data by Federal agency officials as part of their duty to effectively control and prevent air pollution. Moreover, the Committee believes that it is not in the public interest for data relating to the quantity and quality of the emissions to be considered confidential. The public has a right to know who is polluting the atmosphere and in what amounts."[2]

Respondent DEQ operates a number of programs to administer Federal Clean Air Act requirements in the Commonwealth of Virginia. Each of these programs contain required elements memorialized in a variety of federal and state statutes and regulations that provide assurances for public disclosure of air pollution regulatory documents. In addition, the U.S. Environmental Protection Agency has published interpretative memoranda and guidance concerning operational aspects of these programs. For purposes of public disclosure and participation, the nature of these requirements is generally two fold – some requirements ensure that required documents exist and are maintained and other requirements ensure that certain public documents will be available on request.

### 2.2.2 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.

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[2] Senate Committee Report No. 91-1196, at p. 38-39 (1970)

#### 2.2.2.1 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."

#### 2.2.2.2 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.

#### 2.2.2.3 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).[3]

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:

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[3] 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.

> "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 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.*

#### 2.2.2.4 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 that the Commonwealth of Virginia 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 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 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.

### 2.2.3 DEQ's Obligations on Public Documents, Public Disclosure and Permit Issuance Under the Federally Approved State Implementation Plan and Approved New Source Review Program

DEQ operates its clean air program under the mandatory requirements of the EPA-approved Virginia State Implementation Plan[4] adopted pursuant to 42 USC §7410. Specifically, the necessary Clean Air Act elements for state implementation plans must ensure state SIPs....

> "(F) require, as may be prescribed by the Administrator .....(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;" 42 USC §7410(a)(2)(F)

EPA has adopted a number of regulations affecting public availability of emission data associated with approved state implementation plans. Under 40 CFR §51.160(c), state new source review programs approved under state implementation plans must ensure access to emission data:

> "(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on –
>
> (1) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section." 40 CFR §51.160(c)

Under EPA's rules, the public must have notice and availability of information submitted by those seeking new source review permitting:

> "(a) The legally enforceable procedures in §51.160 must also require the State or local agency to provide opportunity for public comment on information submitted by owners and operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval.
>
> (b) For purposes of paragraph (a) of this section, opportunity for public comment shall include, as a minimum –

[4] 40 CFR §52.2420, *et seq.*

> (1) Availability of public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality; (2) A 30 day period for submittal of public comment....." 40 CFR §51.160(a) & (b) (in part).

One element of the approved Virginia SIP addresses confidentiality of information:

> "EPA approves the revised confidentiality of information provisions of Sections 120-02-30 submitted by the Virginia Department of Air Pollution Control on March 18, 1993, as revisions to the Virginia SIP. However, should Virginia submit a SIP revision request on behalf of a source, which contains information that has been judged confidential under the provisions of Section 120-02-30, Virginia must request EPA to consider confidentiality according to the provisions of 40 CFR part 2. EPA is obligated to keep such information confidential only if the criteria of 40 CFR part 2 are met." 40 CFR §52.2423(o)

At the same time the above section was approved at 61 FR 38390, EPA also approved parts of Virginia's new source review regulation for minor sources. 40 CFR §52.2420 and 40 CFR §52.2423.

These federal requirements must again be read in concert with applicable Virginia Code requirements that address whether material may be held confidential:

> "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.

By the same analysis then that was shown above for confidentiality determinations in the Title V federal operating permit program, Virginia must again ensure that information associated with Virginia State Implementation elements must be afforded no more protection than such information would be afforded by EPA pursuant to 40 CFR §2.201, *et seq*. This requirement holds because such Virginia SIP information can become subject to availability from "sources other than the owner" under Virginia's DEQ confidentiality requirements. Because the Virginia program for minor new source review is part of the Virginia State Implementation Plan, the argument above would also extend to the minor source permits Virginia issues pursuant to the approved plan.

### 2.2.4 DEQ's Obligation to Ensure Federal Enforceability of Conditions Contained in Federal Operating Permits and New Source Review Permits that Limit Potential to Emit Ensures that Such Permit Conditions Cannot be Held Confidential

Federal regulations address requirements for enforceability of state implementation plan requirements, new source review permits and state-issued federal operating permits:

> "Failure to comply with any provisions of this part, or with any approved regulatory provision of a State implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, or with any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated in the State implementation plan, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act." 40 CFR §52.23

Inherent in the concept of "federal enforceability" of "applicable requirements" is that concept that such requirements must be enforceable by citizens under 42 USC §7604, the "citizen suit" provision of the Federal Clean Air Act. Under this provision, citizens are given standing to enforce against violations of an "emission standard or limitation under this chapter," 42 USC §7604(f) which includes, in part:

> "(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard.....
>
> (4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plant approved by the Administrator, any permit term or condition, any requirement to obtain a permit as a condition of operations." 42 USC 7604(f)(1) and (4)

DEQ regulations recognize the concept of a "federally enforceable" permit requirement in a federal operating permit which can be enforced by citizens:

> "N. Federal enforceability.
>
> (1)all terms and conditions in a permit, including any provisions designed to limit a source's potential to emit, are enforceable by the administrator and citizens under the federal Clean Air Act, except as provided in subdivision N 2 of this section." [section N 2 addresses state-only requirements.]. 9 VAC 5-80-110(N)(1)

As such, new source review permits and federal operating permits issued by the DEQ must be enforceable by citizens as a matter of program operation for the issuance of such permits.

EPA policy addresses the matter of the effectiveness of limitations on the potential to emit in the context of federal enforceability:

> "The term "federally enforceable" historically has been used in two ways – first, to refer narrowly to the authority of EPA and citizens to bring suit for a violation; and, second to refer to the collective set of elements that the Agency believed contribute to effectiveness of limits (e.g., practical enforceability of limits approval of state programs as meeting certain criteria, notice of proposed limits to the public and EPA, enforceability in federal court by EPA and citizens.)"[5]

EPA goes on to define "enforceability as a practical matter:"

> "To be 'effective,' limitations must be written so that it is possible to verify compliance and to document violations when enforcement action is necessary."[6]

Inherent in writing limitations on the potential to emit that are enforceable by citizens is the intrinsically understood requirement that citizens must be able to see the requirements in writing in order to be able to practically enforce such requirements. In order for citizens to see the requirements and to be able to enforce such requirements in practice, the requirements must be disclosed and may not be held confidential.

### 2.2.5 DEQ Requirements Binding on Honeywell, Inc. as to Prohibitions Against Improper Confidential Business Information Claims

DEQ rules on availability of information and confidentiality address improper claims of confidential business information:

> "E. The responsible representative of the owner who certifies information as confidential which does not meet the criteria in subsection C of this section shall be in violation of the Virginia Air Pollution Control Law." 9 VAC 5-170-60(E)

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[5] EPA paper on "Effective" Limits on Potential to Emit: Issues and Options, January 31, 1996

[6] Ibid, EPA paper, January 31, 1996

As a result, if an owner or their representative makes improper confidential business claims, such owner and or representative shall be subject to sanctions and penalties under the Virginia air pollution statute.

### 2.2.6 DEQ Requirements for Public Participation and DEQ Decisionmaking on Properly Issued Minor Modification Permits that Involve Emissions of Regulated Hazardous Air Pollutants

DEQ rules provide fundamental requirements for permits for stationary sources:

> "C 1. No owner or other person shall begin actual construction, reconstruction or modification of any of the following types of sources without first obtaining from the board a permit to construct and operate or to modify and operate such source:
>
> a. Any stationary source; or
>
> b. Any stationary source of hazardous air pollutants to which an emission standard prescribed under 9 VAC 5 Chapter 60 (9 VAC 5-60-10, et seq.) became applicable prior to the beginning of construction, reconstruction or modification. In the event that a new emission standard prescribed under 9 VAC 5 Chapter 60 (9 VAC 5-60-10 et seq.) becomes applicable after a permit is issued but prior to initial startup, a new permit must be obtained by the owner." 9 VAC 5-80-10(C)(1), in part.

Under the DEQ minor source review program, certain public participation requirements must be carried out:

> "4. Prior to the decision of the board, permit applications as specified below shall be subject to a public comment period of at least 30 days. At the end of the public comment period, a public hearing shall be held in accordance with subsection G 5 of this section.
>
> a. Applications for stationary sources of hazardous air pollutants as specified in subsection C 1 b of this section. [see above citation in prior paragraph]
>
> b. Applications for major stationary sources and major modification with a net emissions increase of 100 tons per year of any single pollutant.
>
> c. Applications for stationary sources which have the potential for public interest concerning air quality issues, as determined by the board. The identification of such sources shall be made using the following criteria:
>
> (1) Whether the project is opposed by any person;

(2) Whether the project has resulted in adverse media;

(3) Whether the project has generated adverse comment through any public participation or governmental review process initiated by any other governmental agency; and

(4) Whether the project has generated adverse comment by a local official, governing body or advisory board." 9 VAC 5-80-10(G)(4), in part.

In making a decision on a permit application, DEQ rules provide:

"3. The board normally will take action on all applications after completion of the review and analysis, or expiration of the public comment period (and consideration of comments from that) when required, unless more information is needed. The board shall notify the applicant in writing of its decision on the application, including its reasons, and shall also specify the applicable emission limitations....." 9 VAC 5-80-10(F)(3), in part.

In summary, DEQ rules require that sources obtain a permit before undergoing reconstruction or modification, that certain sources emitting hazardous air pollutants trigger the need for public notice, comment and potentially a public hearing and that DEQ, in making a decision to issue a permit, shall specify applicable emission limitations in the decision to issue a permit.

Several aspects of this procedure have been approved as federally enforceable state implementation plan requirements at 61 FR 38388.

## 3 Statement of Facts

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

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, respondent 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.

## 3.2 Facts Germaine to Petitioner's Allegations and Notice of Violation to Respondent DEQ that Respondent Impermissibly Failed to Disclose Documents which are Required for Disclosure

At the present time, there appear to be no unresolved issues of disclosure concerning Petitioner's request for documents concerning Smurfitt-Stone Container. However, Petitioner's review of documents in the Honeywell, Inc. file indicate that DEQ has failed to disclose many documents and much significant information relating to this facility. Many of the documents and much of the information constitute "emission data" and/or "applicable requirement" information needed for federal enforceability by the citizens under Clean Air Act provisions at 42 USC §7604.

The following table details information that has not been disclosed by DEQ after being requested under the plain language of the August 5, 2000 Sierra Club Virginia Chapter FOIA request:

| **Table of Documents and Information Relating to Honeywell, Inc. that DEQ has not disclosed to Sierra Club Virginia Chapter Pursuant to a Virginia FOIA Request** | |
|---|---|
| **Records Relating to June 30, 1998 Honeywell, Inc. Application for a CAA Title V Operating Permit** | |
| **Applicable Specific Process Area** | **Information Withheld by DEQ and/or for which Honeywell, Inc. has made Unjustified Confidential Business Claims** |
| Area 6 | Emission calculation description, including applicable emission factors, potential to emit, etc. found on page 3 of 13 - emission calculation section |
| Area 6 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area 6 | All DEQ Application Page 11 information on air pollution control equipment, needed to evaluate claims of air pollution control efficacy and assumed emissions factors |
| Area 7 | All general information describing processes in area 7, which is needed to evaluate potential to emit for hazardous and criteria air pollutants |
| Area 7 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area 7 | Two pages from DEQ Application Page 14 information describing applicable legal requirements from underlying construction permits, SIPs or other rules, needed for evaluating requirement that are federally enforceable by citizens. |
| Area 8/16 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area 8/16 | Two pages from DEQ Application Page 14 information describing applicable legal requirements from underlying construction permits, SIPs or other rules, needed for evaluating requirement that are federally enforceable by citizens. |

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| Area 9 | All general information describing processes in area 9, which is needed to evaluate potential to emit for hazardous and criteria air pollutants |
| Area 9 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area 9 | All DEQ Application Page 10 information on air pollution control equipment, needed for determining emission control equipment efficiency and plant efficacy claims, to evaluate usage of emission factors and to determine potential to emit. |
| Area 9 | One page from DEQ Application Page 14 information describing applicable legal requirements from underlying construction permits, SIPs or other rules, all of which are needed for evaluating requirements that are federally enforceable by citizens |
| Area 11 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area 11 | One page from DEQ Application Page 14 information describing applicable legal requirements from underlying construction permits, SIPs or other rules, all of which are needed for evaluating requirements that are federally enforceable by citizens |
| Area 13 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area 13 | Unknown attachment required for filing |
| Area 14 | All general information describing processes in area 14, which is needed to evaluate potential to emit for hazardous and criteria air pollutants |
| Area 14 | All DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| Area SCA | All general information describing processes in area SCA, which is needed to evaluate potential to emit for hazardous and criteria air pollutants |

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|---|---|
| Area SCA | Three of four pages of DEQ Application Page 4 information, including information needed to calculate potential to emit (maximum production/throughput capacities) and dates when process equipment was installed (needed for NSR compliance evaluation). |
| **Other Title V Application Information Either Not Shown or Not Disclosed** | |
| Virtually all emission data information on stack diameter, velocity, stack gas volume and discharge temperatures is either not disclosed or was omitted from the application | |
| Data on design or actual emission control efficiencies for air pollution control efficiencies are either not disclosed or was omitted from the application. | |
| The application contains no clear exposition of the potential to emit from all process equipment and emission units. | |
| The application includes by reference the 1997 emission statement, but this document provides no disclosure of or omits the following information:<br><br>All attachments describing the basis of "Other" emission factor, designated as "O."<br>No numeric emission factor is provided where "Distillation Calc" is indicated.<br>All data on numerical emission factors, NOX control efficiencies and basis for emission factors is omitted for large NOX sources in Area 9. | |

| **New Source Review Permits and Related Information Considered as Ancillary and/or Underlying, Explicitly by Reference or Implicitly, to the Honeywell, Inc. Title V Application and/or which must be Disclosed by Virtue of Title V Regulations, VA SIP Requirements, Applicable Federal Regulations or Federal Enforceability Considerations** | |
|---|---|
| **Date of Permit Issuance** | **Information Withheld by DEQ and/or for which Honeywell, Inc. has made Unjustified Confidential Business Claims** |
| 02/22/95 | DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Permit was disclosed, but the permit contained limitations on the potential to emit that were held confidential regulating process inputs of oleum and cyclohexanone oxime and production of caprolactam in the effected emission units. |
| 10/13/95 | Honeywell permit application/BACT analysis, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Permit was disclosed, but contained numerous impermissible redactions of conditions to limit potential to emit, including limitations on process feed and production rates. |
| 03/22/96 | Honeywell permit application, DEQ permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. File contained two sheets..."the following 40 pages/ the following 87 pages/ have been omitted due to confidential information" |
| 07/30/96 | Honeywell permit application, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Permit was disclosed, but contained numerous impermissible redactions of conditions to limit potential to emit, including limitations on process feed and production rates. |
| 09/16/96 | Honeywell permit application, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Permit was disclosed, but contained numerous impermissible redactions of conditions to limit potential to emit, including limitations on process feed and production rates. |
| 12/19/96 | DEQ permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Transmittal letter for permit was disclosed, but was attached with a paper indicating "the following 52 pages have been omitted due to the contents of confidential information." |

| | |
|---|---|
| 04/16/97 | Honeywell permit application, DEQ permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. No file jacket on this file was present at time of file review; existence of this permit file determined from reference contained in later permits. |
| 01/23/98 | Honeywell permit application, DEQ permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. No file jacket on this file was provided at time of file review; existence of this permit file determined from numerous references to this permit in the June 30, 1998 Title V application. |
| 05/29/98 | Honeywell permit application, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Permit was disclosed, but contained numerous impermissible redactions of conditions to limit potential to emit, including limitations on process feed and production rates. |
| 08/10/98 | Honeywell permit application, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. Permit was disclosed, but contained numerous impermissible redactions of conditions to limit potential to emit, including limitations on process feed and production rates. |
| 04/28/99 | Honeywell permit application, DEQ permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. No file jacket on this file was present at time of file review; existence of this permit file determined from reference contained in later permits. |
| 10/29/99 | Honeywell permit application, DEQ permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis have not been disclosed. No file jacket on this file was present at time of file review; existence of this permit file determined from reference contained in later permits. |
| 04/18/2000 | Part of Honeywell permit application has not been disclosed. DEQ Permit, DEQ engineering analysis/agency record of decision and DEQ netting analysis were disclosed, but these documents contain numerous impermissible redactions of conditions to limit potential to emit, including limitations on process feed and production rates. |

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|---|---|
| Multiple Permit Issuance Dates | As a result of subsequent additional evaluation and file review by Petitioners, additional permit files (including permit, application, engineering analysis, correspondence and netting analysis) were not disclosed for permit proceedings and dates of issuance for 10/22/1991, 09/04/1992, 01/28/1994, 04/12/1994, 08/22/1994, 10/20/1994, 10/03/1995 and 01/26/2000, all of which are relevant to Petitioner's review of the Honeywell federal operating permit application and Petitioner's "lookback" review of NSR permitting at the Honeywell site. |

### 3.3 Facts Germaine to Petitioner's Allegation that Respondent DEQ Improperly Issued a Series of Alleged "Minor Modification" Permits Involving Emissions of Hazardous Air Pollutants

To the extent that Petitioners can ascertain the facts given the incomplete and defective disclosure afforded to Petitioners by Respondent DEQ, the following facts appear to be established in regard to Respondent DEQ's actions.

Respondent DEQ claims to have "issued" minor modification permits to Honeywell, Inc. on October 22, 1991, September 4, 1992, January 28, 1994, April 12, 1994, August 22, 1994, October 20, 1994, February 22, 1995, October 3, 1995, October 13, 1995, March 22, 1996, July 30, 1996, September 16, 1996, December 16, 1996, April 16, 1997, January 23, 1998, May 29, 1998, August 10, 1998, April 28, 1999, October 29, 1999, January 26, 2000 and April 18, 2000. A number of these permits were not disclosed to Petitioners, either because the entire permit was claimed as confidential business information or because no files at all were provided.

In files disclosed by Respondent DEQ to Petitioners, there are no indications that Respondent DEQ issued a public notice of a public comment period or public hearing concerning any of the disclosed permits. DEQ staff confirmed informally that no such public notice, public comment periods and/or public hearings were held for any of the alleged "minor modification" permits referenced in the prior paragraph.

Although Petitioners do not yet have in hand sufficient information for a final determination, Petitioners assert a preliminary finding indicating that a number of the "minor source" permits in question nevertheless involved process equipment and emission units with emissions of Clean Air Act Section 112 designated hazardous air pollutant emissions within the meaning of 9 VAC 5-80-10(C)(1)(b). Honeywell reported

Toxic Release Inventory emissions of several hazardous air pollutants for 1997.[7] Petitioners articulate a preliminary finding that the Honeywell, Inc. Hopewell facility is potentially subject to a number of "emissions standard(s)" prescribed under 9 VAC 5 Chapter 60 for purposes of stationary source applicability for minor modifications under 9 VAC 5-80-10(C)(1)(b). These include emission standards adopted by DEQ at 9 VAC 5 Chapter 60, including 40 CFR 61- Subpart J, 40 CFR 61 - Subpart V, 40 CFR 61- Subpart FF, 40 CFR 63 - Subpart F, 40 CFR 63- Subpart G; and 40 CFR 63 - Subpart H.

Finally, the inability of DEQ to produce all relevant permit files, the holding of still other permits as completely confidential and the production of defective permits with confidential limitations on the potential to emit indicate that Respondent DEQ has failed to publicly carry out its duties under 9 VAC 5-80-10(F)(3) which require that Respondent "....shall also specify the applicable emission limitations..." in its permit issuance proceedings. Since applicable emission limitations must be publicly available, DEQ has failed to "specify the aplicable emission limitations..."

### 3.4 Facts Germaine to Petitioner's Allegation that Respondent DEQ's Fees for Duplication of Records are Excessive under Virginia FOIA and Discourage Public Participation Under the Federal Operating Permit Program

Respondent DEQ has a duel-track fee policy that it uses to assess fees for duplicating records. DEQ charges an hourly fee for clerk's time to produce document copies of $11.14 per hour and then goes on to charge $0.20/page for duplication.

Given the clerk's rate of $11.14, the per page copy cost should only reflect the non-labor cost to produce a single copied page.

DEQ's unreasonable $0.20/ per page copying rate far exceeds the likely cost to DEQ to produce a single copy page and far exceeds per copy page costs for commercial vendors, such as Kinko's, which produces copies for $0.08 per page.

### 3.5 Facts Concerning the Disruption to Public Participation and Damages Caused to Petitioners by Improper Confidentiality Claims by Respondents DEQ and Honeywell, Inc.

Petitioner Sierra Club of Virginia expected to view the entire administrative record concerning air pollution regulation of Honeywell, Inc. when consultants to the Sierra

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[7] Honeywell reported significant 1997 TRI air emissions of acetaldehyde, benzene, chlorine, ethyl benzene, hydrogen chloride, methanol, methyl ethyl ketone, hexane, phenol and toluene.

Club of Virginia traveled to the DEQ Piedmont Office during the week of September 11, 2000. Instead, Petitioners found that they were not granted substantial access to materials requested at that time, even though Respondent DEQ had an entire month to clear and consolidate the file. Petitioner Sierra Club of Virginia incurred considerable expenses in time and travel to conduct this review.

At this writing, incomplete disclosure of the Honeywell file has caused Petitioners delay in evaluating the Honeywell, Inc. Title V application and overall air pollution regulatory compliance at the Honeywell facility. This delay was caused by failure to properly disclose all requested materials. Any future disclosure will necessarily cause Petitioners to incur additional expenses for time, travel and duplication that would have been avoided if Petitioner DEQ properly discharged its public document disclosure duties.

Of the materials disclosed, some were defective copies of permits containing redacted information elements that were "applicable requirements" and "emission data" subject to mandatory public disclosure. Because DEQ only disclosed such defective copies of minor modification permitting documents, Petitioners will have to gain valid copies in the future of the same materials at considerable additional expense of travel, consulting time and duplication fees.

That Petitioners have had to incur these additional and excessive costs because of respondent's failure to disclose information for which public disclosure is required illustrates that Respondent DEQ's conduct has damaged the ability of the public to exercise its valid rights to participate in the Honeywell federal operating permit approval proceeding.

## 4 Sierra Club Virginia Chapter Notice and Findings of Violation to Respondent DEQ

### 4.1 Respondent DEQ has Violated the Virginia Freedom of Information Act

Sierra Club Virginia Chapter's request to the DEQ Piedmont Office was made pursuant to the Virginia Freedom of Information Act, Virginia Code Chapter 21, §2.1-340, *et. seq.* However, Respondent DEQ has failed to comply with this statute.

Respondent DEQ has failed in several ways to carry out its duty under VA Code Ch 21, §2.1-340.1. Respondent has draped a cloak of secrecy across operating permit and new source review permit proceedings in violation of DEQ's general obligations under VA Code Ch 21, §2.1-340.1 to ensure that "all public records shall be available for inspection and copying upon request." In doing so, Respondent DEQ has failed to carry out the statutory intent that the FOIA statute be "liberally construed to promote an

increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government."

DEQ failed to demand clear justification for confidential business claims from Honeywell, Inc. for each and every claim of CBI made by this firm, failed to enforce the requirement that the Title V applicants must justify CBI claims in their applications and failed to conduct its own *de novo* review of such claims. These failures, individual and collectively, rise to violations of Respondent DEQ's responsibilities to provide proper disclosure under DEQ's duty to ensure that "....all public records....shall be presumed open, unless an exemption is properly invoked" and that "any exemption from public access to records .....shall be narrowly construed and no record shall be withheld .....[from] the public unless specifically made exempt pursuant to this chapter or other provision of law." VA Code Ch 21, §2.1-340.1

Respondent DEQ violated the provision to "narrowly construe" exemptions from disclosure by withholding information containing both confidential and non-confidential materials and by failing to disclose such materials in part. The record shows that entire alleged "minor modification" permit files were not provided, that the entire text of minor source permits was declared confidential and that whole pages of information containing confidential and non-confidential materials was withheld. Where partial disclosure could have been carried out, Respondent DEQ's failure to do so indicates that it failed to "narrowly construe" exemptions from disclosure. Moreover, such failure to disclose "in part" violates VA Code Ch 21, §2.1-342(B)(3).

Respondent DEQ never provided Petitioners with any sort of written denial concerning the information withheld from disclosure. Such failure violates the requirements of VA Code Ch 21, §2.1-342(B)(2) & (3). This statutory provision requires a written denial when materials are withheld from disclosure and requires that written denial to identifies what materials are being withheld and the statutory basis of each decision to exempt such public records from disclosure.

Finally, Respondent DEQ's fee policies for duplication of documents do not conform to requirements of VA Code Ch 21, §2.1-342(F). When Respondent DEQ charges a labor charge on the duplication of documents, the non-labor fee charged per copy duplicated should only reflect the cost to actually duplicate such a copy. Per page duplication costs are only associated with the cost of paper and the costs associated with copy machine equipment. DEQ's per page fee of $0.20 per page [in conjuction with its hourly labor charge] is far in excess of rates that are charged commercially for per page duplication. This means that DEQ has incorporated into the per page cost an inappropriate and unreasonable charging of "extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records" and such conduct is prohibited by the statute at VA Code Ch 21, §2.1-342(F).

## 4.2 Respondent 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

### 4.2.1 Petitioner's Determinations Concerning the Nature of Material that Respondent 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 failed to provide to Petitioners falls into three general categories.

First, there is material for which no credible confidential business information claim can be made under the narrow determination that is required. Failure to disclose for such information is the result of DEQ's impermissible overly broad interpretation in favor of withholding public disclosure, DEQ's failure to verify the legitimacy of confidentiality claims by Honeywell, Inc. and failure to enforce prohibitions against invalid confidentiality claims under 9 VAC 5-170-60(E). The fact section above lists several permit proceedings where no information at all was provided or where the entire text of several permits was held to be confidential. In these cases, it appears that DEQ has impermissibly failed to disclose material which is public or failed to separate disclosable information from other information for which a confidential claim has been made.

Second, 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.

Third, 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."

### 4.2.2 Respondent DEQ's Failure to Disclose Federally Enforceable Applicable Requirements and Mandatory Disclosure Emissions Data and Failure to Maintain Public Copies of Minor Modification Review Permits Violates the Federal Clean Air Act, Virginia Air Pollution Statutes and Applicable Federal and State Administrative Regulations

#### 4.2.2.1 Respondent DEQ's Violation of Requirements Related to the Federal Operating Permit Program

On July 21, 1998, Respondent DEQ's determined[8] 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:

[8] July 21, 1998 letter from Charles L. Turner, Senior Environmental Engineer, DEQ Piedmont Office to Glen Coulter, Plant Manager, Allied Signal

> "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."[9]

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).

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). Respondent 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 the Honeywell Title V permit application.

In view of Respondent 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, Respondent 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.

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.

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[9] DEQ Form 805 – Air Operating Permit Application

The insistence so far by Respondent 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 a 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.), Respondent 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.

#### 4.2.2.2 Respondent DEQ's Violation of Requirements Related to New Source Review, State Implementation Plans and Requirements for Federal Enforceability of State Issued New/Modified Source Review Permits

By the same analysis noted above as to a prohibition at 9 VAC 5-170-60(C) on confidential treatment in the case of allowable disclosure from another source, Respondent DEQ's conduct in failing to fully and completely disclose all new/modified source review permits violates the Federally approved Virginia State Implementation Plan requirements found at 40 CFR §52.2423(o), as well as applicable underlying state regulations implicit in this Federally approved state implementation plan.

Respondent DEQ's determination allowing new source review permits issued to Honeywell to be designated as secret in their entirety, or allowing conditions limiting potential to emit and related emission data to be withheld in association with such permits violates federally approved Virginia regulations on "federal enforceability" found at 9 VAC 5-80-100(N)(1). This regulation explicitly recognizes federal enforcement of applicable requirements by citizens. However, DEQ conduct designating "applicable requirements" and "emission data" as confidential in modified source review permits deliberately precludes all such citizen enforcement of federally enforceable requirements. Citizens can never know such applicable requirements and thus can never compare such information to emission data-related reporting for enforcement purposes.

Finally, Respondent DEQ has failed to enforce federally approved state regulations at 9 VAC 5-170-60(E) that define impermissible and implausible claims of confidential business information as violations of Virginia statutes. In the present case, Honeywell/Allied Signal have made such claims concerning informational elements that

are either federally enforceable applicable requirements and/or emission data. No such confidentiality claim should have ever been asserted over such material.

#### 4.2.2.3 Because Respondent DEQ has Failed to Properly Specify Applicable Emission Limitations in Secret Permits or in Permits with Secret Applicable Requirements Limiting the Potential to Emit, and Because Respondent DEQ has Failed to Properly Carry Out Required Public Notice and Comment Procedures, Many Minor Modification Permits have been Improperly Issued to Honeywell and Such Permits Should be Held for Naught

Under DEQ rules, Respondent Honeywell, Inc. must have an air permit issued by DEQ prior to commencing construction on a minor modification of their industrial facility at Hopewell. 9 VAC 5-80-10(C)(1). Prior to issuing such a permit, DEQ rules approved for minor source review under the Virginia State Implementation Plan require certain determinations relating to public notice and participation for certain sources. DEQ rules provide for enhanced public notice and public participation requirements for existing sources of hazardous air pollutants described at 9 VAC 5-80-10(C)(1). If an existing stationary source emits hazardous air pollutants and this existing source is subject to any emission standard prescribed at 9 VAC 5 Chapter 60, then DEQ must undertake enhanced public notice and participation requirements during minor modification permit proceedings involving such a source.

Petitioners assert a preliminary finding that Honeywell's Hopewell VA facility is a stationary source subject to at least one or more of the following emission standards adopted by DEQ at 9 VAC 5 Chapter 60, including 40 CFR 61- Subpart J, 40 CFR 61 - Subpart V, 40 CFR 61- Subpart FF, 40 CFR 63 - Subpart F, 40 CFR 63- Subpart G; and 40 CFR 63 - Subpart H.

As such, the plain meaning of non-discretionary DEQ public notice and participation rules at 9 VAC 5-80-10(G)(4)(a) that have been incorporated into the Virginia State Implementation Plan as the approved minor source review procedure clearly require a public notice and a public comment period on minor modification permits for the Honeywell facility. However, DEQ has failed to provide such public notice and comment periods for the numerous minor modification permits issued to this facility.

In making decisions to issue such minor modification permits, DEQ must "specify applicable emission limitations" on the record. 9 VAC 5-80-10(F)(3). "Applicable emission limitations" are "applicable requirements" in minor modification review permits that must be publicly disclosed. As a result, DEQ has thus failed to properly "specify applicable emission limitations" on the record and in its public files in all cases when there is no permit in the public file, when the entire text of the permit in the public file

has been held confidential or when the published permit contains applicable requirements which have been held confidential.

Given that DEQ has not followed required public notice and comment procedures for several alleged "minor modification" review permits and that DEQ has failed to properly "specify application emission limitations" in those permits as a result of impermissibly holding part or all of such material confidential, Petitioners hold that all such permits were improperly issued and should be held for naught. As such, the continued legitimacy of Honeywell's operation of process equipment affected by such improperly issued permits must be called into question under the federally approved Virginia Implementation Plan requirement for air permits for minor modifications at 9 VAC 5-80-10(C)(1).

## 5 Petitioner's Requested Relief

Pursuant to the Virginia Administrative Process Act, VA Code Ch 1.1:1 §9-6.14:1, *et seq.*, Petitioners request the following relief as a result of violations, issues, notices, complaints and facts raised in this Petition; specifically, Petitioner's requests below for a Director's Final Order are made pursuant to VA Code Ch 1.1:1 §9-6.14:14:

5.1 Petitioners seek a written Director's Final Order providing for full disclosure of all Honeywell permitting documents identified in the fact section of this document, including complete, unredacted and unabridged copies of permits, permit applications, engineering analysis, agency findings, statement of basis, netting analysis, documents containing agency conclusions and other relevant file materials.

5.2 Petitioners seek a written Director's Final Order granting full disclosure of all information elements (including applications, correspondence and permits) for agency proceedings concerning Honeywell for both new/modified source review and federal operating permit application review of all information elements that are "federally enforceable applicable requirements" and "emission data."

5.3 In the event that Respondent DEQ determines that it will not disclose the requested Honeywell materials as requested, Petitioners seek a written Director's Final Order in compliance with VA Code Ch 21, §2.1-342(B)(2) & (3) that specifically identifies all Honeywell file materials that are withheld as confidential and the statutory and regulatory basis for each element for which the Director denies disclosure requested in this petition.

5.4 To the extent that Respondent DEQ continues to hold information elements in all Honeywell permitting files that are "federally enforceable applicable requirements" and "emission data" as confidential, Petitioner's seek a Director's

Final Order that any Honeywell minor modification new source review permit containing such an impermissibly withheld information element be declared by the Director as improperly issued, held for naught and in violation of Federal and State requirements binding on the Virginia new/modified source review program.

5.5 Petitioners seek a complete waiver of all duplication costs for all requests of DEQ for information relating to a federal operating permit applications, including copies of applications, permits, proposed permits, correspondence, underlying NSR permits and other information necessary for public participation in federal operating permit approval proceedings.

5.6 Petitioners seeks a complete waiver of all duplication costs for reduplication of defective documents DEQ previously provided to petitioners containing improper redactions and improper withholding of information after DEQ determines that such information should have been lawfully disclosed.

5.7 Petitioners seek a revision of DEQ copying fee policies to eliminate improper, illegal and excessive fees that were identified above in this petition.

5.8 In the event that requests 5.5, 5.6 and 5.7 are not granted, Petitioners seek a reduction in per copy duplication costs to $0.10 per page (whenever Petitioners are also subject to DEQ's labor charge) until such time as Respondent DEQ revises its duplication fee policy to ensure that extraneous and impermissible duplicating costs under VA Code Ch 21, §2.1-342(F) are no longer contained in the DEQ duplication fee policy.

5.9 Petitioners seek DEQ's immediate and future compliance with all public notice and public participation requirements found at 9 VAC 5-80-10(G)(4) as these relate to the Honeywell plant. In particular, this notice seeks a public notice and public comment period for all future new/modified source permits for the Honeywell, Inc. Hopewell facility, including all minor modification permits proposed for this facility.

5.10 Petitioners ask that the DEQ file this document as a comment to DEQ concerning the future approval of Honeywell's federal operating permit; further, Petitioners ask that this document be filed as a comment concerning all DEQ proceedings involving past issuance of minor modification NSR permits for Honeywell in which no public comment period was provided.

Respectfully submitted,

SIERRA CLUB VIRGINIA CHAPTER

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Glen Besa, Chapter Director

Filed January 16, 2001

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