February 14, 2001

Acting Administrator

US EPA Region II

290 Broadway

New York NY 10007-1866

RE: OVERFILING REQUEST - Vineland et al

Dear Acting Regional Administrator :

Public Employees for Environmental Responsibility (PEER) and the New Jersey Chapter of the Sierra Club formally request that the U.S. Environmental Protection Agency initiate enforcement action against Vineland Municipal Electric Utility, Fibermark, inc., MAFCO Worldwide Corporation, Coastal Eagle Point Corporation, Merck and Company, Kimble Glass Company, Harrison Baking Company, South Jersey Gas Company, and any and all other companies who have relied on the New Jersey Open Market Emissions Trading (OMET) Program to comply with the Reasonably Available Control Technology (RACT) requirements of the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q.

We request that you take the necessary actions under section 113 of the Act to bring about compliance with the federally approved State Implementation Plan (SIP). 42 U.S.C. § 7413. The OMET has not been federally approved for incorporation into the

SIP. As a consequence, the use of emission reduction credits generated under the OMET for compliance with the SIP RACT requirements is a violation of the SIP

Relevant Authorities:

> The Clean Air Act's RACT requirements are at sections 172(c)(1) and 182(b)(2).

> New Jersey's corresponding requirements for RACT are located at N.J.A.C. 7:27, subchapters 16 and 19, and included in the State Implementation Plan (SIP) in federal regulations at 40 Code of Federal Regulations (CFR) Chapter I, Subpart FF - New Jersey, 52.1570 - 52.1607.

> N.J.A.C. 7:27 Subchapter 16, applicable to volatile organic compounds (VOC), was incorporated into the federally approved SIP on August 7, 1997.

> N.J.A.C. 7:27 Subchapter 19, applicable to oxides of nitrogen (NOx), was approved on January 27, 1997 and March 29, 1999 (40 CFR 52.1605).

> The New Jersey OMET is codified in state regulations in chapter 27, primarily at subchapter 30. The implementation of the OMET also relies on several other subchapters within chapter 27.

RACT is the Clean Air Act's core technology requirement for attainment plans.

Since 1977 the Clean Air Act requirement for "reasonably available control technology" has been the top priority control technology requirement for attainment plans (see section 172(c) which defines nine elements of the required plan; RACT is listed at 172(c)(1)). The RACT requirement applies to existing sources and is the companion requirement to the Act's new source review requirements for new sources to install "lowest achievable" and "best available" control technology (sections 173(a)(2) and 165(a)(4) respectively).

The 1990 Amendments to the Act compelled New Jersey and other ozone nonattainment areas to include in their federally approved State Implementation Plan (SIP) enforceable requirements that "provide for the implementation of the required control measures as expeditiously as practicable but no later than May 31, 1995."

Clean Air Act deadlines have been deliberately ignored.

As we have detailed in documents previously submitted to the Agency,[(1)] early in 1995 as part of the Clinton-Gore Administration's "regulatory reinvention at EPA" initiative, EPA took a number of actions reversing the Clean Air Act's priorities. These actions were taken just prior to - and very much driven by - the May 31, 1995 Clean Air Act deadline for RACT. In these actions the Agency deferred for several years the Act's November 15, 1994 deadline for submission of ozone attainment plans, and at the same time elevated several relatively obscure passages of the Act pertaining to "economic incentive programs", or EIPs. [(2)]

More particularly, the Administration promoted a unique variety of EIP know as "open market trading" (OMT). The Agency formally proposed OMT rules and policies in August of 1995, specifically crediting "the original developers of the open market concept", in particular Richard Ayres, an attorney with O'Melveny and Myers and counsel for the Clean Air Act Corporation's president Ben Henneke.

It is a matter of record (documented in the PEER submissions cited earlier) that development of OMT was driven in large part by the desire for relief from the RACT requirement. It is also a matter of record that the pilot projects used to justify EPA's proposed OMT policies were all based in New Jersey, and all but one developed and brokered by the Clean Air Action Corporation. It is further a matter of record that Messrs. Ayres and Henneke overtly advised the Agency that there would be no "legal" compliance with the RACT requirement for quite some time, and that it was therefore important that the Agency employ "enforcement discretion" to ignore this noncompliance with the Act's requirements. EPA signaled it's agreement with this arrangement in a number of ways, among them numerous statements that New Jersey could rely on the 1995 OMT proposal, even lacking finalization of the proposal. [(3)]

Even today, the OMT proposal has not been finalized.

Noncompliance with the Act by New Jersey sources is a matter of public record.

Since May 31, 1995 at least a dozen companies have avoided compliance with the RACT requirement by foregoing the required control technology and emissions reductions and instead relying on "credits" generated by way of New Jersey's OMET. This information is readily available on New Jersey's own Open Market Emissions Trading Registry at www.omet.com.

Meanwhile the State belatedly submitted RACT rules for federal approval, which was provided in 1997, but the OMET, which has continued to be used for compliance with these federal requirements, has never been incorporated into the SIP. Lacking federal approval of the OMET for compliance with the federal requirements, any use of the program for such compliance is a violation of the SIP and the Clean Air Act.

Enforcement action by EPA is nnecessary to protect public health and the environment.

For six ozone seasons New Jersey sources have continued to emit at levels exceeding those allowed for in the Clean Air Act. This is unconscionable in an area classified as a "severe" nonattainment area, in which every ton of foregone emissions reductions is a contribution to continued exceedance of the federal health-based air quality standards.

Even a cursory review of the OMET Registry shows that the dozen or so companies referred to above have claimed compliance typically using paper credits based on hypothetical reductions occurring several years prior to the compliance period in question.

This use of non-contemporaneous and hypothetically-based credits is at direct variance with the plain requirements for RACT compliance in the SIP and in the Clean Air Act.

Due to the failure of EPA to finalize its proposed approval of New Jersey's OMET program during the past 6 years, since 1995 there has been significant noncompliance with the RACT and SIP requirements. That ongoing noncompliance warrants action.

As these actions have been taken under the aegis of New Jersey's Department of Environmental Protection, we therefore formally request that EPA immediately initiate civil and criminal enforcement proceedings against the companies referenced above.

Federal intervention is required to protect the environment and maintain the credibility of the federally-delegated Clean Air program within New Jersey.

We would also advise you that, lacking such action by the Agency, you should expect formal action under the citizen suit provisions of the Clean Air Act. It is our preference that EPA take the enforcement action itself, and not require the citizenry to have to act in the Agency's place.

Sincerely,

Jeffrey Ruch _____

Executive Director _____

PEER

Cc: Acting AA for EPA OECA

Director, EPA OECA Director of Regulatory Enforcement

Robert Shinn, Director, NJ DEP

1. Comments on Draft EIP, November 30, 1999.

2. The Agency cites primarily the Act's references at 182(g) to EIPs. However, under the Act the 182(g) provisions are triggered only after an area fails to meet the "rate-of-progress" milestone requirements at section 182(b). In other words, these EIP provisions would not be encountered until after an area had submitted an progress and attainment plan (per 182(b)), implemented the plan for several years, and then evaluated whether the projected progress was occurring. In contrast to this scheme, EPA simply set aside the requirements for progress and attainment plans and invoked the EIP provisions.

3. The Agency confirms this in its January 9, 2001 proposed action on the OMET (66 FR 1803.)