Coalition for Responsible Waste Incineration

MEMBER COMPANIES

Dow Chemical U.S.A.
Eastman Chemical Company
Eastman Kodak Company
Eli Lilly and Company
Lafarge Corporation
LWD, Inc.
3M
Onyx Environmental Services, LLC
Syngenta Crop Protection, Inc.
Von Roll America, Inc.
Washington Demilitarization Co.

ASSOCIATE MEMBERS

B3 Systems
Blue Ridge Chemicals
CEntry Constructors & Engineers
Compliance Strategies & Solutions
Cook-Joyce, Inc.
Croll-Reynolds Clean Air Tech.
Crown Andersen, Inc.
ENSR
Envitech
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
Metco Environmental, Inc.
RMT, Inc.
Severn Trent Laboratories, Inc.
Sigrist-Photometer AG
URS Corporation

INDIVIDUAL MEMBERS

Ronald E. Bastian, PE
Ronald O. Kagel, PhD

ACADEMIC MEMBERS
(Includes faculty from:)

Colorado School of Mines
Cornell University
Lamar University
Louisiana State University
New Jersey Institute of Technology
Princeton University
Rensselaer Polytechnic Institute
University of Arizona
University of California
Berkeley
Los Angeles
University of Dayton
University of Kentucky
University of Maryland
University of Utah

1752 N Street, NW, Suite 800
Washington, DC 20036
Phone: 202 452-1241
Fax: 202 887-8044
E-mail: crwi@erols.com
Web Page: http://www.crwi.org

September 25, 2002

Timothy D. Backstrom
Air and Radiation Law Office (2344A)
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Backstrom:

The Coalition for Responsible Waste Incineration (CRWI) is pleased to submit comments on the notice of proposed settlement agreement (67 FR 54804, August 26, 2002) in *Sierra Club v. Environmental Protection Agency*, No. 02-1135 (D.C. Circuit). CRWI represents 27 companies with hazardous and solid waste combustion interests. These companies account for a significant portion of the U.S. capacity for hazardous waste combustion. In addition, CRWI is advised by a number of academic members with research interests in hazardous waste combustion. Since its inception, CRWI has encouraged its members to reduce the generation of hazardous waste. However, for certain hazardous waste streams, CRWI believes that combustion is a safe and effective method of treatment, reducing both the volume and toxicity of the waste treated. CRWI seeks to help its member companies both to improve their operations and to provide lawmakers and regulators helpful data and comments.

CRWI sees several potential problems with the process and the proposed settlement agreement. These are summarized and then discussed in more detail below.

1. CRWI believes that EPA violated a "fairness" principle by negotiating only with Sierra Club on these issues and suggests that EPA re-open the negotiations with all parties to determine if an agreement can be reached by all.

2. CRWI believes that requiring Part 2 applications on May 15, 2003, does not give the permitting authority sufficient time to develop guidance on how to prepare the application nor does it give the facility adequate time to prepare the application. If EPA believes that Part 2 applications will be used by the permitting authorities to set case-by-case standards, the Agency needs to allow adequate time for the development of guidance so that adequate applications can be developed. If EPA believes that Part 2 applications will never be acted upon, the Agency should alter the minimum content of the application to minimize the amount of resources used in the effort.

3. CRWI believes that EPA needs to reconsider the alterations to startup, shutdown, and malfunction (SSM) plans as outlined in the settlement agreement. Proceeding with these changes could make it virtually impossible to start up or shut down a unit without being in violation of the emission standards. In addition, technologies fail, even with the best maintenance. Thus, the principles of SSM plans as they currently exist are important to the operation of a facility. CRWI agrees that the implementation of SSM plans could be improved. However, any discussion of these improvements should include all parties.

CRWI is deeply concerned over how this settlement agreement was developed. EPA published the final rule on April 5, 2002. Sierra Club filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit on April 25, 2002. Other parties filed to intervene with this suit as well as filing their own petitions for review. The deadline for filing petitions was June 4, 2002. By that time, eight other parties had filed petitions or intervenor requests and the court had consolidated the case. Non-binding lists of issues were due by July 4, 2002. This should have been the first time EPA could have determined each party's interests and initiated discussions to consolidate and solve the issues identified. Instead of following an appropriate, logical sequence of determining all the issues, finding common interests, and developing solutions to all party's satisfaction (if possible), EPA began negotiations with Sierra Club before determining the interests of the other parties. When confronted with this, EPA ignored these concerns and finished the negotiations with Sierra Club, settling that part of the lawsuit to the potential detriment of CRWI and other parties. CRWI objected to this at every possible opportunity with the Agency and with the court and will continue to object to what we see as an attempt by the Agency to ignore the interests of certain parties and appease the interests of

Coalition for Responsible Waste Incineration

others. While it may not have been possible to reach consensus on all issues, CRWI believes that compromises could have been reached on at least some of the issues in question. Instead, EPA chose to ignore all parties except the Sierra Club. By negotiating with Sierra Club only, EPA has, by definition, produced a product that only addresses one side of the issue.

CRWI believes that with a few changes and a willingness to discuss all party's interests, EPA could have avoided most of these problems. EPA can easily solve this problem by restarting the negotiations with all parties. Restarting the negotiations would not require a substantial time commitment nor would it cause a long delay if EPA would begin the process immediately. CRWI believes that there are fairly easy potential solutions for these issues should EPA be willing to discuss them with the other parties. While this might appear to prolong the debate, in the end, it will shorten it. Should EPA continue down this path, the most significant repercussion of the one-sided negotiations may likely be the proliferation of more litigation, not less. This litigation will have merit because of the failure of the agency to follow procedures that would allow all parties with an interest to partake in the process. In the Agency's hurry to solve one problem, they created several more.

We would also like to point out that the 113(g) process and comments on any proposed rule change is not a substitute for an adequate hearing for all parties on issues during negotiations of a lawsuit. EPA will have already made fundamental policy decisions prior to the 113(g) notice. These decisions should have been made by all parties to the litigation, not just the Sierra Club.

CRWI believes that each of the two areas where EPA has reached an agreement with Sierra Club will cause problems for our membership. These are discussed below.

1. Changing the timing between a Part 1 and Part 2 application from 24 months to 12 months will create a large expenditure of resources for states and facilities for no apparent reason.

   Under the proposed settlement agreement, EPA will propose to reduce the time period between the submission of a Part 1 application and a Part 2 application from 24 months to 12 months. EPA states in the notice of the proposed settlement agreement that the one year time period will allow proposed MACT standards to be issued, thereby reducing the

burden associated with preparation of the Part 2 application. EPA goes on to state that "EPA also anticipates that the one year period should be sufficient to prevent any need for actual issuance of case-by-case determinations under section 112(j) for all or virtually all affected source categories." CRWI does not see how this can possibly be correct. EPA has had 10 years to develop these MACT standards. While a large number of them have been promulgated, it is inconceivable that the remainder of the categories will be finished in the next nine months. Based on the latest revision of the source category list (see the February 12, 2002, *Federal Register* notice), there are more than 80 source categories where MACT standards have not yet been promulgated. At that time only about 20 have even been proposed. It is unlikely that even all of the proposed rules will be finalized by May 15, 2003, let alone any that have yet to be proposed. Even if all eighty are proposed by May 15, 2003, Part 2 applications would still be due on that date for every one of those facilities. This will mean that permitting authorities will be dealing with 80,000 Part 2 applications (based on EPA estimates, see 67 FR 16590) that may or may not ever be processed, depending upon when the final MACT standards for that category are promulgated. This represents a large expenditure of resources for no apparent reason, especially when EPA acknowledges up front that they do not expect any "actual issuance of case-by-case determinations." Thus, any standard promulgated after May 15, 2003, but before a case-by-case permit is issued will result in wasted effort by both the facility and the permitting agency. Surely there has to be a better way to utilize resources.

CRWI would like to expand upon this point for the Phase II hazardous waste boilers and industrial furnaces category. Based on the assumption that the settlement agreement is finalized as proposed, Part 2 applications for this category will be due in May 2003. Since the permitting authority is required to act on the application within 18 months (according to 63.52(g)(2)), this facility will theoretically receive their case-by-case permit in October 2004. At that time, the facility will have up to three years to come into compliance with their case-by-case standards (October 2007). EPA is under a court order to promulgate the standards for this category by June 2005. If the case-by-case determination did not exist for these facilities, they would have to meet the uniform, national MACT standards by June 2008, approximately eight months after the case-by-case date. This appears to be a great deal of effort to gain eight months. In addition, case-by-case standards will vary from state to state and region to region, depending upon the conditions negotiated between the

facility and the permit writer. It is possible that individual permit conditions could be quite different from the national MACT standards that will be developed eight months later. Should a facility actually receive a case-by-case permit, that facility may have until 2015 to meet the national MACT standards, depending upon the renewal date of the permit. Should, for some reason, the permitting authority fail to act on the Part 2 application prior to June 2005, the permitting authority would be required to incorporate the newly promulgated standards into their permit. This would make all the efforts in developing a Part 2 application meaningless. All of this results in a complicated series of efforts on both the facility and the permitting authority for very little gain. It makes no sense for facilities to have to develop Part 2 applications when they will not be acted upon. It also makes no sense for permitting authorities to develop case-by-case standards for each of about 150 facilities by October 2004 when a national MACT standard will be promulgated eight months later.

Despite EPA's statement in the August 26, 2002, *Federal Register* notice that one year will prevent the need for actual issuance of a case-by-case permit, the example above almost guarantees that case-by-case permits will be issued unless the permitting authorities ignore their deadlines. CRWI believes that this scenario will be repeated for a number of different categories because it will be impossible for EPA to promulgate MACT standards for all the remaining categories by May 15, 2003. By altering the dates for application of the Part 2 applications, EPA is creating a significant amount of work for themselves, the states, and the regulated community for very little return.

In addition, there is no guidance to either the states or the facilities on the contents of a Part 2 application. In the time left before Part 2 applications would be due (if the proposed changes were finalized), EPA has to develop guidance, states have to develop forms or checklists, and facilities have to gather the information needed for the application. This represents a significant amount of work to be done within the next eight months. Unfortunately, none of this work can be done in parallel. Facilities can not develop a Part 2 until the state gives them guidance on what should be in the application (develops forms). At this time, states need help from EPA on what should be included. This uncertainty will make it virtually impossible for the permitting authority to determine whether a Part 2 application is complete. As a result, permitting

authorities can not process any applications and the whole process may well grind to a halt.

Should EPA not be able to alter the timing of the Part 2 application, they should consider altering the contents of the application. If EPA truly believes that most permitting authorities will not need to act on these applications, then the agency should work with all interested parties to minimize the contents of the Part 2 application. While this will not change the timing, at least it will reduce the amount of resources that will be wasted on developing the application that will not be processed.

Another possible solution would be to suspend the need for a Part 2 application for all MACT standards where there is a court ordered deadline for promulgation. Since EPA rarely misses court ordered deadlines, it is probable that they will promulgate standards for these categories in the timeframe allotted. This way, facilities do not have to spend resources preparing Part 2 applications and the permitting authorities do not have to spend resources processing applications that are not really needed. This would delay compliance with some form of a MACT standard by a few months (specifically for the boiler and industrial furnace category - eight months). In return, it would guarantee compliance with a uniform MACT standard earlier than would happen with case-by-case.

2. The startup, shutdown, and malfunction (SSM) plan changes are neither modest nor consistent with policies described in the preamble of the proposed rule or the final rule.

CRWI is also very concerned with the potential changes in the SSM plans. We believe that these plans are an integral part of a facility's operations. It may not be possible to start or shut down operations without them. In addition, malfunctions will occur, even in the best maintained equipment. Thus, we see SSM plans as an important part of facility operations. The discussion below will address EPA contentions that the changes are "modest" and consistent with policies. Comments on the technical problems created by the proposed language in the settlement agreement will be developed when (and if) the proposed language is open for comment.

EPA makes the statement in the August 26, 2002, *Federal Register* notice that "EPA considers these changes to be modest in nature and

consistent with the policies concerning these SSM plans described in the preamble of the original proposal." CRWI does not understand how this can be correct. In the settlement agreement, EPA will propose: a) to change the nature of the SSM plan, b) to require SSM plans to be submitted to EPA, and c) force EPA to require changes to an SSM plan if certain conditions are met. None of these three changes can be considered "modest." Based on EPA's statements that these three changes are consistent with the preamble, CRWI searched the preamble of the proposed rule (March 23, 2001, *Federal Register*) but could find nothing to support EPA's claim. CRWI will address each proposed change based upon what is in the preamble of the proposed rule, the preamble of the final rule, and submitted comments.

a. Changing the nature of the SSM plan. The proposed rule (March 23, 2001) contained the requirement that at all times, including periods of startup, shutdown, and malfunction, owners and operators shall operate and maintain any affected source in a manner consistent with safety and good air pollution control. In addition, the phrase "i.e., meet the emissions standard or comply with the startup, shutdown, and malfunction plan" was included in the proposed rule. This language was not changed when the final rule was published (April 5, 2002). In fact, there is a sentence in the preamble of the final rule (67 FR 16586) that says: "To comply with the rule, sources must either meet the standard or comply with the SSMP." There is nothing in either preamble or the comments to suggest that EPA erred in including this phrase in the rule. Thus, for EPA to state that this change follows their intent is simply not supported by any preamble discussion in either the proposed rule or the final rule.

b. Submittal of SSM plans. In the preamble of the proposed rule, EPA states that a SSM plan must be submitted if the permit writer requests it (66 FR 16326). It goes on to state that the SSM plan can be made publicly available only if a request is made to make it available. In the preamble of the final rule, EPA addressed comments on requesting and making SSM plans publicly available. At 67 FR 16587, EPA states "We further believe, pursuant to 40 CFR 70.4(b)(3)(viii), that the authority for permitting agencies to request a facility's SSMP already exists. Therefore, we do not believe it is appropriate at the present time to revise the rule as commenters requested." The settlement agreement proposal to require facilities to submit their SSM plan is in direct conflict with the preamble language in the final rule. As such,

this proposed change can not be considered either modest or consistent with preamble language.

c. Requiring changes in the SSM plan. This change proposes to alter Section 63.6(e)(3)(vii). This section was not even considered for comment under the proposed rule. The only proposed changes (March 23, 2001) were to 63.6(e)(3)(vii)(B), (C), and a new (D) was added. The first part of the paragraph was not even open for comment. Thus, there is no discussion in either preamble or in the comments for this section of the rule. Therefore, this change can not be considered as consistent with any preamble discussion.

For these reasons, CRWI does not see how EPA can state that the proposed changes in the settlement agreement are "modest" and consistent with the policies stated in the preamble of either the proposed rule or the final rule.

CRWI believes that there is little to be gained by proposing these changes to the General Provisions and strongly suggests that EPA void the current settlement agreement and restart the negotiations with all parties. Not only did EPA approach the entire negotiations in an improper manner, the reasons for these changes are not supported by the preamble of the proposed rule, the preamble of the final rule, or any comments submitted to the docket. In addition, the changes proposed in the settlement agreement do not make technical sense. If EPA insists upon moving forward with these proposed changes, CRWI will develop comments on the technical failings of the potential proposed changes at the appropriate time.

Thank you for considering these comments. If you have additional questions, please contact us at 202-452-1241 or crwi@erols.com.

Sincerely yours,

Melvin Keener, Ph.D.
Executive Director

cc: CRWI Board
Rick Colyer, EPA