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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>

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REVISED

Air and Radiation Docket and Information Center
U. S. Environmental Protection Agency
Mailcode 6102T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attn: Docket Number OAR-2002-0038, Part 63 General
Provisions (Subpart A) and Section 112(j)
Regulations (Subpart B) Litigation Settlement Agreement II

The Coalition for Responsible Waste Incineration (CRWI) is pleased to submit comments on the proposed rule, *National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j)* (67 FR 72875, December 9, 2002). CRWI represents 29 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.

EPA has proposed a number of changes to the startup, shutdown, and malfunction plan section of the Part 63 General Provisions and proposed to change the timing of the Part 2 applications. CRWI will address each of these issues in turn.



Startup, Shutdown, and Malfunction Plans

As the Agency stated in the proposed 113(g) notice (67 DR 54804, August 26, 2002), EPA again states that the changes to the startup, shutdown, and malfunction (SSM) plans are "modest in character" and "generally consistent with policies in the preamble" (see 67 FR 72879). However, as we commented on the 113(g) notice, CRWI does not believe that the changes are modest nor are they generally consistent with policies articulated in previous preambles. In this action, EPA proposes: a) to change the nature of the SSM plan, b) to require SSM plans to be submitted to EPA, and c) to 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 preambles of the proposed and final rules, 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.
- b. Submittal of SSM plans. In the preamble of the proposed rule, EPA states that a SSM plan must be submitted if requested by the permit writer (66 FR 16326). It goes on to state that the SSM plan can be made available to the public only upon request. 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 current 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 current proposal are "modest" and consistent with the policies stated in the preamble of either the proposed rule or the final rule. In fact, each of these changes is significant and may have unintended consequences. The following is a discussion of why we believe that each of these three changes is unwise and/or unlawful, our rational, and a suggestion for alternate language.

A. EPA is proposing to delete an important clarifying statement.

EPA is proposing to modify section 63.6(e)(1)(i) as follows:

*40 CFR 63.6(e) Operation and maintenance requirements.
(1)(i) At all times, including periods of startup, shutdown, and malfunction, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions to the levels required by the relevant standards, i.e., ~~meet the emission standard or comply with the startup, shutdown, and malfunction plan.~~ Determination of whether ~~such~~ acceptable operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures (including the*



startup, shutdown, and malfunction plan required in paragraph (e)(3) of this section), review of operation and maintenance records, and inspection of the source.

By deleting "*i.e., meet the emissions standard or comply with the SSMP*" from this section, EPA is implying that the statement is not correct. But it is correct, and the text is an important clarification for both regulators and source owners that sources must either comply with the emission standards or operate in accordance with their SSM plans. For example, most hazardous waste combustors do not feed waste during startup. Waste is generally introduced after steady-state conditions have been established. Requiring a source to meet the emission standards even during startup when waste is not in the combustion chamber changes the intent of the promulgated rule and is not a "modest change." Eliminating this clarification could imply that all combustors must comply with the yet to be established MACT or the interim MACT limits and the associated operating parameters even during startup. Some operating parameters, such as minimum temperatures, cannot be met when beginning a cold start. Such sources could be considered out of compliance if the MACT emission standards are not met during startup/shutdown or a malfunction. This could severely limit operations for what the deleted language made clear to be a non-steady state condition. In addition, certain operating limits cannot be maintained (e.g., minimum combustion zone temperature, minimum pressure across certain air pollution control devices, etc.) during startup, shutdown or a malfunction. It also should be pointed out that during an SSM event at hazardous waste combustors, hazardous waste feed must be discontinued. During these short periods of time, the threat to human health and the environment is minimal.

During the discussions following the litigation of this rule, the Sierra Club pointed out that the current language could be read to mean that following an SSM plan satisfies the general duty clause to minimize emissions. Should a facility develop an inadequate or improper SSM plan and follow that plan, then it could be construed to have satisfied the general duty clause to minimize emissions. Sierra Club is correct in that the deleted phrase could be interpreted in that manner. EPA chose to solve the problem by removing the phrase. Even though EPA goes to great lengths in the preamble of the proposed change (see 67 FR 72880) to state that compliance with a properly drafted SSM plan during an event "will necessarily also constitute compliance with the duty to



minimize emissions," removal of the entire phrase gives the impression that it was incorrect in the first place. EPA included the phrase in the original rule to make sure it was understood that a facility should meet the standards at all times except during periods of startup, shutdown or malfunction. What the Agency failed to include in this phrase was the concept of an SSM plan that satisfies the requirements of 63.6(e)(3). Instead of including this concept, EPA decided to remove the phrase, creating other problems. Some of these are pointed out in our initial paragraph. In addition, if compliance with an SSM plan is not compliance with the standards, then the standard is unlawful because it is not "achievable" (National Lime Association, 627 F.2d 416 (D.C. Cir. 1980)). Because all technologies fail on occasion, the courts have held that technology-based standards must contain defenses or "safety valves" to accommodate such failures (Portland Cement Association, 486 F.2d 375 (D.C. Cir. 1973)). SSM plans are that accommodation. Accordingly, EPA should not remove the phrase that makes it clear that a facility must meet the standards or follow their SSM plan for it is that phrase that makes the standard "achievable." Thus, the solution chosen by EPA is unlawful and creates more problems than it solves.

Recommendation

CRWI agrees that the current language could be read in a manner that was not intended by the Agency. However, CRWI believes that dropping the entire phrase also has the unintended consequence in that it could render any MACT standard to which it applies "unachievable." It also gives the impression that compliance with an adequate SSM plan does not satisfy the general duty clause to minimize emissions at all times. Even though EPA discusses this in the preamble, local regulators do not always follow preamble language, but always follow regulatory language. Therefore, we suggest that the phrase be retained as finalized in the April 5, 2002, final rule with the following changes:

"... i.e., meet the emission standard or comply with the a startup, shutdown, and malfunction plan that conforms to the requirements of 63.6(e)(3)."

CRWI believes that this change will address the Agency's and Sierra Club's concern that an inadequate or improperly developed SSM plan will protect a facility from enforcement while giving clear direction in



regulatory language that following a properly developed SSM plan does satisfy the general duty clause to minimize emissions. Determining whether an SSM plan conforms to the requirements would remain (as it should) in the hands of the local inspectors. Determining whether a plan conforms to regulatory requirements should take into account the characteristics of the facility and cannot be dictated under a national rule.

In addition, CRWI would also like to point out that several MACT rules specifically contain language that makes it clear that the regulated entity must meet the standards at all times except during periods of startup, shutdown, or malfunction. If EPA deletes the phrase from the General Provisions, it will be inconsistent with these MACT standards. A partial list of the rules containing this provision is as follows.

Subpart F – National Emission Standards for Organic Hazardous Air Pollutants From the Synthetic Organic Chemical Manufacturing Industry (see section 63.102(a)(1))

Subpart U – National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymer and Resins (see section 63.480(j))

Subpart YY – National Emission Standards for Hazardous Air Pollutants for Source Categories: Generic Maximum Achievable Control Technology Standards (see section 63.1108(a)(1))

Subpart EEE – National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors (see section 1206(b)(1))

Subpart GGG – National Emission Standards for Pharmaceuticals Production (see section 63.1250(g)(1))

Subpart HHH – National Emission Standards for Hazardous Air Pollutants From Natural Gas Transmission and Storage Facilities (see section 63.1272(a))

Subpart MMM – National Emission Standards for Hazardous Air Pollutants for Pesticide Active Ingredient Production (see section 63.1360(e)(1))



Subpart 000 – National Emission Standards for Hazardous Air Pollutant Emissions: Manufacture of Amino/Phenolic Resins (See section 63.1400(k)(1))

B. EPA should not require initial and all updated SSM plans to be submitted to the permitting authority.

The requirement for submission of SSM plans to permitting officials alters the MACT General Provisions (40 CFR 63 subpart A) by making such operational plans regulatory deliverables rather than integral planning documents. As originally promulgated, section 63.6(e) of the General Provision requires that facilities must have current SSM plans available for inspection, keep old SSM plans for 5 years after each revision, and incorporate SSM plans by reference only in Title V permits. EPA found that most submissions of original plans and subsequent revisions to the permitting agency were not necessary. As EPA noted in the preamble to the April 5, 2002 (See 67 Fed. Reg. 16582, 16586-87), final rule, the SSMP requirements generated several comments. Based on these comments, EPA reached the conclusions that section 70.4(b)(3)(viii) was sufficient to allow permitting authorities the ability to request SSM plans and that explicit authority within this rule was not necessary.

To be effective, an SSM plan should be an organic document flexible enough to change with operational experience at a particular facility or class of facilities. As information is disseminated (through common ownership, trade associations, or technical research) within a particular source category about how similar facilities work, SSM plans can be revised or appended to reflect experiences at other facilities, a degree of industry cooperation EPA should encourage. For example, within the Department of Defense (DoD), various environmental improvement and Lessons Learned projects encourage facility managers to share their experience with central environmental offices, which in turn often prompt changes to operational standards and procedures implemented by other DoD and contractor-operated facilities. Under the proposed rule change, these kinds of programmatic or industry-standard changes to SSM plans would require multiple submissions of SSM plans to the permitting agency, with the added implication that a facility that has delayed incorporating improvements to its SSM plan because of competing priorities is in violation of 40 C.F.R. §63.6(e)(3)(v). This kind of regulatory regime exalts a reporting requirement over the practicalities of



how regulated entities should cooperate in environmental protection, and how regulatory agencies should promote environmental stewardship. This regulatory implication is all the more disturbing in that SSM plans are not subject to agency approval or the Title V permit shield. This creates a circumstance where SSM plan submittal becomes a regulatory requirement of no real significance in the Title V context other than as an administrative trap for the unwary. We would also like to point out that SSM plans are not documents that are hidden from the regulators or the public. Under current regulations, they are readily available for review when requested by the regulator.

In the final analysis, this whole regulatory question appears to be based on concern that non-reviewed SSM plans may shield traditionally noncompliant operations from agency or citizen enforcement. In particular, the Sierra Club objections to the current SSM plan provisions are apparently based on the fear that a facility could improperly shield poor pollution control practices from enforcement actions by relying upon a deftly drafted SSM plan that characterizes all emission exceedances as "malfunctions." We believe that the definition of "malfunction" in 63.2 already addresses this kind of circumvention. This definition excludes from the ambit of "malfunction" equipment failures that are "*caused in part by poor maintenance or careless operation.*" This already promulgated definition correctly eliminates bad-faith operations from the protection of SSM plans. In addition, EPA has already stated in the preamble of the March 23, 2001, proposed rule that "compliance with an inadequate or improperly developed SSM plan is no defense for failing to minimize emissions" (66 FR 16327). Thus, the potential for poor operation/maintenance or an improper SSM plan should be treated as the *ad hoc* enforcement issue that it truly is, rather than a rationale for categorically applying additional regulatory reporting requirements to all regulated entities.

Recommendation

Members of the public and the regulated community often have to deal with regulators that operate on different timetables. Having regulators that "may not" respond to a request from the public to obtain an SSM plan is not a very good reason to require that all SSM plans be submitted. This requirement will force all facilities to submit their plans and all updates. This will create a considerable amount of "paper" for each



facility. Since a number of these revisions to the SSM plan may be updates and attachments, this will create a confusing mess when trying to determine which is the current plan and which plan applied to what time period. When asked, regulators will end up going back to the facilities to request the appropriate plan, rather than looking in their files. Thus, the practical outcome of these proposed revisions will be that facilities have to submit SSM plans and all revisions. Nothing will be done with these plans until someone requests a copy. When that happens, it is likely that the regulators will go back to the facility to make sure they have the proper plan for the proper time, thus negating the entire reason for submitting the plan in the first place. CRWI believes that requiring the submittal of these plans creates regulatory deliverables with no purpose other than to allow the public the ability to request these plans. If the agency wishes to review a specific SSM plan, it already has the authority to request that plan. Nothing will be done with plans not specifically requested by the local permitting authority except to store them in agency file cabinets. This makes no sense especially when the original rule explicitly stated that the owner or operator "must make the plan available upon request..." Additional requirements are simply not needed and violate the concepts included in EPA's Burden Reduction Initiative.

CRWI suggests that EPA retain the language in the April 5, 2002, amendments that requires facilities to have SSM plans available for inspection and copying and not make the changes proposed on December 9, 2002.

C. EPA must require changes in an inadequate SSM plan.

In the preamble of this proposal, EPA states that they could not envision a circumstance where the revision of a deficient SSM plan should not be required. We agree that if an SSM plan is not properly developed, it should be revised. We note that the General Provisions already require a revision of the SSM plan if a malfunction event is not covered or was not adequately covered (see 63.6(e)(viii)) by the current plan. Revisions of the plan must be made within 45 days and any changes to the plan must be included in the semi-annual reporting. In addition, sources complying with Subpart EEE must revise an SSM plan if more than 10 exceedances within a 60 day period of an emissions standard or operating limit occur while hazardous waste is in the system.



CRWI questions the need for the proposed changes because current language already provides for required changes. In addition, CRWI has two specific concerns with the way that EPA chose to make the changes in the regulations. First, the absolute nature of the requirement does not leave the regulator any discretion in requiring changes. While it is difficult to imagine, there may be cases where practical concerns make it undesirable to make changes in the SSM plan (e.g., where the change could compromise safety). EPA needs to further modify the language to allow the regulator some flexibility in making that decision. Second, the current regulations have four criteria on which to determine if an SSM plan should be revised. As long as regulators "may" require changes based on these four criteria, all four are appropriate. The proposed revised language follows.

"The Administrator must require appropriate revisions to a startup, shutdown, and malfunction plan, if the Administrator finds that the plan:

- (A) Does not address a startup, shutdown, or malfunction event that has occurred;*
- (B) Fails to provide for the operation of the source (including associated air pollution control and monitoring equipment) during a startup, shutdown, or malfunction event in a manner consistent with safety and good air pollution control practices for minimizing emissions to the levels required by the relevant standards;*
- (C) Does not provide adequate procedures for correcting malfunctioning process and/or air pollution control and monitoring equipment as quickly as practicable; or*
- (D) Includes an event that does not meet the definition of startup, shutdown, or malfunction listed in §63.2."*

If, in the final rule, the "may" is changed to "must" the second criterion (B) could be interpreted to require that every time a facility followed their SSM plan and exceeded the emission standards, the plan must be revised. This reading is based on the last phrase "minimizing emissions to the levels required by the relevant standards." This seems to suggest that if the appropriate standards are exceeded, then the SSM plan must be revised. As long as the previous sentence contained a "may," regulators could use their discretion. However, when it is changed to "must," they no longer have any discretion and are forced to require



changes when standards are exceeded. This would create a situation where SSM plans are constantly being revised because the facility exceeded its emission standards every time it started up or shutdown. For example, certain air pollution control devices work on a pressure differential. Since, by definition, the pressure differential is zero upon startup and needs a certain amount of time before the appropriate differential can be developed and maintained, that facility would be out of compliance every time it started up and would be forced to revise its SSM plan after every startup. Obviously, this was not what EPA intended in making this revision.

Recommendation

CRWI believes that the current regulatory language of the General Provisions is adequate to provide for changes to deficient SSM plans. CRWI does not see the need for the proposed change. We suggest that the language remain as it was in the April 5, 2002, final rule.

If however, EPA proceeds with the proposed regulatory language, we suggest an additional change that will remove an unintended consequence of the proposed language. EPA should modify the second criterion as follows:

(B) Fails to provide for the operation of the source (including associated air pollution control and monitoring equipment) during a startup, shutdown, or malfunction event in a manner consistent with safety and good air pollution control practices for minimizing emissions ~~to the levels required by the relevant standards;~~

Making this modification will make it possible to develop and follow adequate SSM plans. Preamble language could be used to make it clear that excess emissions while following an adequate SSM plan should not be used to require a revision in that plan.

In addition to the three suggested changes above, CRWI suggests additional changes in the following two areas concerning SSM plans.

- 1. The amended rule should allow for electronic maintenance of all SSM plans.**



CRWI does not support the proposal to require that SSM plans be automatically submitted to the permitting authority. However, we do support the proposed language in 40 CFR 63.6(e)(3)(v) that provides for electronic submittal of that plan. In fact, we suggest that EPA expand that language to allow facilities to store superseded SSM plans (and all other plans for that matter) in an electronic format.

Recommendation

To accomplish this, we suggest the following additions to 63.6(e)(3)(v) (based on the final language from the April 5, 2002, *Federal Register* notice) that allows SSM plans to be submitted electronically and would allow superseded SSM plans (which must be retained for five years) to be stored electronically.

...In addition, if the startup, shutdown, and malfunction plan is subsequently revised as provided in paragraph (e)(3)(viii) of this section, the owner or operator must maintain at the affected source each previous (i.e., superseded) version of the startup, shutdown, and malfunction plan, and must make each such previous version available in hard copy or electronic format for inspection and copying or printing by the Administrator for a period of 5 years after revision of the plan.

2. EPA should also remove the malfunction reporting requirements from 63.10(d)(5).

During the April 5, 2002, rulemaking, EPA received comments from STAPPA/ALAPCO that oversight of facilities would be easier if the number and description of malfunctions were reported as a part of the semiannual report. Even though this was not proposed and other parties did not have the opportunity to comment on this concept, EPA agreed with the idea and included it in the final rule. In addition, EPA decided that all startups and shutdowns should also be included in this reporting requirement. After discussion with the regulated community, EPA has decided that reporting requirements for startup and shutdown were unnecessary and now proposes to remove those two parts of the reporting requirements. CRWI agrees that these reporting requirements are unnecessary and supports the proposed deletion of startups and shutdowns from this provision. In addition, CRWI suggests that EPA also delete the reporting of malfunctions from this section for the following



reasons. Section 63.10(c)(7) already requires recording of any "excess emissions and parameter monitoring exceedances" that occur during startups, shutdowns, and malfunctions. Subsequently, section 63.10(e)(3)(v) requires reporting of these excess emissions. Thus, other parts of the rule already require reporting of all excess emissions from startups, shutdowns, and malfunctions. The only practical effect of section 63.10(d)(5) is to require the reporting of startups, shutdowns, and malfunctions that did not result in excess emissions. CRWI fails to see why facilities need to or even should report malfunctions that do not result in excess emissions. Malfunctions that do not result in excess emissions show that the SSM plan worked and the responsibility to minimize emissions has been met. Facilities do not report normal operations where the emission standards are met – only the time when standards are exceeded. Why would they need to report malfunctions when the emission standards are met? Should the regulator be concerned about a facility, then the total number of malfunctions can be determined when the operating record is examined during an inspection.

Recommendation

Similar to startups and shutdowns, reporting malfunctions that do not result in exceedances is unnecessary and burdensome. EPA should further amend this section as follows.

*63.10(d)(5)(i) * * * Reports shall only be required if a startup, shutdown, or malfunction occurred during the reporting period, ~~and they must include the number, duration, and a brief description of each malfunction.~~ * * **

This will return the language to where it was prior to the April 5, 2002, change. All startups, shutdowns, and malfunctions are reported as a part of the semiannual report but it will simply contain a statement that a certain number of startups, shutdowns, and malfunctions occurred during the reporting period, that the SSM plan was followed, and there were no excess emissions. If there were excess emissions, then those events will be reported under Section 63.10(e)(3)(v). Not following an SSM plan triggers immediate reporting requirements (see 63.10(d)(5)(ii)). Thus, all reporting possibilities are covered.



Part 2 Application Deadlines

CRWI supports the deadlines for Part 2 applications as proposed. We believe that this solution is a good compromise. It forces EPA to meet deadlines for promulgating MACT standards while not forcing facilities to develop and submit Part 2 applications that will never be acted upon. In addition, we support the August 13, 2005, deadline for the industrial boilers, industrial/commercial boilers, process heaters, and hydrochloric acid production furnaces that burn hazardous waste. Setting that deadline will allow the Office of Solid Waste to develop the MACT standards for those categories and not force Part 2 application on those sources unless EPA misses their deadline.

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