

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Don R. Clay
President
Don Clay Associates
1701 Pennsylvania Ave., NW
Washington, DC 20006

Dear Mr. Clay:

Thank you for your letter of April 11, 1997, in reference to the MACT Implementation Project's (MIP's) draft compliance plan. Don Clay Associates and the MIP member companies have played an active role in the identification of issues and the development of ideas to aid in the implementation of the final rule. Your efforts and ideas have been extremely valuable in the preparation of the final rule, and are appreciated.

In your letter, you express concerns that the Agency will use the compliance plans as enforceable documents to force facilities to stop burning waste before the compliance date of the final rule, or to punish facilities that depart from milestones identified in the plans. While we considered a broad range of options concerning compliance plans, we developed a specific type of plan that does not involve such an enforcement scenario, and we have released that plan for public comment in a Notice of Data Availability (NODA). I understand your staff has obtained a copy of the NODA and is presently reviewing the document.

In the NODA, the Agency describes a submission, similar to the plan outlined in the MIP's Regulatory Blueprint named the Public and Regulatory Notification of Intent to Comply (PRNIC). The NODA discussion of the PRNIC, which was developed based on comments from the MIP and other commenters, explains the use and rationale behind a facility submission to the public. In this NODA discussion, the only enforceable aspects of the PRNIC are that they are submitted on time, and that they are complete. Our thinking regarding information pertaining to a facility's compliance strategy, which is outlined in the PRNIC, is that such information will primarily serve to inform the public.

I invite you to review and comment on the PRNIC as described in the NODA. Your comments will be carefully considered during the development of the final rule. If you or your staff have any further questions regarding the PRNIC, please contact Larry

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Gonzalez of my staff at (703) 308-8468.

Sincerely,

Michael Shapiro
Acting Deputy Assistant
Administrator

April 11, 1997

Mr. Michael Shapiro
Acting Deputy Assistant Administrator
Office of Solid Waste & Emergency Response
U.S. Environmental Protection Agency MC-5101
401 M Street, SW
Washington, DC 20460

Re: MACT Implementation Project -- Draft Compliance Plan

Dear Mr. Shapiro:

As you may recall, the MACT Implementation Project (MIP) is comprised of two companies (the Dow Chemical Company and Eli Lilly & Company) interested in helping EPA to formulate a sensible and workable program for implementing the proposed emissions standards for hazardous waste combustors in a manner that protects human health and the environment. The MIP Project submitted detailed comments on the proposed rule in the form of a "Regulatory Blueprint" dated August 16, 1996; and followed up with additional information in a memorandum to EPA dated January 9, 1997.

One of the elements of the MIP Project's comments was the suggestion that facilities subject to the final rule submit a draft compliance plan to EPA or the authorized state, as well as the affected public, within nine months of the final rule's publication. The facility would hold a public meeting on the plan, and submit a final plan within 18 months of the rule's publication. The plan would not be an enforceable document, but would instead serve to inform the public and the regulators of the facility's progress in evaluating its options for complying with the rule and, if the facility were to elect to stop burning waste, give the facility sufficient time to explore alternative pollution prevention or waste management options.

The goals of such a plan are threefold: First, to meet the spirit of EPA's enhanced public participation rules by giving the public an early opportunity to review the necessary information, rather than a limited comment period at the end; this is particularly important to the MIP members who are concerned that States in which their facilities are located will not adopt an expedited permit modification process if it curtails the public's review. Second, to speed compliance by utilizing a self-implementing process; and third, to document a facility's good faith efforts to meet the compliance deadline in three years, in the event that unforeseen circumstances (delays in processing permit modifications, procurement or equipment problems, shakedown, etc.) require regulators to grant a

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case-by-case compliance extension. In particular, the ability of the public to review this information early in the process is critical to continuing the relationship of trust and credibility that MIP members' facilities have established with their communities. Without informed public involvement and acceptance, speedy implementation will not happen.

The MIP members are concerned, however, with recent reports in the trade press that the concepts in draft compliance plans may be misused or misconstrued. As a voluntary, draft document (and by definition, one subject to change), the compliance plan should neither be interpreted as an enforceable document used to penalize facilities for failure to meet certain milestones, especially those beyond their control; nor lead to a "fingerpointing" exercise. Penalizing companies for sharing early information with the public and regulators will have a chilling effect on companies' willingness to be frank and candid about their planning processes, and will result in the usual adversarial "decide-announce-defend" type of regulatory implementation process. It will also eliminate the self-implementing nature of this concept, and become a needless additional drain on resources for EPA Regions and States. Furthermore, misuse of these compliance plans to "hammer" facilities into ceasing operations is entirely inappropriate. Under the Clean Air Act (CAA), facilities have at least three years in which to prepare for compliance; voluntary documents should not be turned into the means in which opponents can "shoot the volunteers" and we urge EPA not to adopt this scheme in a way that contributes to such an unfortunate situation.

In an effort to address these concerns, the MIP Project has developed two options for refining the compliance plan approach. Under the first option, the compliance plan would be required only at facilities with existing RCRA permits. The rationale for this approach is that these facilities, unlike interim status facilities, will require extra time and planning because of the need for processing of permit modifications in order to come into compliance (many have already experienced delays of three to five years in ongoing permit modification efforts). Under the second option, the draft and final compliance plan would be an optional rather than a mandatory provision of the regulations, thus substantially removing the basis for mischief or misuse. This option would still provide facilities that sought enhanced public participation or wanted an alternative to document good-faith efforts to comply given the likelihood of delays beyond the facility's control, a means to substantiate the basis for a compliance agreement and reduce any possibility of penalties. Finally, the MIP members also would strongly suggest that this document be renamed an "informational or communication plan" instead of a compliance plan. Doing so would ensure that the public is not confused with the intent and purpose of this document -- that is, to provide information on what steps the facility plans to undertake to come into compliance with the hazardous waste MACT rules as opposed to an "enforceable compliance document" that the facility has legally agreed to.

We would be pleased to develop these ideas in more detail, or to discuss them with your staffs at their convenience. We appreciate your continued thoughtful consideration of a variety of viewpoints on this critically important rule, and in particular on expediting and streamlining the implementation and compliance aspects. We look forward to hearing from you.

Sincerely,

Don R. Clay

cc: E. Cotsworth
M. Hale
J. Seitz
B. Jordan
MIP Members
J. Berlow
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B. Holloway
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RCRA Docket