

Great Lakes—Request for additional
information under Article 21(1)(b)

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BY FAX AND REGISTERED MAIL

Mr. William A. Nitze
Assistant Administrator
US Environmental Protection Agency
1300 Pennsylvania Avenue N.W.
Room 31277 (mail code 2650R)
Washington, DC
20004

**Ref.: Request for Information Under Paragraph 21(1) of the North
American Agreement on Environmental Cooperation**

Submitters: Department of the Planet Earth et al.

Party: United States

Date: 27 May 1998, as revised 4 January 1999

Submission: SEM-98-003

Dear Mr. Nitze:

This request for information concerning SEM-98-003 (the "Great Lakes" submission) is made under Article 21 of the North American Agreement on Environmental Cooperation (NAAEC). The Great Lakes submission raises a series of issues concerning the alleged failure of the United States to effectively enforce the Clean Air Act as it applies to certain activities engaged

in by municipal waste combustion (MWC) facilities and medical waste incinerator (MWI) facilities. In a determination dated September 8, 1999, the Secretariat requested a response from the United States to certain of the allegations contained in the submission, and on December 1, 1999, the United States provided its response.

The United States Clean Air Act is widely acknowledged to be an extraordinarily complex environmental law. The United States Supreme Court has stated that the Clean Air Act is “a lengthy, detailed, technical, complex, and comprehensive response to a major social issue.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 848 (1984). The Court offered that characterization before Congress adopted the 1990 amendments to the Act, which “greatly increased the length, specificity, and scope of the Act.” Frederick R. Anderson, Robert L. Glicksman, Daniel R. Mandelker & A. Dan Tarlock, *Environmental Protection: Law and Policy* 378 (3d ed. 1999). One of the United States federal circuit courts of appeal has characterized the Clean Air Act as “one of the most comprehensive pieces of legislation in our nation’s history” and as “an extremely complex law. See *Motor Vehicle Mfrs. Ass’n v. New York State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 524-25 (2d Cir. 1994).

The response of the United States, while quite complete in many respects (it totals more than 100 single-spaced pages, including appendices), raises a limited number of specific questions for which the Secretariat believes additional information would be helpful in determining appropriate next steps concerning the submission. These questions relate in part to section 129 of the Clean Air Act. Section 129 requires that EPA establish standards of performance for new solid waste incineration units and guidelines for existing solid waste incineration units (MWCs and MWIs).

This section also provides that EPA must require the owners or operators of these incineration units to comply with monitoring requirements developed by the agency and report to the agency on the results of that monitoring.¹ As the December 1, 1999 United States response indicates, EPA has issued a series of implementing regulations under section 129. These regulations impose monitoring obligations on solid waste incineration units that vary depending upon at least three factors:

- The type of combustion unit at issue (*i.e.*, whether it is a MWC or a MWI)
- The size of the unit; and
- The date on which construction on the unit commenced.

¹ Title V of the Clean Air Act, which governs the permit program established by the 1990 amendments, imposes additional monitoring and reporting requirements.

This multiplicity of factors, coupled with the complexity of the statutory scheme, raises questions about the actual coverage of the different regulatory and monitoring obligations (*e.g.*, which obligations are now in effect, the number of facilities covered by different obligations, etc.). An understanding of these basic facts is important to the Secretariat's review of the assertions of failures of effective enforcement set forth in the submission.

The Secretariat's understanding from the response is that the majority of MWCs and MWIs are not currently subject to emission standards or monitoring requirements under the federal Clean Air Act. Instead, for many larger MWCs, the United States adopted regulations on December 19, 1995 that establish emission standards and monitoring requirements that will only become effective five years later, on December 19, 2000. Similarly, for many larger MWIs, the United States adopted regulations on September 15, 1997 that establish emission standards and monitoring requirements that will only become effective five years later, on September 15, 2002. Further, while the Clean Air Act appears to make performance standards for new MWCs and related monitoring requirements effective six months after the date of promulgation (that is, six months after December 19, 1995), the response of the United States indicates that there are no MWCs covered by this requirement. It states in footnote 11 that “no new MWCs have been constructed since the most recent NSPS for MWCs were proposed in 1994.”

Assuming the preceding paragraph reflects an accurate understanding of the nature of the regulatory and monitoring requirements for the majority of MWCs and MWIs, some number of MWCs and MWIs appear currently to be subject to emission standards and monitoring requirements. The following questions are an effort to understand the situation concerning these requirements that are already in place. In particular, through this request for information the Secretariat is interested in determining the monitoring requirements under the Clean Air Act that are currently in effect for MWC and MWI sources, the number of MWC and MWI sources currently subject to these requirements, and the compliance status of these sources. Any needed correction of the Secretariat's summary of the regulatory requirements for the majority of MWCs and MWIs, provided in the preceding paragraph or in the remainder of this request for information, should be provided in the response to this request as well.

Additional Information Requested

- 1) The response indicates that one set of standards and monitoring obligations, issued in 1991, applies to a small subset of MWCs (less than six). The response states that "EPA is not aware of any information indicating that MWCs subject to these requirements are not in compliance with them." (p. 10). It would be helpful to have additional information concerning this small subset of MWCs. Please (1) explain the efforts EPA has made to determine the compliance status of these facilities, and (2) indicate the actual compliance status of such facilities.
- 2) The response indicates that EPA issued emission guidelines for existing MWCs on December 19, 1995. These are effective as expeditiously as practicable after approval of a state plan. At the latest, these requirements become effective three years after EPA's approval of a state plan or five years after the date the standards are promulgated, whichever is earlier. 42 U.S.C. § 7429(f)(2). Please indicate whether these guidelines and monitoring requirements are in effect for any existing MWCs, including whether EPA has approved any such state plans (and, if so, the dates of approval). Please also (1) explain the efforts EPA has made to determine the compliance status of facilities (if any) covered by an approved plan, and (2) indicate the actual compliance status of any such facilities.
In addition, please indicate whether any existing MWCs are subject to any emission limitations or monitoring requirements contained in applicable state implementation plans (SIPs) that are not part of an approved state plan under § 129 of the Clean Air Act. If so, please (1) explain the efforts EPA has made to determine the compliance status of such MWCs with applicable requirements, and (2) indicate the actual compliance status of any such MWCs.
- 3) The Clean Air Act requires that EPA issue new source standards of performance applicable to solid waste incineration units with capacity equal to or less than 250 tons per day combusting municipal waste and units combusting hospital waste, medical waste and infectious waste by November 15, 1992. 42 U.S.C. § 7429(a)(1)(C). If EPA has issued such standards, please (1) explain the efforts EPA has made to determine the compliance status of units (if any) covered by these requirements, and (2) indicate the compliance status of any such units.

- 4) EPA issued its standards of performance for new MWIs on September 15, 1997. 62 Fed. Reg. 48,382. The Clean Air Act provides that performance standards and related monitoring requirements for new sources are effective six months after the date of promulgation. 42 U.S.C. § 7429(f)(1). Please (1) explain the efforts EPA has made to determine the compliance status of facilities (if any) covered by these requirements, and (2) indicate the compliance status of such facilities.
- 5) EPA issued its emission guidelines for existing MWIs on September 15, 1997. 62 Fed. Reg. 48,382. The Clean Air Act provides that each unit subject to these guidelines shall be in compliance not later than three years after EPA's approval of a state plan or five years after the date the standards are promulgated. 42 U.S.C. § 7429(f)(2). EPA's response indicates that 28 states with MWIs have submitted plans to EPA. Thus, among other information, it would be relevant whether EPA has approved any such state plans, whether the guidelines for MWIs have become effective yet in any state with an approved plan, and whether these guidelines are in effect for any existing MWIs. If the guidelines are in effect for existing MWIs, please (1) explain the efforts EPA has made to determine the compliance status of any MWIs covered by these requirements, and (2) indicate the compliance status of such facilities. Please also explain whether any existing MWIs are subject to any emission limitations or monitoring requirements contained in applicable SIPs that are not part of an approved state plan under § 129 of the Clean Air Act. If so, please (1) explain the efforts EPA has made to determine the compliance status of such MWIs, and (2) indicate the actual compliance status of any such MWCs.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

per: David L. Markell
Director, Submissions on Enforcement Matters Unit

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Ms. Janine Ferretti, Executive Director