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MEMORANDUM

CLIENT-MATTER NUMBER
306210-0011

TO: Michel R. Benoit

FROM: Richard G. Stoll

DATE: July 12, 2006

RE: Recommendation to Terminate SSRA Mediation

After I briefed you on the mediation session held on June 28, I have been deliberating further and now have a recommendation for you. My bottom line recommendation: I should write the mediators and tell them we do not want to continue with the mediation process.

BACKGROUND

Under the Court's original briefing schedule our initial brief was due June 28. Under the extension we obtained because of the pendency of the mediation, our initial brief is now due September 28. The September 28 briefing date will not be changed unless we ask for it to be changed. That is, even if the mediation process were still underway in September, we could go ahead with briefing if we chose. (The judges are not informed whether mediation is in progress.)

We essentially have four basic procedural options now:

1. Continue with the mediation but go ahead and prepare to file our initial brief September 28.
2. Continue with the mediation and further suspend briefing for another period of time beyond September 28 unless and until it becomes evident that mediation efforts will fail.
3. Withdraw from the mediation and prepare to file our initial brief September 28.
4. Withdraw from the mediation and withdraw from the litigation.

Recall that neither CKRC nor EPA asked for this mediation. While the Court executive says it is "mandatory," we have now completed the only "mandatory" steps. That is, we have prepared and submitted our ten-page statement to the mediators as they have requested, and we

have held our initial meeting with EPA and the mediators as they requested. As the mediators made clear at our meeting, if at any time we do not feel it is worthwhile to continue with the mediation process, we can simply inform them, and that will be that.

To complete the background, please recall the position we were taking going into the mediation:

-- First, we said our strongly preferred position would be for EPA to agree to do just what we asked in our rulemaking petition: to immediately cease requiring any more SSRAs, and to require them in future only if and when EPA would go through a full rulemaking process to establish an SSRA program.

-- Second, we suggested a potential compromise that would specify tight regulatory criteria making it very difficult for EPA to require a second SSRA at a facility that had already performed an SSRA. As to this "rarely-a-second-SSRA" compromise, we were very cautious to note in our mediation statement that we were not yet convinced it would work. We stressed there could be serious procedural problems for our members if a permit writer chose to require a second SSRA where our member believed the permit writer did not faithfully abide by the new regulatory criteria. We stated we would accordingly need a lot of convincing by EPA that our members' procedural rights would be protected in such a situation before we might ever actually agree to such a compromise.

KEY POINTS FROM MEDIATION SESSION

A. There is no way EPA would go along with our preferred position. We fully expected this.

B. We learned that EPA Regional personnel have been very vocal and very active in the entire process of addressing the CKRC SSRA petition. This was no surprise, but it was somewhat surprising to hear EPA counsel be so candid and direct about this point. Further, EPA Regional personnel objected strongly to any concessions of any kind during our earlier SSRA petition process. EPA counsel in essence confirmed everything we had said in the mediation statement about the Regions driving all this.

C. EPA Regional personnel would almost certainly object strongly to any further restrictions in regulatory language on their ability to require a first SSRA or a second SSRA, and EPA HQ people seem to have no reason to pick a fight with the Regions on this. In fact, EPA counsel pointed to the one very mild provision in the new regulatory language that mentions whether an SSRA has already been performed as one out of eight factors to consider in assessing whether a new SSRA should be required. EPA counsel revealed even that mild concession was only inserted at the insistence of OMB.

D. EPA counsel reinforced our concerns about procedural rights in the event there was a dispute between a permit writer and a facility about whether a second SSRA should be required. Echoing our worst fears, she indicated that the initial permit denial could well trigger a

requirement to stop burning waste, and that the regulations were not as clear as they could be on that point. When a mediator asked whether EPA might amend its basic RCRA permit procedural regulations to provide greater administrative appeal rights and/or greater certainty on this point, EPA counsel (quite expectedly) rolled her eyes.

E. The mediators actively pressed the point that whatever deal might get struck here, all "stakeholders," especially environmental groups, should be brought into the process sooner rather than later.

MY REACTION AND RECOMMENDATION

I have a hard time seeing how anything good could come out of this process. In rough order of importance, here are my basic points:

1. Bringing in the "stakeholders" is something that could not possibly help us but would most probably hurt us. At least when EPA chose to wrap the SSRA petition process into the MACT rulemaking, ETC and Sierra were sufficiently diverted on MACT issues that they never even bothered to comment on the SSRA issues. If SSRA were suddenly to become isolated as a stakeholder event, either through meetings and/or notice and comment, ETC and Sierra would most likely weigh in at 180 degrees from our positions. EPA HQ would thus be pressured to compromise not only to accommodate the Regions (as if that weren't bad enough for us) but also ETC and Sierra.

2. The more I think about it, even our "rarely-a-second-SSRA" regulatory compromise would suffer from some of the same problems discussed in #1 immediately above. That is, even if "stakeholders" were kept totally in the dark until the day a rulemaking proposal hit the Federal Register, they would then have a focus on SSRA they never had before and probably cause problems that could water down the compromise. And in any subsequent judicial review, they could come in as parties or intervenors, whereas one major advantage we have in the currently pending litigation is that ETC and Sierra never came in (and it is now too late).

3. Beyond process issues, I frankly cannot see how EPA would ever agree to any compromise that would satisfy our concerns because of the extreme Regional influence on these issues. And as EPA counsel also indicated, even the compromise we were gingerly offering probably suffers from procedural problems that could adversely affect our members. Apparently the only way to resolve a disagreement on the need for an SSRA under our proposed regulatory language would be a permit denial followed by appeal, with the facility's ability to continue burning while the appeal proceeded left hanging in the air.

4. Thus, if we continue with the mediation, we will continue to run up legal fees with the likelihood of a successful compromise being near zero in my estimation. Moreover, the further down the road we might go, the greater risk ETC or Sierra might get involved and actually make things worse for us.

5. I recommend dropping the mediation immediately. Whether CKRC decides to pursue the litigation through briefing and oral argument is something that can be decided later – although not too much later in light of the September 28 briefing deadline.

Please let me know what you think.