RCRA Permit Appeal Fact Sheet **1988**

FACILITY: Envirosafe Services of Ohio, Inc. (Envirosafe)
City of Oregon, Ohio
OHD 045 243 706
RCRA Appeal No. 88-40

PETITIONERS:[1]
- City of Oregon, Ohio
- Envirosafe Services of Ohio, Inc.
- Michael D. Lorton, Hazardous Environments Leak Poisons (HELP), and Kathleen Steingraber

PETITIONS FILED:
- December 8, 1988
- December 12, 1988
- December 13, 1988

STATUS OF PETITIONS: See Permit Appeal Status Report

ISSUES:
- RFI conditions are not justified
- Other corrective action issues (additional RCRA facility assessment)
- Procedural issues
- Joint permitting
- Miscellaneous other issues (financial responsibility; groundwater monitoring; level of specificity in the permit; air emissions; compliance schedules; inspection and personnel training requirements; decontamination of waste hauling vehicles; emergency provisions; requirements for non-hazardous materials; limitation of design flexibility; and revised statistical analysis protocol; waste analysis plan; recordkeeping and reporting requirements; unseverable permit conditions; and closure/post-closure requirements)

Summary of Petitions:

This fact sheet summarizes three petitions for the review of a permit issued to a hazardous waste management facility owned by Envirosafe Services of Ohio, Inc. The petitions are divided in this

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[1]Additional letters filed by Cynthia L. St. John (received November 22, 1988) and Gary Chudel (received December 5, 1988).

fact sheet into two groups. The first discusses the concerns of the citizen organizations, while the second presents the concerns of the facility owner.

Issues Contested by the City of Oregon, Ohio, and Michael D. Lorton, Hazardous Environments Leak Poisons, and Kathleen Steingraber.

Both parties specify areas in which they believe EPA's decision to issue the permit was based on inadequate, insufficient, or inappropriate information. The petitioners are concerned primarily that the permit fails to contain specific conditions to address corrective action. However, the petitioners contend that other terms of the permit are also erroneous. These conditions concern procedural and joint permitting issues, financial responsibility requirements, health risks, and operating standards. The individual and collective arguments of the petitioners are presented below.

- **Additional RCRA Facility Assessments.** The City of Oregon, Ohio, and HELP contend that the permit should require Envirosafe to conduct another RCRA facility assessment (RFA) and proceed with corrective action at certain units. Both petitioners suggest that the permittee has not sufficiently investigated the existence of hazardous releases despite the RCRA requirement that permits address corrective action pursuant to Section 3004(u). The petitioners also suggest that EPA did not completely address the possibility that city drinking water could become contaminated as it passes through water lines underneath the Envirosafe facility. The petitioners note that the limited investigations that have occurred indicate that some contamination does exist in the shallow zones of the facility. They encourage EPA to evaluate their data, which EPA failed to consider before issuing the permit, and to continue monitoring the facility's shallow zone well for four consecutive quarters to determine if a release has occurred at the facility.

- **Procedural Issues**. HELP objects to the permit on the basis of two procedural issues.

  - The petitioner contends that the permit should incorporate the interim final criteria for vulnerable hydrogeologic settings that HSWA directed EPA to promulgate by May 8, 1986. The petitioner notes that the Agency's draft criteria is clearly more rigorous than that contained in the permit.

  - The petitioner suggests that EPA failed to fully consider the health risks associated with operations at the Envirosafe facility, further noting, that the permittee's health assessment does not contain all the information required by 42 USC 6939(a)(f).

- **Joint Permitting.** The City of Oregon objects to the fact that the facility's Federal permit includes approval for several items that Envirosafe deleted from its permit request pending

before the Ohio EPA and the Ohio Hazardous Waste Facility Board. For example, the applicant modified its permit application before the State of Ohio by dropping its request to handle any of the "P" waste codes and several "U" waste codes. However, the Federal permit allows the facility to handle these waste codes. The petitioner believes that the two permits should be consistent.

- **Financial Responsibility**. HELP is opposed to the condition that allows Envirosafe to use the same instrument for financial assurance at both this and another facility located in Idaho. If Envirosafe does not provide a separate financial assurance instrument, HELP requests that EPA add a provision to the permit which provides Ohio courts with jurisdiction over the funds. In addition, the petitioner suggests that RCRA financial responsibility limits are generally too low, citing the cost of cleanup at Love Canal as proof that the existing RCRA requirements are inadequate.

- **Groundwater Monitoring.** Both petitioners claim that hydrogeologic information was not considered by EPA, and suggest that the groundwater monitoring system, as included in the permit, is insufficient to meet the minimum adverse risk requirement of 40 CFR Section 264.97.

- **Level of Specificity in the Permit.** The City of Oregon contends that the permit lacks specificity and detail with regard to the facility's plans to expand operations. On these same grounds, the petitioner objects to the provisions in the Site Plan and to the proposed waste treatment and processing activities.

- **Air Emissions.** The petitioner requests that EPA require Envirosafe to place a nonporous cover over any active units that are not in immediate use. The petitioner suggests that this precaution should minimize the risks associated with air emissions from such units.

Issues Contested by Envirosafe Services of Ohio, Inc.

Envirosafe objects to several aspects of its permit. Generally, its objections fall clearly into the nine categories discussed below.

- **RFI Conditions are not Justified.** The petitioner contends that the corrective action conditions contained in the permit are inappropriate and beyond the scope of authority of EPA.

  - The petitioner requests that EPA delete from the permit the corrective action conditions which could be inferred as requiring the facility to conduct an additional RFA. Envirosafe notes that in response to the permittee's submittal, dated August 13, 1985, the

Agency's RFA Report dated December 15, 1987, and the corrective action statement appearing in the draft permit, there was no evidence that a release has occurred. In addition, Envirosafe anticipates that the opponents of the facility will present no evidence of any release from any previously existing solid waste management unit.

- Envirosafe contends that the Agency lacks the legal authority to impose a requirement to conduct sampling and analysis of the City of Toledo's water line dewatering trenches, because corrective action requirements can only be imposed if a release has been detected.

- **Procedural Issues**. Envirosafe objects to the permit's references to Sections 3008(a) and (h) of RCRA. The petitioner claims the references were not contained in the draft permit and were inserted in the final permit by the Agency without any explanation or justification. Envirosafe notes that Section 3008(h) applies only to interim status facilities, therefore, it is inappropriate to include this reference in a final permit. The petitioner contends that the reference to Section 3008(a) might, under certain circumstances, illegally force the facility to choose between compliance with Agency regulations or the permit itself.

- **Joint Permitting.** Envirosafe claims that some permit conditions conflict with Ohio's hazardous waste laws or regulations. The petitioner requests that, with regard to these conditions, the Federal permit should supercede the State permit. Similarly, Envirosafe contends that the RCRA permit should be amended to clarify which State laws preempt local control at the facility.

- **Financial Responsibility Requirements.** The petitioner contends that the permit inappropriately restricts Envirosafe's latitude to choose amongst the financial responsibility instruments specified by the regulations for closure and post closure costs. Envirosafe also requests that the language that requires the coverage limitations to be "exclusive of legal defense costs" be deleted from the permit.

- **Compliance Schedules.** Envirosafe requests that EPA incorporate compliance schedules that are mutually agreed upon by the Agency and Envirosafe into the permit to allow for the orderly implementation of the new requirements. Envirosafe suggests that while the facility is phasing in the new Part B requirements, it should be allowed to operate under the terms of its interim status permit and its current operating practices.

- **Inspection and Personnel Training Requirements.** Envirosafe objects to various inspection and personnel training requirements, which the petitioner finds both unreasonable and burdensome.

- **Decontamination of Waste Hauling Vehicles.** Envirosafe objects to the permit condition that requires the facility to decontaminate all waste hauling trucks. The petitioner contends the provision is vague, ambiguous, and unnecessary.

- **Emergency Provisions.** The petitioner claims that the emergency provision establishes an arbitrary and unreasonable response time in the event of an emergency.

- **Groundwater Monitoring Requirements.** The petitioner objects to several conditions of the groundwater monitoring system required by the permit. For example, Envirosafe contends that it is unreasonable to require the facility to perform total metals versus dissolved metals analysis on groundwater samples. The petitioner argues that it is technically inappropriate to require the facility to screen bedrock wells in rubble zone overlying the bedrock. Envirosafe contends that EPA should clarify whether or not background values should be reestablished for all wells for one year prior to entering the detection monitoring phase under the Part B permit, or just for the new wells.

- **Requirements for Non-Hazardous materials.** Envirosafe objects to the permit conditions that require certain potentially non-hazardous materials to be handled as hazardous constituents.

- **Limitation of Design Flexibility.** The petitioner contends that the permit inappropriately limits the facility to only one possible final cover system and does not provide sufficient flexibility for the incorporation of new materials, design, or performance standards. Similarly, Envirosafe claims that the permit should allow the facility to utilize various levels of fertilizer, seed blends, and mulching based on varying soil and weather conditions, as recognized by area scientists and agencies.

- **Revised Statistical Analysis Protocol.** Envirosafe requests that the permit be revised to allow the facility to use a different statistical procedure to determine if the difference between sampling data obtained from the Toledo dewatering trench monitoring wells, and other groundwater monitoring wells, are significantly different from their background values. The petitioner notes that the statistical protocol which Envirosafe proposes to employ has been approved by EPA for use at another facility in Region 5.

- **Waste Analysis Plan**. The petitioner objects to several conditions related to the permit's waste analysis requirements. Some of these conditions are listed below.

  - The petitioner contends that the requirement to conduct random sampling is inconsistent with 40 CFR Section 264.13(a)(1), which recognizes that representative sampling is preferable because of the heterogeneous nature of hazardous wastes.

- Envirosafe contends that there is no regulatory or technical justification for the permit to require leachate analysis, since the leachate by definition will nearly always contain contaminants. The petitioner notes that the facility pumps the leachate from the collection system and disposes of it as hazardous waste.

- The petitioner contends that it is arbitrary and unreasonable to require the facility to comply immediately and retroactively with various provisions concerning the revised waste analysis requirements. Envirosafe proposes to phase in these requirements as new waste streams undergo evaluation, or updated analytical data is provided for existing waste streams. The petitioner also objects to the provision that requires a waste certification on a separate form if it can be included in the Application for Acceptance of Waste Product form.

- **Recordkeeping and Reporting Requirements.** The petitioner claims that the permit's recordkeeping and reporting provisions are burdensome and inconsistent with regulatory requirements.

  - The petitioner objects to the provision that requires the facility to furnish information within the time designated by the Regional Administrator. Envirosafe requests EPA to amend the provision to be consistent with 40 CFR Section 270.30(h), which allows a reasonable amount of time to submit information following the Regional Administrator's request.

  - Envirosafe claims that the permit's recordkeeping provision is not consistent with the requirements of 40 CFR Section 270.30(j). According to the petitioner, the provisions also refer to buildings that no longer exist. The petitioner requests that this provision be revised.

  - Envirosafe claims that the failure to specify a reasonable time period for inspecting new or modified units at the facility constitutes an abuse of discretion.

  - The petitioner claims that there are no regulations in 40 CFR Part 264 Subpart D that require Envirosafe to notify the Regional Administrator of revisions to the Contingency Plan. The petitioner requests that EPA amend the permit to be consistent with the regulations.

- **Unseverable Permit Conditions.** The petitioner contends that permit provisions concerning the severability of permit conditions contradict 40 CFR Section 124.16(a)(2). Envirosafe requests that the provision be changed to reflect the regulatory language on this issue.

- **Closure/Post Closure Requirements.** The petitioner objects to several closure/post closure requirements contained in the permit, and requests that the provisions be amended.

  - The petitioner argues that the permit should include an automatic extension in the event that Ohio EPA approval of the closure plan is not given in a timely fashion.

  - Envirosafe objects to the permit's requirement that the facility maintain a closure cost estimate for hazardous waste management units that are not active or are not yet constructed.

  - Envirosafe contends that the permit requires the facility to comply with overly burdensome post closure care requirement provisions.

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BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Envirosafe Services of Ohio, Inc. Oregon, Ohio	)	RCRA Appeal No. 88-40
Docket No. OHD 045 243 706	)	

ORDER DENYING REVIEW

Before me are three petitions -- filed by Envirosafe Services of Ohio, Inc.; the City of Oregon, Ohio; and Hazardous Environments Leak Poisons ("HELP") -- requesting review of a RCRA permit issued by Region V. The permit authorizes continued operation and expansion at Envirosafe's hazardous waste management facility in Oregon, Ohio. After a series of extensions, Region V submitted a response to the petitions as requested by the Agency's Chief Judicial Officer.

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. See 40 CFR §124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to §124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." Id. The burden of demonstrating that review is warranted is thus on the Petitioners.

Although the Oregon and HELP petitions raise a wide variety of issues, neither demonstrates clear error or other grounds for review. One issue, however, warrants clarification. HELP argues (Petition at 7) that the Agency should refrain from issuing Envirosafe's permit until EPA meets the deadline in RCRA §3004(o)(7) for the publication of guidance criteria regarding vulnerable hydrogeology. [1/] The Region responds that the Agency's failure to meet this deadline does not justify a failure to meet the statutory deadline for issuing final permits under RCRA §3005(c)(2)(A)(i). [2/] Both HELP and the Region fail to recognize that in July 1986, the Agency published the guidance criteria called for by RCRA §3004(o)(7). [3/] Thus, assuming arguendo that a failure to meet the §3004(o)(7) deadline would warrant delay of permit issuance, there has been no such failure by the Agency here.

Section §3004(o)(7) also requires the Agency to issue rules that contain acceptable location criteria for the siting of

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[1/] See 42 U.S.C.A. §6924(o)(7) ("Within 18 months after November 8, 1984, the Administrator shall publish guidance criteria identifying areas of vulnerable hydrogeology.").

[2/] See 42 U.S.C.A. §6925(c)(2)(A)(i) ("Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.").

[3/] See Criteria for Identifying Areas of Vulnerable Hydrogeology Under the Resource Conservation and Recovery Act, Statutory Interpretive Guidance, Guidance Manual for Hazardous Waste Land Treatment, Storage and Disposal Facilities (OSWER, July 1986).

hazardous waste facilities, but it specifies no deadline for the issuance of such rules. [4/] The Agency is currently preparing amendments to the rules in response to this mandate. Until these rules are issued, a permit writer has the discretion to address siting issues on a case-by-case basis under the omnibus provision in RCRA §3005(c)(3), [5/] using the July 1986 Guidance on vulnerable hydrogeology where appropriate. See In re Ecolotec, Inc., RCRA Appeal No. 87-14 (Dec. 14, 1988).

After the permit was issued in this case, Oregon submitted new hydrogeologic data to Region V. Although these data are not part of the administrative record (see 40 CFR §124.18), the Region has acknowledged their potential significance. Region V represents that it is currently reviewing the data and will reevaluate the adequacy of the current permit conditions upon completion of the data analysis. Permit modification proceedings may then be initiated if warranted under the applicable rules (40 CFR Part 270, Subpart D). In determining whether permit modification is warranted, the Region may consider exercising its discretion under the omnibus provision to modify the permit,

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[4/] See 42 U.S.C.A. §6924(o)(7) ("In addition to the requirements set forth in this subsection, the [RCRA] regulations * * * shall specify criteria for the acceptable location of new and existing treatment, storage, or disposal facilities as necessary to protect human health and the environment.").

[5/] See 42 U.S.C.A. §6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.").

including those permit provisions regarding the facility's authority to expand, if necessary to protect human health and the environment.

The Region's response to the petitions (p.1) states that the Region and Envirosafe have informally resolved the issues raised by Envirosafe's petition, and that the Region will subject revised permit language to public notice and comment. In view of this resolution, Envirosafe's petition is moot. Conditions contested by Envirosafe (and any non-severable conditions) shall remain stayed pending reissuance of a final permit decision on those conditions by the Region.

For the reasons set forth above and in the Region's response to the petitions, review is denied.

So ordered.

Dated: OCT 22 1990

William K. Reilly
Administrator

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Envirosafe Services of Ohio, Inc., RCRA Appeal No. 88-40, were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid:

Robert Brown
HELP
3204 Pickle Road
Oregon, OH 43616

Gary Schudel
650 Dover
Toledo, OH 43605

Nick Batt
325 10th Street
Toledo, OH 43624

Joseph Gregg
Eastman & Smith
800 United Savings Bldg.
Toledo, OH 43605

Timothy J. Thurlow
Assistant Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Dated: 10/22/90

Brenda H. Selden, Secretary
to the Chief Judicial Officer