



RCRA Permit Appeal Fact Sheet

1988

FACILITY: Environmental Waste Control, Inc. (EWC), d/b/a Four County Landfill
Fulton County, Indiana
IND 000 780 544
RCRA Appeal No. 88-14

PETITIONER: EWC

PETITION FILED: July 29, 1988

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- Procedural issues
- Miscellaneous other issues (basis for permit denial)

Summary of Petition:

The Indiana Department of Environmental Management (IDEM) and the U.S. EPA, Region 5; (EPA) jointly issued a Notice of Intent to Deny a RCRA Operating Permit for the Four County Landfill. The petitioner contends that the Notice of Intent to Deny, in accordance with Section 124.2(a), is considered the draft permit. EWC is petitioning for administrative review of the Regional Administrator's decision to deny the issuance of the permit.

■ **Procedural Issues.** EWC believes that its due process rights have been denied by the lack of a description, in the denial letter, of the bases for EPA's decision to deny EWC's permit. Although the denial letter refers to a Response to Comments, the letter fails to make specific references to those particular responses which constitute the basis for EPA's denial.

- Although the IDEM Commissioner stated several broad reasons for IDEM's denial of the permit, she did not indicate whether EPA's reasons for denial were the same or similar. The Commissioner stated only that EPA "also denied" EWC's permit.
- The petitioner claims that it is impossible to determine which of the numerous responses to comments are the actual bases for EPA's decision or how much weight was given to each response.
- EWC states that the Response to Comments attached to the denial letter fails to comply with the requirements of 40 CFR Section 124.17(a)(1) which requires that, at the time a permit decision is issued, the Regional Administrator shall issue a response to comments



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which "shall specify which provisions, if any, of the draft permit have been changed in the permit decision, and the reasons for the change."

- The petitioner argues that EPA's denial of EWC's requested extension of the comment period denied EWC its minimum due process rights by denying EWC the opportunity to respond to comments made by others during the public comment period. EWC believes that it sufficiently demonstrated the need for such extension in a letter which accompanied its comments on the draft permit decision.
- The petitioner objects to a statement in the denial letter which, if used as a basis for EPA's decision to deny the permit, infringes upon EWC's due process rights by prematurely concluding that EWC is guilty of alleged interim status violations prior to their being fully litigated.
- **Basis for Permit Denial** EWC objects to the denial of its permit to the extent that such denial was based on the inadequacy or incompleteness of information submitted by EWC concerning the Four County Landfill.
 - The petitioner argues that, for each of the subjects that the Agency considers deficient in terms of the information provided, it raised all reasonably ascertainable issues and submitted all reasonably available arguments supporting its position during the public comment period. These subjects are as follows:
 - Groundwater monitoring system/program;
 - Compatibility testing;
 - Layout design;
 - Collection systems;
 - Water balance;
 - Transmissivity testing;
 - Permeability and liner contacts;
 - Landfill design;
 - Stability of landfill slopes;



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- Material testing data or equivalent capacity information;
 - System strength or prevention of clogging;
 - Synthetic liners, run-on control system, or drainage and erosion;
 - Construction quality assurance program;
 - Interim status monitoring;
 - Aquifer identification; and
 - Contaminant plume description, detection monitoring program and information relating to indicator parameters, and waste constituents and reaction products to be monitored.
- The petitioner acknowledges EPA's opinion that the site is located in an area that is, from a geological perspective, poorly suited for hazardous waste disposal. However, EWC objects to the denial of its permit on the basis of failure to provide complete or adequate information or on the basis of failure to comply with interim status standards (as outlined above), if, in fact, the major reason for permit denial is the allegedly poor site geology.
- The petitioner objects to the permit denial to the extent that such denial was based on its failure to provide information which could not reasonably be provided to the extent requested.

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

In the Matter of:

Environmental Waste Control, Inc.

RCRA Permit No. IND 000 780 544

RCRA Appeal No. 88-14

ORDER DENYING REVIEW

By Petition dated July 28, 1988, Environmental Waste Control, Inc. ("EWC") seeks review of Region V's denial of EWC's RCRA permit application for its commercial hazardous waste facility in Fulton County, Indiana. Region V filed a response to the Petition dated January 27, 1989, as requested by the Agency's Chief Judicial Officer. EWC was subsequently granted leave to submit a reply, which it did on September 1, 1989. As agreed by the parties, Region V then submitted a final response dated January 5, 1990.

The State of Indiana is authorized to administer its state hazardous waste program in lieu of the federal program, except for requirements imposed under the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). Accordingly, the Region's permit denial relates only to the HSWA portion of the permit.^{1/} The primary basis for Region V's denial was EWC's failure to submit a complete and adequate Part B permit application despite repeated notices of deficiencies and opportunities to do so. Also of

^{1/} The Indiana Department of Environmental Management contemporaneously denied the non-HSWA portion of the permit.

significance was evidence that the facility was not in compliance with various RCRA rules, including those relating to groundwater monitoring and financial responsibility. When the Region issued its Notice of Intent to Deny ("NOID"), it referred to a civil proceeding then pending in federal court alleging such noncompliance.^{2/} It also noted that the State of Indiana had determined that the facility was not in compliance the state hazardous waste program.^{3/}

EWC's submissions essentially raise five issues: (1) whether Region V properly denied EWC's request for an extension of the public comment period on the NOID; (2) whether EWC was denied due process due to its alleged failure to receive a timely notice of denial and accompanying response to comments on the NOID; (3) whether Region V correctly concluded that EWC's Part B application was inadequate; (4) whether EWC received adequate prior notice of the deficiencies that formed the basis of the

^{2/} This action was initiated by the U.S. Department of Justice at the request of EPA. On March 29, 1989, the federal district court held that EWC had violated RCRA requirements regarding groundwater monitoring and insurance. It imposed a civil penalty of \$2,778,000, ordered corrective action for groundwater releases, and permanently enjoined operation of the landfill. Significantly, the court found that the groundwater monitoring violations had continued through the time of trial (December 1988), which was well after the Region issued its final permit denial (June 1988). EWC has appealed the district court's decision to the U.S. Court of Appeals for the Seventh Circuit.

^{3/} See Fact Sheet at 55-56. The record also establishes that Region V relied on evidence of noncompliance in rendering its final decision to deny the permit. See Response to Comments on the Federal Portion of the Draft Intent to Deny a RCRA Operating Permit, at 3.

denial; and (5) whether it was proper for Region V to consider evidence of continuing noncompliance even though the federal court proceeding concerning those issues was still pending.

Under the rules that govern this proceeding, there is no automatic administrative appeal from a Region's permit decision. Ordinarily, a RCRA permit determination will not be reviewed unless it is clearly erroneous (factually or legally), 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 Petitioner.

EWC has failed to show that Region V's permit denial is clearly erroneous or otherwise warrants review. The Region's responses to EWC's submissions thoroughly rebut each of EWC's contentions. A brief clarification of one issue, however, is appropriate.

EWC argues that the Fact Sheet accompanying the NOID was defective because it failed to specify certain application deficiencies that later formed the basis of the final denial decision. The purpose of a Fact Sheet, however, is merely to provide a "brief summary" of the basis for a draft permit or, in this case, the NOID. See 40 CFR §124.8(b)(4). More detailed specification of application deficiencies ordinarily occurs in a

Notice of Deficiency ("NOD") under §124.3(c), several of which were issued to EWC during the application review process. It was entirely appropriate for the Region simply to list the general areas of continuing deficiencies in the Fact Sheet, with the expectation that the Fact Sheet would be read in light of the NODs that specified the missing information in more detail.

EWC further argues that even if the NODs are taken into account in judging the adequacy of the Fact Sheet, the Response to Comments that accompanied the final denial decision was flawed because it identified certain deficiencies that EWC had no opportunity to correct. Where an application is deficient, the rules contemplate the issuance of at least one NOD and an opportunity to correct the deficiencies. See 40 CFR §124.3(c). If the deficiencies remain uncorrected, the Region may then issue a NOID (§§124.3(d)), which is subject to public comment. It is important to note, however, that the public comment period on the NOID is not the proper time to initiate a serious effort to perfect an application. Although it was within the Region's discretion to accept EWC's supplemental application materials throughout the comment process (as it did), wholesale revision of the application at this stage runs the serious risk of raising new deficiencies. Under the rules, such newly created inadequacies will not automatically result in another opportunity to perfect the application. If they did, the Region could be faced with a seemingly endless series of application revisions,

with each revised submittal raising new inadequacies that require further correction.

If an applicant fails altogether to submit requisite plans, drawings, or data prior to the NOID, it precludes the kind of meaningful exchange between itself and the Agency that might avoid more specific deficiencies down the road. It should therefore come as no surprise if the post-NOID public comment period proves to be an insufficient setting in which to cure major deficiencies caused by years of neglect. In this case, EWC submitted its Part B application in January 1984. Over the next few years, the Region issued several NODs and engaged in less formal exchanges with EWC. At the time of the NOID, however, the application remained fundamentally deficient, missing basic information that, had it been supplied earlier, might have led to more fruitful discussions with the Region. In several respects, EWC's submissions on appeal are simply another attempt to supplement or revise its earlier application submissions long after the proper time for doing so. ^{4/}

^{4/} For example, the Region's Response to Comments (pp. 14-21) challenges many of the averages contained in the compatibility data submitted by EWC during the public comment period. On appeal, EWC argues that most of these averages are accurate when evaluated in light of the mathematical principle of "significant figures." See EWC Reply at 39. Yet, EWC evidently failed to submit the underlying calculations or equations with its data as it was requested and required to do, thereby leading the Region to assume that normal averaging was used. See Region Response to EWC Reply at 29. EWC's failure to provide the data earlier in the application process, and its continued failure to provide underlying calculations, resulted in application confusion and incompleteness that might have been easily avoided.

Certain deficiencies listed in the Fact Sheet simply went uncorrected and thus were listed in virtually the same form in the Response to Comments.^{5/} For other deficiencies listed in the Fact Sheet, EWC attempted to address them in its post-NOID submissions, but in so doing it raised different deficiencies that the Region could not have anticipated in the NODs or Fact Sheet.^{6/} The Region was not required to provide EWC with yet another opportunity to cure these newly created inadequacies. Although the significance of certain individual inadequacies might be debated, the record supports the Region's determination that EWC's application, viewed as a whole, remains deficient.^{7/}

^{5/} For instance, EWC admits that it did not submit completed layout patterns until after the close of the public comment period. See EWC Reply at Exh. D (p.20); Region Response to EWC Reply at 30 n.21. This deficiency was noted in a May 1987 NOD, the Fact Sheet that accompanied the September 1987 NOID, and the Response to Comments that accompanied the final permit denial.

^{6/} For example, the May 1987 NOD (at Att. I, p. 2, #17) requests the composition of the herbicide to be applied prior to installing the flexible membrane liner, and a demonstration that the herbicide will not adversely affect the liner. The Fact Sheet on the NOID (p.55) specifies the same deficiency. During the public comment period, EWC took the position that the herbicide was unnecessary because plant growth would not damage the liner. It failed, however, to amend its application to reflect this change in position, or to provide any demonstration that its new position was in fact sound and supportable. See Region Response to EWC Reply at 24-25 & n.19. The Region plainly could not have anticipated these new deficiencies at the time of the NOID. For other examples of deficiencies caused by EWC's post-NOID submissions, see id. at 28-32.

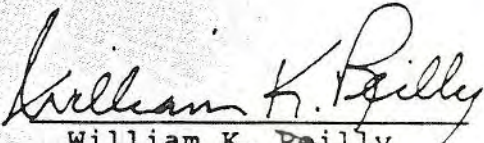
^{7/} For certain deficiencies listed in the Response to Comments, it is unclear from the submissions before me whether EWC was previously apprised of the inadequacy (e.g., the failure to provide compatibility data for the natural materials in its liner system). If these inadequacies were in fact specified for the first time after the comment period, the listing of them in the
(continued...)

Conclusion

For the reasons set forth above and in Region V's responses to EWC's Petition and Reply, review is denied.

So ordered.

Dated: APR 10 1960


William K. Reilly
Administrator

2/ (...continued)

Response to Comments is merely cumulative of other deficiencies and does not impair the overall integrity of the permit denial.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in In re Environmental Waste Control, Inc., RCRA Appeal No. 88-14, were served upon the following in the manner indicated:

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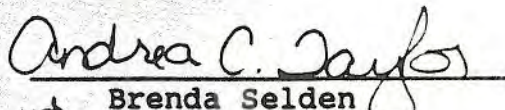
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Dated: APR 19 1990


Brenda Selden
for Secretary to the
Chief Judicial Officer