# *RCRA Permit Appeal Fact Sheet* **1988**

**FACILITY:** CECOS International, Inc. (CECOS)
Williamsburg, Ohio
OHD 087 433 744
RCRA Appeal No. 88-23

**PETITIONER:** CECOS

**PETITION FILED:** November 1, 1988

**STATUS OF PETITION:** See Permit Appeal Status Report

**ISSUES:** Miscellaneous other issues (permit denial)

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**Summary of Petition:**

The petitioner is requesting review of the Agency's decision to deny the land disposal facility's Part B permit application. The petitioner believes that the Agency's reasons for denying the permit (i.e., because CECOS failed to provide complete and accurate information in its application and because CECOS failed or refused to correct deficiencies in the application) are inaccurate. Further, the petitioner argues that it made every attempt to satisfy the Region's expressed dissatisfaction with the permit application, but that the Region provided minimal and inconclusive explanations of exactly what information would render the application complete, even after repeated requests for assistance from the petitioner.

- **Permit Denial.** The petitioner described legal defects in the permit denial, which was based on 118 permit application "deficiencies."

  - The petitioner claims that without effective communication from the Region as to what was expected of CECOS beyond the plain meaning of the regulation (which the petitioner asserts is intentionally broad and vague to allow for site-specific considerations), CECOS could not comply with the Region's view of the requirements regardless of how much CECOS desired and tried to do so.

  - The petitioner argues that, given the fact that both RCRA and the Part 264 regulations call for information to be included in a permit application to the Regional Administrator who must then convert the information into site-specific permit terms, to reject an application as "incomplete" or "inadequate" because it proposes regulatory conditions

different from those preferred by the permit-granting authority (i.e., when the real disagreement is one of policy) offends both the statute and the requirements of due process.

- The petitioner claims that the Region rested 13 of the 118 denial grounds on misinterpretations of CECOS' responses that in fact fully addressed the points raised in the Notice of Intent to Deny (NOID).

- The petitioner further argues that remand of the entire denial to the Region is required because "[t]he denial notice simply listed 118 grounds for denial without any narrative that either tied them to the ultimate decision or explained their relationship to each other. The only way to read such a notice is that the decision is the cumulative result of all the 118 deficiencies." This argument is based on the Supreme Court Case of *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (Frankfurter, J.).

- Finally, the petitioner spelled out a three-pronged argument for remanding the decision to the Region, based on the precepts of the general law of judicial review, as follows:

  - The Agency imposed the most drastic sanction at its command -- rejection of the entire permit application -- without claiming that the defects cited, either singly or together, posed any threat to human health or the environment, or that they reflected incurable, substantive regulatory problems;

  - Even apart from the legal defects discussed above, many of the reasons for denial were trivial; and

  - Of the 118 defects that the Region alleged, the majority related to units that have not yet been constructed. Nonetheless, these defects made up an inseparable part of the Region's basis for also rejecting the Part B for the existing units, thus forcing them to close down. Nothing in EPA's rules required that step. On the contrary, 40 CFR Section 270.1(c)(4) says that "EPA may issue or deny a permit for one or more units at a facility without simultaneously issuing or denying a permit to all of the units at the facility."

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

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| In the Matter of: | ) | |
| CECOS International, Inc. | ) | RCRA Appeal No. 88-23 |
| EPA I.D. No. OHD 087 433 744 | ) | |

**ORDER DENYING REVIEW**

By petition dated November 1, 1988, CECOS International, Inc. seeks review of a decision by Region V to deny CECOS' application for a permit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901-6991i (1983 and West Supp. 1989). The application is for continued operation of a large, commercial hazardous waste facility in Clermont County, Ohio. Region V denied the permit because it found CECOS' application to be seriously deficient despite repeated opportunities to perfect it.

In its Petition, CECOS argues that the alleged deficiencies either (1) were improperly raised for the first time in the denial notice; (2) were unforeseeable due to vague language in the Notice of Intent to Deny; (3) are not deficiencies at all, but mere refusals by CECOS to adopt the Region's position on disputed regulatory issues; (4) reflect misunderstandings of the application by the Region; or (5) are too trivial to warrant permit denial. In a "Regulatory Discussion" attached to the Petition, CECOS responds to the denial grounds individually, placing each into one or more of these five categories. As

requested by the Agency's Chief Judicial Officer, Region V responded to the Petition on December 16, 1988. Also before me is a CECOS Reply dated February 22, 1989. [1/]

**Background**

Region V formally requested CECOS to submit a Part B permit application for the facility on March 22, 1983, and it received the Part B on September 23, 1983. After determining that the application was incomplete, the Region sent CECOS its first Notice of Deficiency ("NOD") on December 2, 1983, listing the information necessary to perfect the application. Although the NOD specified January 8, 1984, as the due date for a response, Region V did not receive CECOS' response until March 19, 1984.

The Region determined that the response did not remedy all the application's deficiencies, and on June 18, 1984, it issued a second NOD and Letter of Warning, indicating that failure to cure the remaining deficiencies might result in loss of interim status. On September 14 CECOS submitted another Part B, but this too was deemed deficient. Ten days later, Region V issued a Complaint and Finding of Violation and Order against CECOS, asserting that CECOS had still failed to submit a timely, complete Part B application. The parties resolved the matter through a June 28, 1985 Consent Agreement and Final Order, which

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[1/] Although CECOS' reply was neither requested by my staff nor authorized by the Agency's rules, it has been considered to ensure a full airing of CECOS' views due to the gravity of the consequences of the Region's permit denial.

stipulated that CECOS had submitted all the information requested in the second NOD and had paid a civil penalty of $11,000.

Due to regulatory developments and changes in CECOS' plans and operations, CECOS and Region V subsequently concluded that the revised Part B no longer adequately reflected conditions at the facility. The Region consequently issued a third NOD and Letter of Warning on September 3, 1986. On December 19, CECOS responded with a substantially revised Part B permit application.

Region V reviewed the revised application de novo and issued a fourth NOD and Letter of Warning on July 22, 1987. This NOD listed 723 deficiencies in the revised Part B and warned CECOS that failure to correct the deficiencies would result in denial of the permit and termination of interim status. In July and August 1987, the Region discussed the NOD with CECOS during the course of four conference calls, each limited to two hours according to CECOS. See Petition at 7. CECOS formally responded to the fourth NOD on September 4, and on October 15 it submitted a revised Part B which incorporated that response. Region V reviewed the new Part B and found that of the 723 deficiencies listed in the fourth NOD, 397 remained.

On April 21, 1988, the Region issued a Notice of Intent to Deny the Permit ("NOID") pursuant to 40 CFR §124.6(b). On May 17, Region V officials met with CECOS to discuss the continuing application deficiencies, and engaged in follow-up discussions as well. At the May 26 public hearing on the NOID, CECOS submitted written comments and made oral presentations.

The Region postponed the end of the comment period from June 7 to June 30, 1988, to allow CECOS to submit additional written comments. Among CECOS' submissions was yet another substantially revised application, including a new Part A, general facility description, waste analysis plan, closure plan, and contingency plan. After reviewing the public comments on the NOID, the Region determined that CECOS had still failed to correct 120 deficiencies, [2/] and on September 29, 1988, it denied the permit.

## Analysis

CECOS' petition has successfully called into question a number of the 120 grounds set forth in the denial notice. [3/]

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[2/] The Denial Notice itself lists only 118 deficiencies, but the technical appendix to the notice sets forth 120.

[3/] For example, CECOS' application states that it will report the analytical results of its groundwater sampling within 30 days of the sampling. Denial Item 64 states that the proposed 30-day period is "inadequate" and that two weeks is sufficient for the requisite calculations. Although Region V might well be correct that two weeks is sufficient, the application should not be deemed deficient simply because it fails to reflect the Region's view on this matter. Although a regulatory dispute can give rise to an application deficiency where the applicant refuses to provide plans, procedures, or information necessary to prepare the permit, for this Denial Item there was no such refusal, but merely a disagreement as to the appropriate permit term.

Likewise, Denial Items 6 and 7 do not involve any failure to provide underlying plans, procedures, or information, but mere failures to specify in the application that CECOS will comply with various rules governing the manifest system. Although the permit may, of course, require compliance with such rules, the Region has failed to explain why an applicant must go through the exercise of promising compliance with each rule in Part 264.

Yet, despite repeated opportunities to revise and supplement its application, CECOS' Part B remains seriously deficient. A representative (though not exhaustive) list of continuing deficiencies is set forth in the margin. [4/]

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[4/] For example, Denial Items 9, 10, 37, 93, 94, and 98 (among others) involve deficiencies in various plans, descriptions, and drawings required as part of the application, many of which would have been incorporated into the permit. CECOS states in its Regulatory Discussion that the "entire message" of its plans is that operations will be conducted according to the Region's specifications, and that any deficiencies in the plans are minor. It evidently believes that the Region must accept deficient plans so long as the applicant commits in theory to compliance with relevant standards, and that the Region is bound to cure the inadequacies when drafting the permit. The rules, however, plainly place the burden and expense of preparing adequate plans on the applicant. See 40 CFR Part 270. Although the Region should be available to answer questions regarding application requirements (as Region V was here), the permit writer does not serve as the applicant's editor. The permit drafting process may be used to correct typographical errors and the like in proposed plans, but it cannot cure any and all deficiencies. In many cases, the Region would not be able to cure the plans because it would not know the applicant's intended procedures due to the very deficiencies that need to be cured.

For Denial Item 22, CECOS' proposal to use "professional judgment" is simply not responsive to the Region's request for specific criteria to be used in exercising that judgment when segregating incompatible waste. For Denial Item 23, CECOS' data regarding its leak inspections and the compatibility of its topcoat are not responsive to the request for a demonstration (i.e., procedures for ensuring) that wastes will not be stored on incompatible base materials. For Denial Item 82, CECOS' mere list of emergency equipment locations is not a demonstration that the equipment will meet the facility's needs as requested in the NOID. For Denial Items 31, 32, and 34, the omitted information falls within the NOID's reference to "complete and accurate" and "detailed" descriptions of the tanks; CECOS' contention that it could not have anticipated the requisite level of detail rings hollow.

Denial Item 2 specifies CECOS' failure to locate accurately the onsite branch of a creek. CECOS argues that it had no notice of the desired information, but the NOID specifically requests an accurate description of the creek's location. The Region's

(continued...)

Although CECOS argues that Region V has not been sufficiently helpful in perfecting the application, the record shows that Regional staff discussed the application deficiencies with CECOS on several occasions. In fact, CECOS' predicament appears to be entirely of its own making. The Petition (p.4) states that CECOS has been willing "to go anywhere and do anything" to cure its application deficiencies, but the record reveals a long history of application inadequacies and suggests that CECOS' recent efforts are little more than an eleventh-hour attempt to avoid permit denial, undertaken in earnest only after

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4/ (...continued)
Response to the Petition (p.14) asserts that the application is still deficient in this regard. CECOS' proper recourse would have been to show in its Petition that this factual determination was erroneous on the merits and that its application was in fact complete and accurate (which it failed to do), not to raise a procedural objection.

For Denial Item 52, CECOS remains unable to respond to a straightforward request for criteria for the acceptance of containers holding free liquid. Its application is deficient, not because it fails to focus on ampules (as CECOS suggests in its Regulatory Discussion), but because it fails to provide the requested criteria (e.g., size, type, etc.) for ensuring that accepted containers are sufficiently small. For several other items, CECOS does not deny that the deficiencies exist or that it had adequate notice of the need to address them, but simply asks for yet another opportunity to do so. See, e.g., Denial Item 118. Nothing in the rules obligates the Region to allow for a seemingly endless series of revisions until the application is complete.

For many denial grounds, CECOS' voluminous submissions have failed to show that the Region's finding of deficiency is erroneous. For example, CECOS argues that it had insufficient notice of the required data for Denial Item 11, but the NOID for #11 appears to request precisely the information CECOS failed to provide, namely, a minimum acceptable value for the unconfined compressor strength test for bulk wastes stabilized offsite. See also Region Response, Att. 14 at 5.

the Region followed through on its previous commitment to initiate denial proceedings if the deficiencies were not cured. Indeed, the record shows that as late as May 17, 1988, CECOS' own consultants reportedly stated that the application "was disorganized and that even they had difficulty in finding information." Region Response, Attachment 14 at 6.

While CECOS is correct in noting that the permitting process should be a cooperative venture between the applicant and the Agency, the Agency's resources are not unlimited. Undoubtedly, the sheer bulk of CECOS' deficiencies made difficult the kind of detailed, beneficial exchange that could have occurred had there been only a handful of inadequacies. Given CECOS' long history of deficiencies throughout the application process, it was not unreasonable for the Region to deny CECOS yet another bite at the apple. [5/]

CECOS emphasizes (Petition at 2, 26) that Region V has not formally found the facility to be unsafe or that it cannot meet the governing RCRA regulations, but such fundamental determinations are not even possible until a complete and adequate application is submitted. CECOS further asserts that

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[5/] It should have come as no surprise to CECOS that the permitting process for such a large facility was complex and demanding. Yet CECOS evidently did not retain its current application consultant until after Region V issued its April 1988 NOID, some five years after the Region requested CECOS' Part B and nine months after it issued the fourth NOD (setting forth 723 deficiencies). See Petition at 8-9. The Agency has strongly recommended that such consultants become involved at the very beginning of the application process. See Permit Applicants' Guidance Manual, at p. 2-4 (May 1984, EPA 530 SW-84-004).

some of the deficiencies are simply too trivial to warrant permit denial. The cumulative effect of CECOS' deficiencies, however, can hardly be described as trivial. See generally Region Response at 18-19. Moreover, I agree with the Region that even a seemingly minor requirement (e.g., submission of a facility photograph) might serve a vital purpose. Id. It should go without saying that permit denial might eventually be warranted even for a single critical deficiency where the applicant remains recalcitrant and fails to provide the requisite information despite repeated opportunities to do so. A demonstrated willingness and ability to comply with basic Agency application procedures is the sine qua non of any successful permit application. [6/]

Finally, CECOS argues that a remand is required where, as here (see note 3), some of the denial grounds have been shown to be inappropriate. See Petition at 23-24 (citing SEC v. Chenery Corp., 318 U.S. 80, 95 (1943)). Chenery, however, speaks only to federal judicial review of final agency action, not to internal administrative review. See id. at 88, 92-95. As CECOS itself notes elsewhere (see CECOS Reply at 18), one major purpose of

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[6/] Regarding the closure plan deficiencies in particular, CECOS asks rhetorically: "What sense does it make to reject a Part B application -- thus forcing closure -- because the closure plan is inadequate?" Petition at 28. The approach implied by this inquiry would, however, eviscerate the regulatory requirement that an applicant prepare an adequate closure plan. Perhaps a more appropriate question is: "What sense does it make to issue a RCRA permit -- authorizing hazardous waste management for up to ten years -- to a facility incapable of preparing an adequate closure plan?"

administrative review is to permit the agency to correct any errors in its reasoning prior to final agency action. Where errors are detected and corrected during the course of considering a petition for review, no remand is necessary. The NODs and NOID made clear Region V's intent to deny the permit unless the deficiencies were cured. When viewed in light of CECOS' application history, the voluminous submissions before me leave no doubt that Region V would have denied the permit had it focused solely on the many legitimate denial grounds. The Region's exercise of its discretion to deny the permit is supported by the record, and thus no remand is necessary. 7/

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7/ CECOS maintains that some of the denial grounds were set forth for the first time in the denial notice itself, thereby depriving it of an opportunity to address and correct these deficiencies. Ordinarily, a permit denial should not be based exclusively on grounds raised for the first time in the denial notice. The rules contemplate notice and at least one opportunity to correct application deficiencies. See 40 CFR §124.3(c). On the other hand, a denial notice is not fatally defective where, in addition to legitimate denial grounds raised in the NOID, it lists other deficiencies subsequently discovered during the public comment period. Moreover, some of the plans submitted by CECOS in its June 1988 response to the NOID were new and conceptually different from the plans found to be deficient in the NODs and NOID (e.g., the closure plan). In view of CECOS' abysmal application history, it strains common sense to argue that the Region should have restarted the denial process to provide yet another comment period on the new deficiencies raised by CECOS' revised submission. Such an approach could result in a virtually endless denial process, with each new deficient revision requiring a new notice and comment period. In any event, none of the continuing deficiencies set forth in footnote 4 -- all of which support the Region's determination here -- was raised for the first time in the denial notice.

For the reasons set forth above, and in the Region's Response to the Petition (to the extent consistent with this opinion), CECOS' petition for review is denied.

So ordered.

Dated: :90

William K. Reilly
Administrator

## CERTIFICATE OF SERVICE

This certifies that the foregoing Order Denying Review in the matter of CECOS International, Inc., RCRA Appeal No. 88-23, was mailed to the following in the manner indicated:

First Class Mail
Postage Prepaid:

William F. Pedersen, Jr.
Perkins Coie
1110 Vermont Avenue, NW
Washington, DC 20005

Basil J. Constantelos
Director
Waste Management Division
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Marc M. Radell
Assistant Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Dated: January 12, 1990

Andrea C. Taylor for
Brenda H. Selden, Secretary
to the Chief Judicial Officer