



RCRA Permit Appeal Fact Sheet

1988

FACILITY: EnviroSAFE Services of Idaho, Inc. (EnviroSAFE)
Grand View, Idaho
IDD 073 114 654
RCRA Appeal No. 88-41

PETITIONER: EnviroSAFE

PETITION FILED: December 12, 1988

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- RFI conditions are not justified
- Due process
- Miscellaneous other issues (sampling and testing methods; monitoring frequency; reconstruction of piezometers; use of field, trip, and matrix blank data)

Summary of Petition:

EnviroSAFE is petitioning for review of its permit for the storage, treatment, and disposal of hazardous waste, issued jointly by EPA and the Idaho Department of Health and Welfare (IDHW) on November 8, 1988. The petitioner argues that the permit is predicated upon policies, guidance documents, and proposed rules, and upon clearly erroneous findings of fact.

- **RFI Conditions are not Justified.** EnviroSAFE contends that EPA and IDHW impose corrective action monitoring and detection monitoring conditions for past practice units even when EPA's RCRA facility assessment and air sampling plan, and EnviroSAFE's preliminary assessment report, uncover no evidence of a release to soil or groundwater. EnviroSAFE argues that such preventative monitoring is not supported under Section 264.101, which requires corrective action as a permit condition only in the event of a release of hazardous constituents from a solid waste management unit (SWMU).
 - The petitioner argues that requiring corrective action conditions when they do not apply is a denial of due process.
 - EnviroSAFE requests that, with limited exception, all references to monitoring wells and monitoring well locations for past practice units be deleted from the permit.



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- In addition, the petitioner objects to permit conditions addressing closure and post-closure cost estimates, because conditions are based on the corrective action groundwater monitoring.

- **Due Process.** The petitioner argues that permit conditions predicated on policies, guidance, and proposed rules are an abuse of discretion and a denial of due process. EnviroSAFE contends that such documents are not legally supportable, since they have not been promulgated as final regulations.
- **Sampling and Testing Methods.** The petitioner contends that the permit's preclusion of composite sampling of containerized waste precludes EnviroSAFE from complying with EPA's requirement of assuring representative samples. EnviroSAFE argues that separate samples taken from a single waste shipment may exhibit slightly different waste characteristics. The petitioner points out that the permit allows composite sampling for bulk solid truck loads, and that EPA guidance favors composite over non-composite sampling.

The petitioner argues that the Agency's position to require in-place hydraulic conductivity testing is legally insupportable, as it relies on a guidance document rather than a regulation. In addition, EnviroSAFE contends that existing procedures and quality assurance/quality control (QA/QC) documentation utilize established ASTM methodologies in determining hydraulic conductivity.

- **Monitoring Frequency.** The permit imposes weekly monitoring of the secondary leak detection system after closure. The petitioner argues that this condition is based solely on a proposed rule, and is thus not legally supportable. In addition, EnviroSAFE contends that the requirement is arbitrary and unreasonable. Since the unit will be covered with an impermeable cap during the post-closure period, the petitioner argues that quarterly monitoring is appropriate.
- **Reconstruction of Piezometers.** The petitioner contends that the requirement of reconstruction of "wells/piezometers" for the purpose of establishing water level considerations is an inappropriate exercise of discretion. EnviroSAFE argues that only monitoring well replacement is necessary.
- **Use of Field, Trip, and Matrix Blank Data.** EnviroSAFE argues that in failing to allow the use of field, trip, and matrix blank data, EPA and IDHW have inappropriately exercised their discretion and violated the requirements of due process. The permit does not specify how such data would be reported; the petitioner contends that the inclusion of such a condition would define reporting procedures in a manner proposed by EPA, and would allow data to be reviewed to discount error without the requirement of resampling.

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

In the Matter of:

Envirosafe Services of Idaho, Inc.

RCRA Permit No. IDD073114654

RCRA Appeal No. 88-41

ORDER DENYING REVIEW

By Petition dated December 9, 1988, Envirosafe Services of Idaho, Inc., seeks review of a RCRA permit issued jointly by Region X and the Idaho Department of Health and Welfare for Envirosafe's hazardous waste management facility near Grand View, Idaho. As requested by the Agency's Chief Judicial Officer, Region X responded to the Petition on March 30, 1989 ("Region Response"). With Region X's consent, Envirosafe submitted a Reply dated June 14, 1989. ^{1/}

Under the rules that govern this proceeding, there is no automatic administrative appeal from a Region's permit decision. Ordinarily, a RCRA permit 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 Section 124.19 states that "this

^{1/} By letters dated January 27 and March 30, 1989, Envirosafe withdrew its challenge to permit conditions relating to data evaluation and post-closure monitoring frequency for secondary leak detection systems, and those establishing criteria for piezometer replacement and repair.

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.

I. Compositing

Envirosafe first argues that the permit improperly prohibits compositing of samples of containerized waste generated off-site and received at the Envirosafe facility. Region X and Envirosafe agree that at least ten out of every 100 containers should be sampled (to be selected randomly). Envirosafe would like to combine those ten samples into one composite subject to only a single analysis. Region X opposes such compositing because it would result in only one analysis per 100 containers. Region X argues that compositing might mask abnormalities that sampling is designed to detect, and contends that a ten-percent frequency for both sampling and analysis is necessary here for safe waste management.

Compositing is usually done to save costs and involves combining several samples (or aliquots of several samples) from the same waste to reduce the number of analyses to be run. See Test Methods for Evaluating Solid Waste, EPA Publication SW-846, at p. NINE-78 (3d ed. 1986) ("SW-846"). Envirosafe purports to quote SW-846 as stating that "'composite sampling achieves a better representation of the waste than would occur with non-composite sampling.'" Petition at 4. It fails, however, to

provide an accurate recital of the guidance. In fact, SW-846 states:

The major disadvantage of composite sampling, as compared with noncomposite sampling, is that information concerning the chemical contaminants is lost, i.e., each initial set of samples generates only a single estimate of the concentration of each contaminant.

Id. at p. NINE-21; see also id. at p. NINE-78 ("the disadvantage of sample compositing is the loss of concentration variance data"). ^{2/} Accordingly, SW-846 does not support EnviroSAFE's position in this regard. ^{3/}

In its reply, EnviroSAFE contends that other EPA Regions permit compositing. This argument was not raised during the public comment period, thereby precluding a response on the record from the Region, and thus was not preserved for review. See 40 CFR §§124.13 and 124.19(a). Moreover, as noted in the Region Response to the Petition (Att. 2 at 1), there is no single standard for sampling/analysis frequency. The appropriate

^{2/} SW-846 does state that "[a] remedy to [the disadvantages of compositing] is to collect and analyze a relatively large number of composite samples, thereby offsetting the savings in analytical costs that are often associated with composite sampling, but achieving better representation of the waste than would occur with noncomposite sampling." SW-846 at p. NINE-21. EnviroSAFE does not propose to increase the number of samples, however, but merely to composite the ten samples per 100 containers required by the permit.

^{3/} In discussing containerized waste specifically, SW-846 states that "[i]deally, if the waste is contained in several containers, every container will be sampled." Id. at p. NINE-73. Where such extensive sampling is impracticable, random sampling is recommended. Id. This discussion does not, however, recommend compositing for containers, particularly where (as here) only ten percent of the containers will be sampled.

frequency for any given facility entails a balance of competing, sometimes site-specific, factors. See SW-846 at pp. NINE-45 to NINE-46. Contrary to EnviroSAFE's assertions (see Reply at 5), this issue is not the type that requires strict national uniformity among all Regions or facilities. It was not unreasonable or an abuse of discretion for Region X to decide against compositing here. Nor has EnviroSAFE shown that Region X's position is clearly erroneous or otherwise warrants review.

II. In-place Hydraulic Conductivity Testing

EnviroSAFE next challenges a requirement that it conduct in-place hydraulic conductivity testing on a test fill for its soil liners. Although the Agency has proposed regulations requiring such field (as opposed to lab) testing of soil liners, (see 52 Fed. Reg. 20,218 (May 29, 1987)), these rules have not yet been promulgated in final form. Nevertheless, the Agency has previously upheld a permit condition requiring field testing. See In re Chem-Security Systems, Inc., RCRA Appeal No. 88-6 (June 7, 1989) ("CSSI"). As noted in CSSI, such conditions are legally authorized by the RCRA omnibus provision, which directs the Agency to impose any permit term or condition necessary to protect human health and the environment. ^{4/} As explained in the legislative history, this provision authorizes the Agency "to add

^{4/} See RCRA §3005(c)(3), 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."); 40 CFR §270.32(b)(2) (same).

permit terms and conditions beyond those mandated in regulations, if * * * necessary to protect human health and the environment." S. Rep. No. 284, 98th Cong., 1st Sess. 31 (1983). This authority may be used "to incorporate new or better technologies or other new requirements in permits, where EPA intends to add such technologies or requirements to the regulations but has not yet issued a final regulatory amendment." Id.

In discussing the Agency's preference for field over lab testing, the CSSI decision refers to the rationale set forth in guidance prepared under the direction of EPA's Office of Research and Development in cooperation with the Office of Solid Waste and Emergency Response.^{5/} The 1987 preamble to the proposed rule sets forth the Agency's position that "[a] field hydraulic conductivity test of the compacted soil in the test fill is necessary to confirm that the materials and procedures used in the field will result in a compacted soil liner with a hydraulic conductivity of 1×10^{-7} cm/sec or lower." 52 Fed. Reg. at 20,258; see also 1985 Guidance, supra note 5, at 38.

Envirosafe argues that this permit requirement must be deleted because field testing is not required by formal regulation, but is merely recommended by EPA guidance documents.

^{5/} See Technical Guidance Document: Construction Quality Assurance For Hazardous Waste Land Disposal Facilities, at 20-21 (July 1986) (EPA 530-SW-86-031, OSWER Policy Directive No. 9472.003) ("1986 CQA Guidance"); see also Minimum Technology Guidance on Double Liner Systems for Landfills and Surface Impoundments -- Design, Construction, and Operation, at 22-25, 35, 37-42 (2d Version May 24, 1985) (EPA 530-SW-85-014) ("1985 Guidance").

See Petition at 6. Although EnviroSAFE correctly notes that these documents have no binding legal effect, it wrongly concludes that the Agency must therefore ignore their recommendations. Because guidance documents are non-binding, they are open to attack in any particular case. Having considered and properly rejected proffered counterarguments, however, the Agency remains free to apply the principles set forth in the guidance. ^{6/}

The Petition's only substantive challenge to the Agency's preference for field testing is EnviroSAFE's assertion that its lab testing procedures "utilize established ASTM [American Society for Testing and Materials] methodologies in determining hydraulic conductivity of the soil liner." Petition at 6-7. The Agency recognizes that the technical protocol for in-place testing is not yet strictly standardized, but as stated in CSSI, "permit writers need not forgo environmentally protective conditions merely because those conditions entail the reasonable exercise of discretion by the permittee." CSSI, supra, at 3. ^{7/}

^{6/} See Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105, 1110-111 (D.C. Cir. 1987). EnviroSAFE relies on National Solid Waste Management Ass'n v. EPA, 27 ERC 1566 (D.C. Cir. 1987), but that case is inapposite. It holds only that nonbinding guidance documents may be challenged in an enforcement proceeding, not that the Agency must automatically disregard the advice in such guidance when challenged. See id. at 1566-67.

^{7/} EnviroSAFE also asserts that other EPA Regions do not require field testing, but it provides no recent examples. CSSI sets forth the Agency's general preference for field over lab testing for the reasons stated in the 1987 preamble and the guidance documents. In any particular case, however, there might be compelling reasons for deviating from the Agency's general policy. If the Agency's policy on this (or any other) issue is
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In its Reply, EnviroSAFE raises additional substantive challenges to field testing. Because EnviroSAFE did not raise these matters during the public comment period, they have not been properly preserved for review. See 40 CFR §§123.13 and 124.19. EnviroSAFE's basic objection is that the test fill used in field testing cannot exactly replicate actual landfill conditions. See Reply at 7-8. The short answer is that lab samples are even less representative. See 52 Fed. Reg. at 20,258; 1985 Guidance, supra note 5, at 37-42; 1986 CQA Guidance, supra note 5, at 20-21;. Although EnviroSAFE expresses concern over the precision and accuracy of measurements for hydraulic gradient and flow rates (particularly at low flow rates), lab tests are even less precise and could underestimate actual conductivity by a factor of 10 to 1000. See 1985 Guidance, supra note 5, at 37. Accordingly, review is denied on this issue. ^{8/}

III. SWMU Monitoring

EnviroSAFE also challenges certain permit requirements for post-cover care for more than thirty solid waste management units ("SWMUs") at the facility. The permit requires EnviroSAFE to

^{7/} (...continued)

disregarded in a permit proceeding, EnviroSAFE's proper recourse is to participate in that proceeding before the Region and, if necessary, to petition for administrative review.

^{8/} The Agency recognizes that it is difficult to quantify field permeability values significantly less than 1×10^{-7} cm/sec, but existing technology can verify whether permeability is 1×10^{-7} cm/sec or less, which is all that the Agency requires.

monitor specified existing wells and to construct and monitor a number of new wells to detect any future releases from these SWMUs. See Permit Parts VIII and IX. ^{9/} The SWMUs, referred to in the permit as "past practice units," are not subject to the requirements applicable to regulated units, but instead are governed by the corrective action requirements for SWMUs under RCRA §3004(u) ^{10/} and Section 264.101 of the rules. ^{11/} EnviroSAFE argues that these provisions apply only to existing, documented releases. It states that Region X has "made no finding of a release to groundwater or soils" and that "there has been no such release from these units * * *." Petition at 11.

^{9/} In addition to the specific requirements set forth in Permit Condition VIII.B, EnviroSAFE objects to related terms for cover and post-cover cost estimates and financial assurance (Conditions VIII.C and VIII.D), monitoring well location (Condition IX.A), and the detection monitoring system (Condition IX.D.1). The grounds for these challenges are identical to those discussed above. See Petition at 12-14.

^{10/} 42 U.S.C.A. §6924(u) (permits issued after November 8, 1984, shall require "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit.").

^{11/} 40 CFR §264.101(a) ("The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.").

Although the record contains extensive evidence of both groundwater and soil contamination near certain SWMUs, ^{12/} for other SWMUs there are evidently no existing releases (either confirmed or suspected). Apart from the authority to require investigation of existing releases, however, the Region has legal authority under RCRA §3004(u) to require groundwater monitoring to detect future releases from SWMUs. See 52 Fed. Reg. 45,789 (December 1, 1987). Routine monitoring of all SWMUs at RCRA facilities is not currently required, but permits may require such monitoring on a case-by-case basis where necessary to protect human health and the environment. Id. Factors to be considered in deciding whether to require such monitoring include the volume and concentration of hazardous constituents, site characteristics, and unit design. Id. The record shows that Region X considered these and other relevant factors in imposing the conditions at issue. ^{13/} EnviroSAFE is simply incorrect that

^{12/} See, e.g., EnviroSAFE of Idaho, Inc. -- Site B, Preliminary Assessment Report, at 38-46 (Final Report July 1986); Evaluation of EnviroSAFE Services, Inc. Site B, at 85-88 (Hazardous Waste Groundwater Task Force, May 1987).

^{13/} See Region Response to Comments on the Draft Permit, at 47. The 1987 preamble suggests that monitoring will be required where a SWMU is likely to have a future release, but this assertion should not be read to overstate the evidentiary threshold needed for future release monitoring. RCRA §3004(u) was intended to apply to releases that occur after permit issuance. See S. Rep. No. 284, 98th Cong., 1st Sess. 32 (1983); 53 Fed. Reg. at 45,789. Its terms are broad enough to authorize monitoring for future releases as necessary to protect human health and the environment, particularly when read in conjunction with the Agency's omnibus authority (see note 4, supra). The record in a given case might not allow for a conclusive finding that a future release is likely to occur, but might nevertheless reveal a

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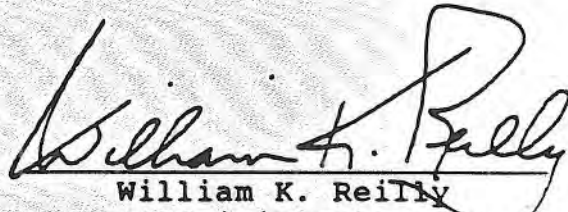
the Agency's authority under RCRA §3004(u) is limited to existing releases. ^{14/}

Conclusion

All other arguments raised by EnviroSAFE have been considered and rejected. For the reasons set forth above and in the Region Response, review is denied.

So ordered.

Dated: APR 3 1990


William K. Reilly
Administrator

^{13/} (...continued)

serious or substantial risk of a future release that warrants monitoring to protect human health and the environment. The key to adhering to Agency policy is to undertake a particularized, SWMU-specific analysis of the potential for a future release, as opposed to requiring routine monitoring for all SWMUs. Here, the record contains such an analysis and supports the Region's concerns about the serious risk to groundwater from the SWMUs at issue. EnviroSAFE has failed to show that this determination is clearly erroneous or otherwise warrants review.

^{14/} EnviroSAFE properly notes that SWMUs are not subject to the specific closure and post-closure requirements under Subpart G of 40 CFR Part 264. Corrective action under RCRA §3004(u), however, should be designed to achieve a level of environmental protection similar to that achieved by Subpart G. Both closure and corrective action must be protective of human health and the environment, and it is entirely appropriate that requirements under RCRA §3004(u) be similar to those under Subpart G.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Envirosafe Services of Idaho, Inc., RCRA Appeal No. 88-41, were sent by First Class Mail to the following persons:

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Dated: APR 4 1990

Andrea C. Taylor
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