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

**FACILITY:** Chem-Security Systems, Inc. (CSSI)
Arlington, Oregon
ORD 089 452 353
RCRA Appeal No. 88-6

**PETITIONER:** CSSI

**PETITION FILED:** April 14, 1988

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

**ISSUES:**

- RFI conditions are technically inappropriate
- Other corrective action issues (modification of cost estimate; demonstration of clean closure)
- Procedural issues
- Level of detail
- Miscellaneous other issues ("harmless" condition)

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**Summary of Petition:**

CSSI objects to ten permit conditions, a plate, and a table on the basis that these materials demonstrate that the Agency and State have made a clearly erroneous finding of fact or conclusion of law and/or overstepped the statutory and regulatory authority to impose such conditions. CSSI believes that other contested conditions highlight important policy considerations that the Administrator should review in his discretion. Each of these contested provisions is discussed below.

- **RFI Conditions are Technically Inappropriate.** Permit conditions IX.A.(1), IX.A.(2), IX.B.(7), Plate 1, and Table 2 require CSSI to construct and operate a groundwater monitoring network specified by EPA rather than the network submitted in CSSI's Part B permit application.

  - CSSI argues that EPA's waste management area designation is incorrect based on hydrogeological characterization data on record, and that the well distances required by EPA, based on modeled results, are without factual basis.

  - CSSI also requests that the Administrator reopen the administrative record regarding requirements for the location of new groundwater monitoring wells.

- **Modification of Cost Estimates.** Sections II.M.(5) and II.M.(6) conditions modify the post-closure care cost estimates submitted by CSSI in its Part B application in Appendix C to reflect the expanded groundwater monitoring network which the Agency seeks in the permit under Sections IX.A.(1), IX.A.(2), Plate 1 and Table 2. CSSI argues that the imposition of these revised costs prior to a determination of the validity of EPA's groundwater monitoring network would be an abuse of its discretion.

- **Demonstration for Clean Closure.** Section II.J.(14)(b) requires CSSI to demonstrate that all 14 units that clean closed under the interim status requirements of 40 CFR Part 265 (and were certified by the appropriate agency) were clean closed in a manner equivalent to the requirements of 40 CFR Part 264. This equivalency demonstration must be submitted within 120 days from the effective date of the permit for each of the clean closed units. If the equivalency demonstration fails to document that clean closure of any of these units was not equivalent to 40 CFR Part 264 standards, the Agency may require a post-closure permit, including corrective action, for that unit.

  - CSSI argues that EPA's decision to require recipients of a Part B permit to conduct additional sampling and analysis of all previously clean closed units constitutes an erroneous application of the law and an abuse of discretion. The Agency has pointed out no factual basis to show that there is: (a) any reason to review the way these units were closed; (b) any indication that they do not meet the closure requirements of 40 CFR Part 264, or (c) any suggestion that they may now require a post-closure permit.

  - CSSI asserts that imposition of a schedule for submittal of the equivalency demonstration is an arbitrary and erroneous exercise of EPA's discretion. Section 270.1(c) does not specify a submittal deadline with respect to the equivalency demonstration, but rather allows a schedule which is technically feasible. CSSI does not know if such a demonstration can be made for all 14 units within this time period, given the limited regulatory description of how a demonstration is to be made, no standards for EPA's decision on whether a demonstration is adequate, and no guidance on how to make this demonstration. CSSI has had no opportunity to comment on this 120 day requirement, which was not in the draft permit.

  - Finally, CSSI contends that the provision allowing EPA to require a post-closure permit, including corrective action, if EPA determines that the equivalency demonstration fails to document clean closure, is clearly erroneous under the law, because it violates CSSI's due process rights and fails to provide CSSI with the procedural rights in 40 CFR Section 270.1(c)(6) governing the equivalency demonstration for clean closure.

- **Procedural Issues.** CSSI argues that EPA modified the grouping of certain waste management units at the facility between the draft and final permit, without providing CSSI the opportunity to comment on EPA's decision.

- **Level of Detail.** CSSI takes issue with the level of detail in the permit, specifically those conditions which specify test methods and accuracy of waste record keeping:

  - Permit conditions V.A.(4)(a) and VI.B.(3)(c) require CSSI to perform in-place hydraulic conductivity testing, as specified using the Double-Ring Infiltrometer (DRI) testing method in the EPA's "Construction Quality Assurance Guidance," on any soil liner used for a surface impoundment or landfill, respectively. In the preamble to its proposed rules on leak detection from landfills, EPA solicited comments on whether in-field testing should be mandatory for permeability testing of the lower soil liner. EPA itself has not yet decided whether an in-field hydraulic conductivity test will be adopted as a regulatory requirement. In addition, CSSI argues that EPA has no legal authority to require liner testing for the clay portion of that soil liner, since there is no minimum technology requirement for the clay portion of the primary composite liner.

  - Section VI.A.(6) requires that CSSI maintain a permanent, accurate record of the three-dimensional location of each waste buried at the site in existing landfills, irrespective of the date of disposal. CSSI argues that EPA lacks the legal authority to impose absolute obligation on CSSI to ensure that waste location records prepared by the previous owner provide an accurate three dimensional location of each waste disposed within the landfill irrespective of the date of disposal.

- **Harmless Condition.** Section I.B requires CSSI to hold the Federal government, the State of Oregon, and all of their personnel harmless for any claim filed against them based on activities at the facility, except those claims arising from their own negligence. CSSI argues that EPA lacks statutory or regulatory authority to impose this condition, which is without precedent in the regulations and in other RCRA Part B permits issued by EPA.

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

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| In the Matter of: | ) | |
| Chem-Security Systems, Inc. | ) | RCRA Appeal No. 88-6 |
| RCRA Permit No. ORD-089-452-353 | ) | |

ORDER DENYING REVIEW

Chem-Security Systems, Inc. ("CSSI") has petitioned for review of a permit issued under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A §§6901-6991i (1983 & West Supp. 1988), for its hazardous waste management facility near Arlington, Oregon. The permit was jointly issued by U.S. EPA Region X and the Oregon Department of Environmental Quality ("DEQ"). [1/] Also before me is CSSI's related motion to reopen the administrative record to receive additional hydrogeologic data on the site. As requested by EPA's Chief Judicial Officer, Region X filed a response to CSSI's petition and motion dated June 30, 1988 ("Region Response"). CSSI then submitted replies dated August 11, 1988.

Under the rules governing this proceeding, there is no appeal as of right from the 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

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1/ The State of Oregon is authorized under RCRA §3006(b) to administer portions of the RCRA program in lieu of the federal program.

involves an important matter of policy or exercise of discretion that warrants review. See 40 CFR §124.19(a) (1988). The preamble to the regulations states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33412 (May 19, 1980). The burden of demonstrating that review is warranted is thus on the petitioner.

CSSI first challenges the permit requirement that it conduct in-place hydraulic conductivity testing on the test fill for its soil liners. See Petition at 17-22. This requirement to use field (as opposed to lab) testing is based on policy guidance from the Agency's Office of Solid Waste and Emergency Response ("OSWER"). [2/] Although such field testing is not currently required by the rules, [3/] the Agency is authorized under the RCRA "omnibus provision" to go beyond the rules and impose any permit

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[2/] See Technical Guidance Document: Construction Quality Assurance For Hazardous Waste Land Disposal Facilities, at 21-22 (July 1986) (EPA 530-SW-86-031, OSWER Policy Directive No. 9472.003) (Attachment B-1 to Region Response) ("CQA Guidance"). This guidance was prepared by OSWER and EPA's Office of Research and Development. It is specifically referenced in the permit conditions at issue.

[3/] The Agency has proposed to amend its regulations to require such field testing. See 52 Fed. Reg. 20218, 20258-59 (May 29, 1987) (§§264.20(b)(3)(iii)(A), 265.20(b)(3)(iii)(A)).

condition necessary to protect human health and the environment. [4] In my view, the Region has provided sufficient justification for field testing. [5] Although CSSI argues that the technical protocol for such testing is not strictly standardized, permit writers need not forgo environmentally protective conditions merely because those conditions entail the reasonable exercise of discretion by the permittee. CSSI raises certain practical concerns regarding field testing, but it has failed to demonstrate clear error in the Region's determination that such testing is preferable to lab testing and necessary here to protect human health and the environment. [6]

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[4] See RCRA §3005(c)(3), 42 U.S.C.A §6925(c)(3); 40 CFR §270.32(b)(2). The legislative history to the omnibus provision states that this authority may be exercised where (as here) the Agency intends to impose new requirements to protect human health and the environment but has not yet issued final rules to implement the proposal. See S. Rep. No. 284, 98th Cong., 1st Sess. 31 (1983).

[5] See Region Response, Attachment 2 at 3-4; see also CQA Guidance, supra note 2, at 21-22; 52 Fed. Reg. at 20258-59.

[6] If ORD and OSWER change their current position on the desirability of field testing as a result of comments on the proposed rule to require such testing, CSSI may request an appropriate modification of its permit. See Joint Response to Public Comments on [CSSI's] August 14, 1987 Draft RCRA Permit at 40, 45 (March 11, 1988) ("Response to Comments"). Until any such policy change, however, permit writers may require field testing when they deem it necessary to protect human health and the environment. Such determinations under the omnibus provision will generally be reviewed only for clear error.

Region X and DEQ agree with CSSI that field testing should be conducted only for the bottom 36-inch soil liners, not for the soil portion of the top composite liners. The Region represents that the permit will be modified to reflect this understanding. See Region Response, Attachment 2 at 3.

The second issue raised by CSSI concerns its groundwater monitoring network. See Petition at 24-30. The rules provide that where a facility contains more than one regulated unit, the units may be grouped into waste management areas ("WMAs") for purposes of locating monitoring wells. See 40 CFR §264.97(b). In its application, CSSI proposed to consolidate ten units into three WMAs (WMAs 1, 2 & 7). In the final permit, the Region subdivided the three proposed WMAs into eight WMAs, thereby increasing the total number of wells required at the site from 74 to 87. [7/] CSSI challenges this subdivision of the proposed WMAs, as well as certain conservative modeling parameters used by the Region. It also argues that the record should be reopened to receive additional hydrogeologic data because the Region modified its decisional basis on this issue after the public comment period. [8/]

On the merits, the Region has sufficiently justified the groundwater monitoring network required by the permit,

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[7/] The permit provides for a groundwater monitoring network of 87 wells, 23 of which are new wells that CSSI must construct after the permit becomes effective. Of the 23 new wells, 13 result from the Region's subdivision of CSSI's proposed WMAs. See [CSSI] Motion to Reopen the Administrative Record, Virnig Aff. at 1-2 (April 12, 1988).

[8/] The only relevant change to the draft permit involves Ponds A and B. The draft permit proposed to consolidate Ponds A and B into a single WMA, but the final permit separates these units due to information first considered by the Region and DEQ while preparing their response to comments. See Response to Comments, supra note 6, at 55. CSSI does not challenge the Region's authority to change the draft permit, but objects to the Region's alteration of its decisional basis after the comment period.

particularly given the absence of detailed hydraulic conductivity data for the three WMAs proposed by CSSI. [9] Although the Region's justification for its position changed somewhat during the course of the permit drafting process, [10] such a change

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[9] See Region Response, Attachment 2 at 5-11; Response to Comments, supra note 6, at 53-58. CSSI submitted detailed hydraulic conductivity data for one landfill, L-13, and Region X accepted these data as justifying a relatively large WMA for this unit. CSSI argues that the Region should have assumed that the data for L-13 applied throughout the entire site. I agree with the Region, however, that L-13 is unique in certain key respects and that data regarding this unit are not necessarily applicable to the site as a whole. See Response to Comments, supra note 6, at 53-55; Region Response, Attachment 2 at 9-11. Similarly, CSSI has failed to show that the Region's dispersivity values and other modeling parameters are clearly erroneous. See Response to Comments, supra note 6, at 56-58; Region Response at 7-8.

Although it had no obligation to do so, Region X continued to analyze hydrogeologic data submitted by CSSI after the permit was issued. The Region and DEQ are unconvinced that CSSI's additional submissions warrant modification of the groundwater monitoring network specified in the permit. See Regional Response, Attachment 2 at 6, 10.

[10] CSSI exaggerates the extent to which the Region's rationale changed. The August 1987 Fact Sheet states that CSSI's proposed WMAs (1) improperly assume a uniform vertical flow of a release from the units at issue (as opposed to a point source release); (2) are based on unsupported dispersivity values; and (3) might result in a release that goes undetected during the post-closure monitoring period. Fact Sheet at 73-74. It also asserts more generally that subdivision of the proposed WMAs is necessary to "detect contamination in the aquifer at the earliest possible time." Id. at 74. When the permit was issued in March 1988, the Region rejected the proposed WMAs due to their high horizontal/vertical conductivity ratios. Response to Comments, supra note 6, at 53-55. Despite this shift in emphasis and more refined analysis, the basic objection remained the same, namely that the proposed WMAs are too large to permit timely detection of a release. There is no evidence that the Region deliberately withheld its true decisional basis in the Fact Sheet or that the Fact Sheet was otherwise fatally deficient, particularly when viewed in the context of the prior exchanges between the parties regarding the site's hydrogeology. See Motion to Reopen at 3-6; Region Response, Attachment 2 at 6-9, Attachment 5 at 6.

standing alone does not require that the record be reopened. Administrative review under Section 124.19 serves as an adequate check to ensure that any change in the decisional basis is not unduly prejudicial, just as it does for a change to the draft permit itself. [11/] CSSI's appeal, however, fails to convince me that it has suffered any undue prejudice, that an additional comment period is necessary, or that the Region's permit decision otherwise warrants review. [12/]

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[11/] It is entirely appropriate for a public comment period to result in changes to the Region's decisional basis, the record, or the draft permit itself. The rules expressly address only changes to the draft permit, but such changes frequently involve a change in decisional basis as well. The Region is required only to specify and explain such changes, not to receive additional comment on them. See 40 CFR §124.17(a)(1). The Agency has also made clear that changes to the factual record in response to comments need not always result in an additional comment period. See 45 Fed. Reg. 33412 (May 19, 1980). A fortiori, a Region need not receive additional comments on a change to its decisional basis unaccompanied by any significant change to the draft permit or factual record. Accord, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973) ("A contrary rule would lead to the absurdity that * * * the agency can learn from the comments only at the peril of starting a new procedural round of commentary.")

[12/] CSSI also argues that the permit requires it to drill certain wells through a final closure cover for four landfills in violation of Sections 264.112(a)(2) and 264.310 of the rules. Petition at 25-26, 29. The Region and DEQ concluded, however, that these wells are sufficiently removed from the edge of each landfill and that any risk of potential contamination from constructing these wells is outweighed by the need to obtain complete groundwater monitoring data for these units. See Response to Comments, supra note 6, at 51-52. Moreover, the hazardous waste regulations cited by CSSI are inapplicable to these four landfills because they are solid waste (not hazardous waste) management units. See Fact Sheet at 70.

## Conclusion

For the reasons set forth above and in the Region Response, and based on the submissions and record before me, CSSI's petition for review and motion to reopen the record are denied. [13/]

So ordered.

William K. Reilly
Administrator

Dated: JUN 7 1989

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[13/] CSSI's Petition raised several other issues, but these have been settled through negotiations. See Region Response at Attachment 2. The permit should be modified accordingly. CSSI requests a thirty-day delay before the contested permit conditions become effective to allow for a smooth transition from interim to permitted status. This request is best resolved at the Regional level.

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Chem-Security Systems, Inc., RCRA Appeal No. 88-6, were sent to the following in the manner indicated:

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Dated: JUN -7 1989

Brenda H. Selden, Secretary
to the Chief Judicial Officer