

**Memorandum**

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Date: July 20, 1993

From : Office of Legal Counsel  
324-5780

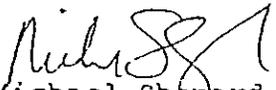
Subject: Revision of OPP 87-15, Permit Denial Policy

In March or April you asked me to revise OPP 87-15, Permit Denial Policy. I did a draft revision about the time Jim Pappas' workgroup was finalizing the Permit Writer Handbook. Now that I'm getting back to the policy and comparing it to the handbook, I realize that most of what is in the policy is already in the handbook.

The main piece that is not in the handbook concerns the criteria for permit decisions, which is attached to this memo as Attachment 1. This section covers the criteria for taking action based on a disclosure statement, which we discussed with Bill Carter in March. At that point, we intended to add it to the revised Permit Denial Policy. Attachment 1 could be added to the handbook or issued as a separate policy.

There are several miscellaneous issues that may or may not be covered in the handbook. I thought Jim could tell me more quickly than I could go through the handbook. I will include the text on the miscellaneous issues as Attachment 2, and we can clarify these issues with Jim.

Please let Jim and me know if you want Attachment 1 included in the handbook or issued separately. I will ask Jim by copy of this memo about the issues raised in Attachment 2.

  
Michael Shepard  
Senior Staff Attorney

Attachments

cc: See next page.



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cc: Jim Pappas  
Region 1

Odette Madriago  
Headquarters

Colleen Murphy  
Office of Legal Counsel

ATTACHMENT 1

CRITERIA FOR PERMIT DECISIONS

The department has substantial discretion in deciding whether to grant or deny a permit application or to revoke a permit:

A. Health and Safety Code (HSC), Section 25186

HSC section 25186 allows denial or revocation of a permit based on (a) violations of or noncompliance with environmental protection statutes and regulations, if the violation or noncompliance shows a repeating or recurring pattern or may pose a threat to public health or safety or the environment, (b) aiding, abetting, or permitting such violations, (c) violation of or noncompliance with administrative or court orders, (d) misrepresentation or omission of significant information in information reported to the Department, (e) activities resulting in conviction of a crime significantly related to the applicant's fitness to perform under the permit, and (f) activities resulting in the revocation or suspension of any related permit.

B. 22 California Code of Regulations (CCR) Section 66270.43

Title 22 CCR section 66270.43 lists four criteria for revocation or denial:

1. Any cause specified in HSC section 25186.
2. Noncompliance by the applicant with any condition of a permit.

This criterion allows the Department to deny a permit application from a facility that has not been operating in compliance with its permit. The violations should be significant in nature to serve as a basis for denial, should be well documented over a period of time by the Department, Regional Water Quality Control Board (RWQCB), or USEPA inspection reports, and the facility should have been notified of the violations in writing well before the denial.

decision is made. Some examples of violations that would generally be considered significant and are the type of violation that could support a denial decision include:

- (a) Failure to install an adequate environmental monitoring system;
  - (b) Failure to construct the facility properly, for example, inadequate containment systems; inadequate run-on/run-off collection systems; systems that do not meet seismic and precipitation design standards; or use of construction materials that are incompatible with wastes being handled; and
  - (c) Failure to manage waste handled at the facility property, e.g., failure to comply with waste analysis requirements; failure to maintain adequate security; improper handling of incompatible reactive or ignitable wastes; or spillage of wastes onto soil.
3. The applicant's failure, in the application or during the permit issuance process, to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time.

Failure of an applicant to provide adequate information in the Part B application, failure to respond to a notice of deficiency (NOD), or misrepresenting any facts in the Part B are grounds for denial. Only significant violations will support a denial. Failure of a facility to submit a complete Part B application in the original submittal generally should not be used as a basis for denial. A NOD should be issued to facilities in these situations. Failure to respond to a NOD or submittal of a response that is grossly inadequate can (and should be) used as a basis for denial. It is important, however, that the NOD address all significant Part B deficiencies to maximize the Department's basis for denial if the facility fails to respond or does not respond adequately. Keep in mind the fact that HSC section 25200.8 requires the

Department to initiate denial of an application if the facility does not respond to three or more NODs.

4. A determination that the permitted activity endangers human health or the environment and cannot be adequately regulated under a permit.

All facilities should be evaluated to determine if they can operate (or continue to operate) without posing a threat to public health and the environment. This evaluation will focus primarily on the potential for releases of hazardous wastes to occur at significant levels, but other environmental impacts should be considered as well. Two key documents, the Part B application and the Environmental Impact Report (EIR) or Initial Study (IS), will provide most of the information that will be used to identify potential or actual impacts. The EIR/IS can be particularly useful because the scope is broader than the Part B application. The EIR/IS may provide information on significant impacts that are not directly associated with releases of hazardous waste. Other important sources of data and information that may help in determining the potential for impacts or identifying actual impacts include surveillance and enforcement inspection reports, RWQCB inspection reports (including comprehensive groundwater monitoring evaluations), and exposure information reports submitted by disposal facilities pursuant to RCRA.

Some examples of situations that could serve as grounds for denial under this criterion are provided below:

- (a) "Existing" landfills are not required to meet any specific manufactured liner standards, but must meet the containment performance standard specified in 22 CCR section 66264.31. This situation means that natural geological conditions at the unit must be sufficient to contain the hazardous waste and prevent contamination of the vadose zone and groundwater. If migration of wastes is documented through groundwater monitoring

data, inspection reports, or any other reliable source, the Department might conclude that the best way to "adequately regulate" the unit would be to deny the permit application and require the facility to close. As part of closure, the facility would be required to install a low permeability cap over the landfill to prevent any further influx of precipitation and to monitor the groundwater.

- (b) Large amounts of hazardous wastes can be released via evaporation from surface impoundments located in areas with high evapotranspiration rates. The Department could deny an application if these atmospheric releases would be high enough to impact adversely the health of individuals living or working in the area of the hazardous waste facility.
- (c) Significant impacts not directly associated with releases of wastes from a facility can be identified through the IS or EIR process. Vehicular traffic associated with the operation of a facility, for example, can have a severe impact on some communities. This situation would primarily be associated with large, commercial, off-site hazardous waste facilities that create a large flow of heavy truck traffic over extended periods. The Department could deny a permit application in this situation, if the truck traffic were forced to move through a relatively quiet commercial or residential area to get to the facility because of the lack of any other access route.
- (d) Failure of an incineration facility to meet the standards for a trial burn. The Department could deny an application based on failure to meet technical criteria (e.g., excessive HCL in exhaust) or failure to comply with the required protocol standards (e.g., waste flow rate too low).

### C. General Considerations

There are two different types of criteria listed in the statute and regulations discussed above as a basis for permit decisions.

First, HSC Sections 25186(a) and 25200(a) require a permit applicant and holder to comply with the requirements established in statute and regulation for a hazardous waste facility permit. In addition 22 Cal. Code Regs. Section 66270.43(b)(3) specifies that a permit may be denied or revoked if the Department determines that the permitted activity will endanger human health or the environment and cannot be adequately regulated under a permit. Under this type of criteria the specific reason cited for denying or revoking a permit will be a technical requirement, usually one found in the regulations, as described above.

Second, HSC Section 25186 and 22 Cal. Code Regs. Section 66270.43(b)(1) and (2) provide that a permit may be denied or revoked on the basis of the acts and omissions of the permit applicant or holder. While the statute and regulation establish criteria, they do not provide a clear yes or no answer to the question whether to grant, deny, or revoke a permit based on the behavior of the permit applicant or holder. In evaluating behavior, the following factors should be considered:

1. The nature and seriousness of a violation, noncompliance, failure to disclose or misrepresentation of information, etc.
2. The date of the event referred to in #1.
3. Whether the event referred to in #1 was an isolated or repeated incident.
4. Whether the event referred to in #1 was an intentional or negligent act.
5. The nature and seriousness of any potential threat to public health or the environment.
6. The circumstances surrounding the behavior.

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Generally denial or revocation of a permit should only be considered when an act of the permit applicant or holder poses a threat to public health or the environment, results in conviction of a crime significantly related to fitness to perform under the permit, is a violation of an administrative or court order, shows a clear unwillingness or inability to comply with environmental laws, or results in the revocation or suspension of any related permit.

## ATTACHMENT 2

### OTHER ISSUES

#### A. Multiple Units at a Single Facility

Multiple-unit facilities may be permitted by: (1) a single decision to permit all units or to deny all units; (2) a single decision to permit some units and to deny the other units; or (3) separate decisions to issue or deny permits for individual units or groups of units (in this case, all interim status units not addressed in the permit decision remain under interim status).

The administrative procedure for making the final permit decision is the same for all three of these scenarios. When a single decision is used to permit some units and any others, all documentation prepared should clearly identify the units being permitted, those being denied, and the basis for reaching the decision for each unit.

#### B. Permit Conditions

When the Department grants a permit with conditions, the conditions are in effect a partial denial of the permit application that may be appealed by the applicant.

If the applicant comments on and petitions for review of permit conditions, the Department will treat the contested conditions as a permit denial.

#### C. The Relationship Between Permit Denial and Facility Closure

Interim status terminates on the date the Department's final permit decision becomes effective for an interim status facility. This date may vary from 30 days after service of the final permit decision, if no petition for review is filed, to 30 days after service of the final decision after a review.

A closure plan be submitted within 15 days of the date on which interim status terminates (22 CCR section 66265.11c(d)(3)(A)). Facilities in the latter category must resubmit a closure plan due to the fact that the

one in the Part B is based on 22 CCR, div. 4.5. chapter 14, rather than chapter 15 standards. More importantly it does not reflect closure of the units in accordance with the date on which interim status terminates. These plans are then reviewed, determined to be complete, public noticed, and approved following the regular closure plan approval process.

Facilities that are having some units permitted and other denied are more complicated. In this situation (as a permit condition), the facility must submit a revised Part B that includes a closure plan reflecting only the permitted units. The facility must also submit a closure plan, as discussed in (C) above, for the denied units. These plans can then be reviewed together, public noticed as both a permit modification and closure plan approval, and approved. (Note: if post-closure will be required for the units closing under interim status, a separate post-closure permit can be issued or the operating permit can be modified to include post-closure requirements for these units.)

D. The Relationship Between Denial and Issuance of a Post-Closure Permit

No specific time requirement for submittal of a post-closure permit application following denial is established in regulations. Therefore, a fair amount of flexibility exists in triggering the post-closure permitting process. Three different strategies are generally available, including:

1. The post-closure permit application can be called in at the same time as the closure plan. Both documents can then be reviewed and approved together.
2. The post-closure permit application can be called in after the closure plan has been approved and the permit can be issued prior to completion of closure. Once the facility completes closure, it moves directly into post-closure.
3. The post-closure permit application can be called in after the closure plan has been approved and the permit can be issued after completion of closure. In this situation, the facility must be

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directed (usually in the closure plan approval letter) to comply with interim status post-closure requirements following completion of closure and until a post-closure permit is issued.

Issuance of a post-closure permit subsequent to a denial action follows the same review, public notice, and approval process as for an operating permit. As noted above, facilities that have some units permitted and some denied can be handled two different ways with regard to issuance of a post-closure permit: (1) a separate post-closure permit addressing only the denied units requiring post-closure can be issued, or (2) the facility's operating permit can be modified (via a major modification) to include post-closure requirements for the denied units.

