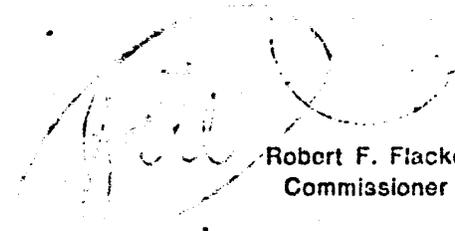


FINAL

New York State Department of Environmental Conservation  
60 Wolf Road, Albany, New York 12233

  
Robert F. Flacke  
Commissioner

July 17, 1981

Robert P. Merino, Esq.  
749 Seventh Street  
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Lewis Steele, Esq.  
714 Buffalo Avenue  
Niagara Falls, New York 14303

Re: Declaratory Ruling - 27-07  
In the Matter of CECOS INTERNATIONAL, INC.,  
PINE AVENUE SITE, TOWN OF NIAGARA, NEW YORK

Dear Messrs. Merino and Steele:

This letter is a Declaratory Ruling in response to your respective petitions pursuant to 6 NYCRR Part 619 concerning the applicability of Environmental Conservation Law Article 27 title 11 to the siting of two proposed secure land burial facilities by CECOS International, Inc. at its Pine Avenue Site, Town of Niagara, New York.

The request for ruling in this case relates to these factual circumstances:

CECOS International, Inc. operates a hazardous waste management facility on a 385 acre site located partially in the City of Niagara Falls and partially in the Town of Niagara. The site is in an industrial-commercial area with the Great Lakes Carbon Company plant located immediately to the south, the Airco-Speer plant immediately to the west and the New York State Thruway (I-190) forming the eastern and northern boundary of the site.<sup>1</sup>

<sup>1</sup> "Soils, Geology and Hydrology of the Newco-Niagara Recycling Site, Niagara Falls, New York", by the Calspan Corporation, January 10, 1978 at page 1.

The facility on this site actually consists of a series of operationally interrelated subfacilities including three secure landburial facilities, an intermediate landfill handling both hazardous and non-hazardous industrial sludges, an aqueous waste treatment system, various waste reclamation, detoxification and solidification processes and waste storage areas.

Applications for two new secure landburial facilities (SLF 4 and SLF 5) at the site were the subject of a Commissioner's Decision after extensive hearing, dated March 20, 1981. That Decision denied the two new SLF applications on grounds that were summarized in the direction that any reapplication would have to include the following: (1) an adequate 10-year plan for the future of the facility, (2) data and analysis of an identified groundwater flow problem, (3) data and analysis of an identified relationship between groundwater and a certain acid pond, and (4) grounds for a variance under 6 NYCRR §360.8(b)(2)(ii)(g).

A reapplication was made by CECOS in May of 1981. The instant declaratory ruling request asks whether a Certificate of Environmental Safety and Public Necessity which is issued by the Hazardous Waste Facility Siting Board under ECL Article 27, title 11 is required with respect to SLF 4 and SLF 5.

The Department first addressed the applicability of the Industrial Hazardous Waste Siting Board in a declaratory ruling issued February 19, 1980 entitled In the Matter of Frontenac Environmental Services, Inc., Niagara Falls (see Appendix "A"). In that ruling, the Department held that a proposal for a hazardous waste facility to be located at the site of an existing operation does not require review and approval of the Industrial Hazardous Waste Siting Board where the proposed facility would be substantially similar to the existing operation. This position was reiterated in a second Declaratory Ruling issued by this Department on March 21, 1980 captioned In the Matter of Frontenac Environmental Services, Inc., Utica (see Appendix "B").

That position reflects the Department's interpretation of legislative intent concerning the applicability of siting board jurisdiction under ECL Article 27, title 11, which is also manifest in the following exemption under proposed regulations implementing the statute (6 NYCRR Part 361 referred to as Draft Regulations for Siting of Industrial Hazardous Waste Facilities, dated October 1, 1980):

"Exemptions. Whatever other provisions of this title or of the ECL apply to a facility, the provisions of this Part shall not apply if ...

"(2) the proposed industrial hazardous waste facility will be located at a site where either a substantially similar function with regard to industrial hazardous waste has been or is being performed or substantially similar materials have been or are being generated, handled, treated, stored, compacted, recycled, exchanged or disposed...." [6 NYCRR 361.1(f)(2)].

The rationale for this exemption turns upon the significance of the term "new industrial hazardous waste facility" [emphasis added; see ECL 27-1105(1)]: i.e., an existing facility is not a new facility.

The Draft Environmental Impact Statement (DEIS) accompanying the proposed Part 361 regulations, gives further clarification of this rationale:

"The intent of ECL Article 27, title 11 is to establish a board which will review new sites where hazardous waste treatment, storage and disposal will occur in order to determine the environmental, economic and social acceptability of a particular location. The inclusion of this exemption will dispense with the need for a siting board where another agency has already reviewed the site location for its acceptability and the Department determines that the proposed site and the use thereof is substantially similar to the preexisting facility. The Department believes that requiring a siting board in cases covered under this exemption would be duplicative of prior regulatory reviews and would be incongruous with the legislative intent to constitute the siting board only when new sites are proposed." [Draft EIS, Part 361, October 1, 1980; §7.5.1 at pp.35-36]

A proposal that falls within the description contained in the above quoted section of the DEIS is not considered to be one for a "new" facility.

Exemplification of this exemption can also be found in this Department's May 28, 1981 Declaratory Ruling In the Matter of Harrison Radiator (see Appendix "C"). The method of analysis employed in Harrison will be used as the touchstone for this ruling.

In Harrison, the Department stated that its decision to assert siting board jurisdiction was based on two fundamental considerations. First, the proposed facility in Harrison offered a "fundamentally different mode of waste management" as compared to the existing facility. Second, certain of the siting criteria set forth in the enabling statute were never at issue at the time the existing facility underwent administrative review. In furtherance of the legislative intent behind this enabling statute, the Department concluded in that ruling that the proper forum under current law for consideration of these criteria was the Siting Board.

In the context of the instant ruling, application of the above analysis yields the following results. With respect to the similarity of the modes of waste management, the undisputed facts clearly demonstrate that both the proposed and existing landfills will employ identical methods of waste management. As to the opportunity for a regulatory review of the siting criteria enumerated in ECL §27-1103, the earlier proceedings conducted by this Department in respect to the existing SLFs 1, 2 and 3 clearly afforded such review.

However, the two issues discussed above are merely the beginning of a comprehensive analysis regarding the nature of the proposed activity. As noted in Harrison,

"... a factual dispute concerning the similarity of the materials currently being stored in the lagoons and those identified for disposal at the proposed secure land burial facility exists. Based on the above determinations, resolution of this factual disagreement need not be reached. However, under different circumstances, types of waste to be disposed may be dispositive of an inquiry concerning siting board exemptions."

In the instant case, having resolved the threshold issues identified in Harrison, the Department must focus its attention on the specifics of the proposed operation.

This additional analysis will address the question of the similarity of the waste stream for the existing and proposed landfills with respect to composition, volume and source. Additionally, it is necessary to determine whether or not the proposed location for the landfills is an integrated part of the existing waste management site and whether or not site conditions at the proposed location vary significantly from those at the location of the existing landfills.

The concept of "site" under ECL Article 27, title 11 has a different significance than the more limited concept under 6 NYCRR Part 360. Under Part 360, "site" usually means the immediate dimensions of a facility's structure, whereas under ECL Article 27, title 11 "site" signifies a larger land area specified by the Applicant to which the siting criteria will be applied. The significance of this distinction is that the resulting ECL Article 27, title 11 certificate represents a site-wide entitlement. In this case, a comparable site-wide evaluation of the CECOS 385 acre Pine Avenue site has occurred during the prior proceedings. Geological reports<sup>2</sup> prepared in relation to prior regulatory reviews of the existing landfills have defined the site for our purposes.

Geological reports evaluated during the most recent hearing on CECOS applications have analyzed the entire site as a discrete entity. The conclusion of these reports is that the geology of the site is essentially uniform:

"The basic element of geologic deposits with increasing depth is that of: manmade fill and residual materials from land surface to a variable depth; a lacustrine clay of variable thickness; a glacial till of very localized occurrence; and bedrock of the Lockport Dolomite Formation.

"The most significant deposit with respect to the waste management operations at this site is the lacustrine clay. This clay is found to be continuous beneath the entire property and varied thickness from less than two feet to more than sixteen feet and generally occurring with an average thickness of eight feet."<sup>3</sup>

Thus, prior regulatory reviews served to determine the amenability of the site, from a geological perspective, for secure land burial. The permit reviews for the proposed landfills will address any technical questions which may result from spot variations in the depth of the clay.

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<sup>2</sup> Ibid.; see also

"Hydrogeologic Investigation of the Newco-Niagara Recycling Site, Niagara Falls, New York" by Roy F. Weston, July 25, 1978.

<sup>3</sup> Ibid., p.5-1 of Weston report.

It should be clearly recognized that the purpose of the Siting Board's review is to focus attention on the amenability of an overall site for a particular type of hazardous waste management activity and not to address technical issues raised in relation to specific permit requirements.

On the subject site, secure landfills for the disposal of hazardous wastes predominate. Besides the presence of the three landfills heretofore referenced which exclusively handle hazardous wastes, an intermediate landfill facility handling both hazardous and non-hazardous industrial sludges is also in operation. It therefore may be concluded that the proposed SLF 4 and 5 will become an integrated part (assuming all permit approvals are forthcoming) of a preexisting waste management site; a site, moreover, where landburial is a primary activity.

Lastly, it is necessary to review questions related to the similarity of the waste stream.

Comparison of the contents of the subcells of the existing landfills with that of the proposed landfills indicates a clear similarity. Existing subcells provide space for heavy metals and their salts, pseudometals, organics, flammable wastes and general space for acids and overage from other subcells. The proposed landfills will have five subcells: #1 - general, whose contents will be as described above; #2 - pseudometals; #3 - heavy metals; #4 - flammable wastes; and #5 - organics.

The source of the current waste stream is broken down as follows: 44% Niagara County, 7% Erie County, 19% other New York State, 30% out of state. The projected sources for wastes designed for the proposed landfills is practically identical.

Although the proposed SLFs 4 and 5 have a greater design daily tonnage capacity than existing SLF 3, there will be no increase in the volume of hazardous waste being transported to the site. Proposed SLF 4 will be accepting

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<sup>4</sup> Landfill #1	Approval to Construct, 11/15/77
Landfill #2	Permit to Operate No.2208, 6/8/78
Landfill #3	Permit to Operate No.2025, 10/27/79
Landfills #4&5	Proposed Permit to Operate No.2561

<sup>5</sup> Draft Environmental Impact Statement, NEWCO Solid Waste Management Facilities, Section 1.2.3, pp. 1-7, by Ecological Analysts, Inc., April 1979.

Supplemental DEIS for Proposed SCMF's #4 and #5, Section 1.4.2.2, pp. 1-10, by Ecological Analysts, Inc., July 25, 1980.

only the waste stream precisely directed to landburial in SLF 3 and the intermediate landfill, both of which are to be closed due to lack of capacity before SLF 4 becomes operational. Hence the average daily tonnage of hazardous waste delivered to the site for landburial will continue to be approximately 700 tons per day. SLF 5 will only become operational when No. 4 is at capacity. At such time, the waste stream to No. 5 will be substantially identical to that for No. 4.

In summary, it is concluded that the two proposed SLFs, Nos. 4 and 5, are exempt from review of the industrial hazardous waste siting board because the existing site operation is substantially similar with respect to the mode of waste management and the nature of the waste stream to the existing facility.

As stated in prior rulings of this Department regarding siting board jurisdiction under ECL Article 27, title 11 each specific proposal involving treatment, processing, storage or disposal of hazardous wastes must be evaluated in its specific context, and each resultant ruling has a correspondingly limited applicability. Rulings concerning the applicability of ECL Article 27, title 11 to proposals that seek to modify or expand existing facilities must emphasize three factors, i.e., site uniformity, similarity in mode of waste management and the similarity of the waste stream. The analysis of these factors in the context of

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<sup>6</sup> Ten Year Technology Plan by CECOS International, Inc. submitted at Legislative Hearing in Niagara Falls, New York on June 16, 1981.

Tables 6-1 and 6-2 on pages 6-5 and 6-6, respectively, shows the closing of SCMF #3 at end of 1981 and closing of the Secure Sludge Management Facility in 1982.

<sup>7</sup> Permits to Construct SCMF #4 and SCMF #5 - "Application for Approval to Construct a Solid Waste Management Facility" dated May 11, 1981, submitted by R.A. Stadelmaier, Exec. V.P. CECOS International, Inc. Estimated Daily Tonnage for each landfill is 700 (Design).

<sup>8</sup> Ten Year Technology Plan by CECOS International, Inc. submitted at Legislative Hearing in Niagara Falls, New York on June 16, 1981:

Table 6-5 on page 6-136 shows phasing of SCMF #4 beginning in 1982/ending 1984 and SCMF #5 beginning in 1984/ending 1986.

this ruling does not however constitute a standard against which subsequent cases will necessarily be judged. This ruling is based on the assumption that facts incorporated herein and attributable to CECOS International, Inc. are accurate.

Sincerely,



Thomas A. Ulmer, for  
Richard A. Persico  
General Counsel/  
Deputy Commissioner

cc: CECOS International  
Robert Doleski  
Peter Burke, Esq.