ORIGINAL

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO PERMITTING	)	
FOR USED OIL MANAGEMENT AND	)	R99-18
USED OIL TRANSPORT	)	(Rulemaking-Land)
35 ILL. ADM. CODE 807 AND 809	)	

P.C. #20

NOTICE

Dorothy M. Gunn, Clerk
IL. Pollution Control Board
James R. Thompson Center
100 W. Randolph, Ste 11-500
Chicago, Illinois 60601
(First Class)

Matthew J. Dunn, Chief
Environmental Bureau
Office of the Attorney General
James R. Thompson Center
100 W. Randolph, 12th Floor
Chicago, Illinois 60601
(First Class)

Robert Lawley, Chief Legal Counsel
Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787
(First Class)

Joel Sternstein, Hearing Officer
IL. Pollution Control Board
James R. Thompson Center
100 W. Randolph, Ste 11-500
Chicago, Illinois 60601
(First Class)

Service List
(First Class)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Final Comments of the Illinois EPA, of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: _____
Daniel P. Merriman
Assistant Counsel
Division of Legal Counsel

DATE: September 24, 1999
Illinois EPA
Division of Legal Counsel
1021 North Grand Avenue East, P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE POLLUTION CONTROL BOARD
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SUPPLEMENTAL FINAL COMMENTS OF THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
ADDRESSING ISSUES RAISED AT THE THIRD HEARING

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorney, Daniel P. Merriman, and pursuant to 35 Ill. Adm. Code 103.320, respectfully submits these SUPPLEMENTAL FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ADDRESSING ISSUES RAISED AT THE THIRD HEARING ("Supplemental Comments") in the above-captioned matter to the Illinois Pollution Control Board ("Board").

The Illinois EPA contends that the proposed regulations filed in this matter with the Board, as modified by the proposed amendments set forth in the FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND PROPOSED AMENDMENTS TO ADDRESS ISSUES RAISED AT HEARING ("Final Comments"), previously filed in this matter on May 7, 1999 (dated May 6, 1999), and incorporated by reference herein, constitute a necessary, workable and well-justified proposal. The Illinois EPA requests that the Board adopt the proposal, as amended, as submitted.

Background

The history of this proposal is succinctly stated in the January 21, 1999 Opinion and

Order of the Board adopting the Illinois EPA's proposed amendments to 35 Ill. Adm. Code Part 807 for first notice. In the interest of administrative economy, the Illinois EPA refers to pages one through three of that Opinion and Order, and incorporates by reference herein that recitation of the regulatory and statutory framework behind, and the procedural history of, this proposal. In brief, on November 2, 1998, the Illinois EPA filed a "Motion to Sever the Docket" in In the Matter of: Nonhazardous Special Waste Hauling and the Uniform Program, 35 Ill. Adm. Code 809 (Pursuant to P.A. 90-219), docket number R98-29, and requested that the Board sever the issues regarding permitting certain used oil management facilities and used oil transporters from the remainder of the proposal in that proceeding. On December 17, 1998 the Board granted the Illinois EPA's motion and opened docket R99-18 to address the used oil issues. The Illinois EPA's proposal went to first notice on January 21, 1999, and the first hearing in docket R99-18 was held on February 25, 1999, in Chicago, Illinois. A second hearing was held in Springfield, Illinois, on March 1, 1999.

During the course of the second hearing on docket R99-18, certain issues were raised by members of the regulated community concerning the effect of the proposed amendments on their operations. The Illinois EPA believes that some of those concerns were adequately addressed during both the first and second hearings, and incorporates by reference herein the testimony of Illinois EPA witnesses, both written and oral, offered therein. However, a few issues arising from concerns expressed by members of the regulated community remained outstanding, and the Illinois EPA addressed those in its May 7, 1999 Final Comments, including some proposed language changes to the rules.

Pursuant to the Hearing Officer Order of April 12, 1999, the deadline for filing public comments was extended to May 7, 1999. Between the end of the second hearing and the

comment deadline, several organizations who were not present or otherwise represented at the first and second hearings filed comments with the Board. Due to issues of timing, the Illinois EPA was able to address some of the public comments in its May 7, 1999 Final Comments, but not all. On June 18, 1999 the Board therefore ordered a third hearing, which was held on August 23, 1999, in Chicago, Illinois.

At that hearing both the Illinois EPA and representatives of the National Oil Recyclers Association ("NORA") were represented. The Illinois EPA provided pre-filed written testimony of three of its witnesses: Theodore Dragovich, P.E., manager of the Illinois EPA Bureau of Land Permit Section's Disposal Alternatives Unit; Lawrence W. Eastep. P.E., manager of the Illinois EPA Bureau of Land's Remedial Project Management Section; and Leslie D. Morrow, human health and ecological risk assessor in the Illinois EPA Office of Chemical Safety's Toxicity Assessment Unit, which testimony was entered into the Record as Illinois EPA Exhibit 3. In addition, the Illinois EPA provided oral testimony from its witnesses summarizing and supplementing their written testimony was provided, as well as oral testimony given in response to questions and comments presented at hearing by representatives of NORA, and in some instances, the Board.

At the third hearing a number of issues were raised by NORA in opposition to the Illinois EPA's proposal. These issues were generally addressed by the Illinois EPA in its witnesses' written and oral testimony, which is hereby incorporated by reference in support of these Supplemental Comments. However, certain of the issues raised at the third hearing by NORA were apparently of sufficient concern to its membership to be addressed repetitiously throughout the hearing.

Although NORA's complaints about the Illinois EPA's proposal were many and varied,

they each generally fell into one of three categories. First, NORA contended that the Illinois EPA's proposal to require certain used oil recycling facilities to obtain State permits, pursuant to 35 Ill. Adm. Code Part 807, is an unnecessary application of regulatory authority. Second, NORA asserted that the Illinois EPA's proposal to require such State permits will result in the imposition of an unduly burdensome impact on its members. The third and final category of NORA's objections was its claim that the Illinois EPA's proposal is unfair and anti-competitive in its effect.

Although the Illinois EPA attempted to fully respond to NORA's concerns at the hearing, the repeated utterance of those concerns suggests that the Illinois EPA's responses may also require repetition, and, perhaps in some instances, clarification or supplementation. Accordingly the following remarks are intended to address those concerns raised by NORA at the third hearing that the Illinois EPA believes bear repeating. Since NORA's representatives expressed their objections and concerns in rather a "shotgun" approach, scattered throughout the hearing record, the Illinois EPA will attempt to address them in accordance with which of the general categories of complaints, mentioned above, that they fall into, and not chronologically in the order in which they were presented.

In addition, NORA presented at the hearing a proposal for the imposition of a "bright line" standard to determine when used oil is deemed a waste, subject to regulation, and when it is deemed a product or commodity, not subject to regulation by the Illinois EPA. Although not a part of this proposal, the rulemaking, The Illinois EPA will comment below on that proposal, as well.

NORA'S COMPLAINTS AND ILLINOIS EPA'S RESPONSES

I. UNNECESSARY REQUIREMENT

A. ISSUE: EXISTENCE OF OTHER REGULATIONS

1. NORA's Complaint or Comment:

NORA's argument is simply that since much of their used oil recycling activity is already subject to substantive regulation (e.g., the used oil management standards of 35 Ill. Adm. Code Part 739; the underground storage tank regulations of 35 Ill. Adm. Code Part 732, the federal Toxic Substances Control Act of 15 U.S.C. §§ 2601 to 2692, as it relates to used oil contaminated with polychlorinated biphenals,("pcbs"); the federal Clean Water Act of 33 U.S.C. §§ 1251 to 1387, and associated State regulations as they relate to used oil POTW discharges, federal Department of Transportation hazardous material transportation regulations as they relate to the transportation of flammable materials, etc.), and since the Illinois EPA can freely inspect to ensure compliance with those substantive provisions, and since the government has the enforcement ability to require remediation should there be a violation, then additional regulation requiring permits for their facilities is completely unnecessary. (See, e.g., August 23, 1999 Hearing Transcript ("Tr."), pp. 30-33.)

2. Illinois EPA's Response:

The Illinois EPA's proposal does not seek to impose any new or additional substantive standard or used oil management requirements. The applicable substantive regulations that apply to used oil recycling facilities are the same now as they will be when the Illinois EPA's proposal is adopted. Although the current statutory and regulatory substantive provisions that may apply to a used oil recycling facility supply the necessary authority to require remediation of a release of used oil into the environment, *after the fact*, the purpose of permitting is to ensure

environmentally safe operation of a waste management facility in the future by requiring the applicant to address in advance the environmental impact of its planned activities. (By analogy, the mere fact that petroleum underground storage tank ("UST") regulations exist that address the remediation steps once petroleum has been released into the environment from an UST should not be considered a valid argument against the Office of State Fire Marshal maintaining regulations for the proper installation and maintenance of USTs.)

All this proposal seeks to do is to reinstate the permitting requirement to a subset of used oil management facilities that were previously required to have State permits issued pursuant to 35 Ill. Adm. Code Part 807. Those facilities that would be subject to permit requirements under this proposal are used oil transfer facilities, used oil processors, used oil marketers who market used oil other than that generated by their own activities from the site where generated, used oil burners of off-specification used oil and petroleum refining facilities, as defined in 35 Ill. Adm. Code 739.100. Prior to the Board's adoption of the used oil management standards of 35 Ill. Adm. Code Part 739, such facilities were permitted pursuant to 35 Ill. Adm. Code Part 807. (See, e.g., In the Matter of: Amendments to Permitting for Used Oil Management and Used Oil Transport 35 Ill. Adm. Code 807 and 809 (January 21, 1999), Proposed Rule, First Notice, R99-18, p. 1.) In fact, many of NORA's Illinois members previously had state operating permits issued by the Illinois EPA that covered their management of used or waste oil. The exemption of used oil management facilities from permitting requirements that the Illinois EPA is seeking modify in this proposal was an inadvertent, unintended result of the selection of the Part number applied to the used oil management standard regulations as affected by the language of 35 Ill. Adm. Code 807.105(a). (*Id.* p.2.)

The federal government, in promulgating the used oil management standards in 40 CFR

Part 279, did not intend to do away with all existing state permitting requirements. For example, 40 CFR 279.31(b), relating to used oil collection centers, provides that such used oil management facilities must "be registered/licensed/permitted/recognized by a state/county/municipal government to manage used oil." In In the Matter of: RCRA Update, USEPA Regulations (7/1/92 -- 12/31/92) (Identical in Substance Rules), (September 23, 1993), Adopted Rule, Final Order, R93-4, pp. 76-77, the Board stated that it had requested comments as to whether, among other things, the used oil management standard regulations contemplated the creation of a permit process. USEPA commented, in part, as follows:

> The Administrator may require owners or operators to obtain a permit pursuant to RCRA Section 3005(c) if he determines that an individual permit is necessary to protect human health and the environment. We have contacted ... Headquarters about this issue. (They) ... informed us that state and local governments retain some discretion to choose the type and extent of oversight.

Thus what Illinois EPA is seeking to accomplish in this proposal is not prohibited by federal law and is amply supported by our experience and history. (See, e.g., Tr. pp. 15 - 20.) The addition of the permitting requirement for certain used oil management facilities is a prospective approach to insure proper used oil management before environmental problems occur. The permitting process will insure that the used oil management facilities operating procedures and design are in compliance with the appropriate environmental standards.

B. ISSUE: RE-REFINING

1. NORA's Complaint or Comment:

NORA contends that problems of the past, as illustrated by Mr. Eastep's's testimony about the numerous lengthy and costly used oil remediation projects, are unrelated to present

recycling practices, because they relate only to re-refiners, a process that is neither economical nor in use today, so it is unnecessary to require NORA's constituents, primarily used oil fuel blenders, to obtain permits. (See, e.g., Tr. pp 30, 39, 130.)

2. Illinois EPA's Response:

Contrary to NORA's assertions, re-refining is still being performed today. There are two used oil re-refining facilities in the Chicago area. One of these facilities is located in Illinois. The other, a relatively new facility, and one of the largest in the country, is operated by Safety Kleen in East Chicago, Indiana. As recently as five years ago, while looking at an expanding market, re-refiners were processing roughly 100 millions gallons of used oil annually, producing 62 million gallons of re-refined base oil. The federal government has guidelines in place creating a re-refined lubricating oil purchasing preference policy. With rising consumer desire to purchase recycled products and mandates that governments purchase recycled products, we hope the demand for recycled lubricant oils will rise. Therefore, it would not be appropriate to consider the adoption of regulations based solely on their applicability to used oil fuel blenders.

C. ISSUE: INDUSTRY IMPROVEMENTS

1. NORA's Complaint or Comment:

NORA claims that used oil has gotten "cleaner" over time, based on automobile manufacture and gasoline refining improvements, so the potential human health and ecological hazards of a release of used oil into the environment discussed in Mr. Morrow's testimony are no longer a concern. (See, e.g., Tr. pp. 30, 37.)

2. Illinois EPA's Response:

NORA provided no background or basis for making this assertion. The only thing that we know for certain about such alleged changes is the reduction in the lead content of gasoline.

What the effect of the lead reduction in gasoline is on used automotive crankcase oil has not been demonstrated in the Record in this proceeding, and there remain other sources of used oil subject to the used oil management standards that may apply to this proceeding. Additionally, lead is only one of the constituents of concern when managing used oil. Accordingly, this conclusory statement by NORA is not something upon which the Board should base its decision.

D: INSPECTION AUTHORITY

1. NORA's Complaint or Comment:

NORA's contention that since the Illinois EPA has broad inspection authority, cannot point to any instances where used oil recyclers have refused inspections, and at the same time has not conducted many inspections, it can therefore not be said that there are any current (post-Part 739) problems at used oil recycling facilities that warrant the exercise of permit authority. (Tr. pp. 33, 58-61) In a similar vein, NORA asserts that since inspections generally occur as the result of a complaint, the fact that are few inspections must mean that there are few complaints. NORA further asserts then that the fact that there are few complaints, must mean that are few problems occurring at used oil recycling facilities. (Tr. p. 33.)

2. Illinois EPA's Response:

The conclusion reached by NORA that the fact that there have been relatively few regulatory inspections of used oil management facilities must mean that there are correspondingly few environmental problems associated with managing used oil does not necessarily follow. First, complaints usually occur when a facility's operations are impacting offsite areas through visual contamination or odors. Inspections in response to odor complaints may be limited to emissions from tanks and process equipment. Therefore, serious problems are usually present before a complaint would prompt a Bureau of Land inspection. Additionally,

the Illinois EPA stated at the hearing its belief that there were other administrative reasons why there have been relatively few inspections of used oil recycling facilities, not the least of which is limited resources. (E.g., Tr. 59 - 60.) Because these facilities are not inspected routinely, we do not have a very good picture of any additional environmental damage these facilities may be creating, but the fact that these facilities are not inspected routinely does not establish that there is no such damage.

II. UNDULY BURDENSOME

A. ISSUE: MORE STRINGENT THAN FEDERAL STANDARDS

1. NORA's Complaint or Comment:

NORA contends that Illinois EPA's present proposal creates more stringent substantive obligations than are imposed under the used oil management standards of 35 Ill. Adm. Code Part 739 (E.g., Tr. pp. 36.)

2. Illinois EPA Response:

As previously stated, this proposal relates to permitting used oil transfer facilities, used oil processors, used oil marketers who market used oil other than that generated by their own activities from the site where generated, used oil burners of off-specification used oil and petroleum refining facilities, as defined in 35 Ill. Adm. Code 739.100. It does not propose any modifications or additions to existing used oil management standards. There is no logical basis to compare a procedural permitting regulation with a substantive operating standard. It would be analogous to stating, for example, that 35 Ill. Adm. Code Part 705 is more stringent than Part 724.

Even if this proposal did seek to impose substantive standards that are more stringent than the existing used oil management standards, however, 35 Ill. Adm. Code Part 739 is a

RCRA pass-through provision of the federal used oil management standards of 40 C.F.R. Part 279. Under Section 3009 of RCRA, 42 U.S.C. § 6929, States are prohibited from imposing requirements that are *less* stringent than the federal counterpart, but they are not prohibited from imposing requirements that are more stringent.

B. ISSUE: FEAR OF PROHIBITIVE REGULATION

1 NORA's Complaint or Comment:

NORA repeatedly argued that if this proposal is adopted, Illinois EPA will impose extensive, intrusive and prohibitive permit conditions that will have an adverse impact on its members ability to stay in business. For example, without anything on which to base its subjective fears, NORA suggested that the Illinois EPA might impose the requirement to do a full TCLP analysis of every batch of used oil received at the recycling facility. (Tr. p 56.) Moreover, based on Mr. Eastep's comments that were plainly prefaced that they were observations from his perspective as a remediator, NORA assumed that the Illinois EPA would, if given the opportunity in a permit, require site remediation prior to issuance of the permit (Tr. p. 65), would impose its own design standards for tanks (Tr. pp. 66-69), and require additional tests for such constituents as sulphur and bottom sediment and water ("BS & W"). (Tr. p. 89.) NORA's comments exhibited a belief that the Illinois EPA, once granted the ability to require permits, would have unbridled discretion in imposing whatever requirements it desired on each recycling facility.

2. Illinois EPA's Response:

At the hearing the Illinois EPA repeatedly reminded NORA that should its proposal be granted, the Illinois EPA's permitting authority could not be exercised in a vacuum. (E.g., Tr. pp. 47 - 51.) This proposal does not include additional used oil recycling management or

operational standards. The applicable management and operational standards that exist today are the same ones that will exist when the proposal is adopted. In general, the terms and conditions of the permit would relate to the methods by which the operator, in its permit application, proposed to meet the applicable standards.

Both Section 39(a) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/39(a), and 35 Ill. Adm. Code 807.206 restrict the Illinois EPA's ability to impose conditions to those conditions necessary to avoid violations of the Act and the regulations promulgated thereunder, and that are not inconsistent with existing regulations. While providing the flexibility to tailor site-specific permit conditions, neither the Act nor Part 807 afford the Illinois EPA with unbridled discretion. Additionally, if the Illinois EPA imposes a condition that the facility operator believes is unwarranted and unduly burdensome, the permit review process afforded by Section 40(a) of the Act grants the Board the final say on the reasonableness and the necessity thereof.

The Illinois EPA has no ability or desire to impose prohibitive conditions on used oil recyclers. At the hearing, Mr. Dragovich testified to the position of the Illinois EPA on this issue:

> A review of the facilities that have now notified USEPA or Illinois EPA of their used oil activity indicates that most facilities, which would be required under this proposal to obtain a Part 807 permit, previously operated under a Part 807 permit. Facilities that previously operated under a part 807 permit and those facilities that are designed and operated according to appropriate industry standards could comply with the Part 807 regulations.
>
> The requirement to obtain an Part 807 permit would not be unduly

burdensome to a well-run facility which is currently operating under Part 739.

(Tr. pp. 13 - 14.)

With respect to NORA's fears that the Illinois EPA will use its conditioning authority to impose design standards on the facility, Mr Dragovich again accurately expressed the Illinois EPA's policy:

> A performance standard offers a lot of flexibility, but ultimately the facility operator is going to have their own design standards and operating procedures that they've developed over time that they're going to show – demonstrate – will meet the performance standard. So it does involve performance – I mean, it does involve operating standards and design standard s, but not one selected by the Agency. So we're not going to establish design standards.

(Tr. p. 69.)

Nonetheless, NORA continued to take issue – not on what the Illinois EPA has proposed – but rather on what NORA has supposed – that the Illinois EPA might do. For example, when asked at the hearing for an opinion about the sample permit application forms supplied by the Illinois EPA, NORA's general counsel, Mr. Harris stated:

> ...the actual permit application that you see before you is I don't think overly intrusive, but based on the information generated from that or ideas that the Agency has, it could be extraordinarily burdensome ...

(Tr. p. 141.) As previously stated, Illinois EPA has neither the authority nor the inclination to impose burdensome obligations beyond the existing environmental standards.

III. UNFAIR, ANTI-COMPETITIVE EFFECT

A. ISSUE: WASTE OIL RECOVERY ACT

1. NORA's Complaint or Comment:

At the hearing NORA's contended that the Illinois EPA's proposal to require permits of certain used oil management facilities was in violation of Section 9 of the Illinois Waste Oil Recovery Act ("WORA"), 815 ILCS 440/9 (Tr. pp. 37, 41.) That provision requires State officials to "act within their authority to encourage the use of recycled oil and prohibit any discriminatory action which would be a discouragement to the use of recycled oils."

2. Illinois EPA's Response:

Illinois EPA believes that its proposal to require facilities that handle large amounts of used oil to return to the former requirement of operating under a Part 807 permit is not a discriminatory action that discourages the use of recycled oils, and thus it is not in violation of Section 9 of WORA. No additional management or operating standards are included in this proposal. This proposal does not address the "use" of recycled oil. It does not prohibit or restrict the use of burning used oil fuel for energy recovery nor does it prohibit or restrict the use or re-refined used oil for lubrication. All it does is propose a permit requirement to help assure that used oil processors, blenders, re-refiners and the like meet the current, existing used oil management standards.

Under Section 9 of WORA, State officials are bound to act within their authority. Section 4 of WORA includes as one of the purposes of WORA, in addition to encouraging recycling of used oil, the goal of protecting the health and welfare of the people of Illinois. In accordance with the obligation to encourage use of recycled oil the Illinois EPA has proposed that used oil aggregation points and collection centers – previously subject to Part 807 permit requirements – not be included in the proposed permit requirement. The Illinois EPA believes that this proposal is the best alternative to both encourage the recycling of used oil and protect

the environment from the mismanagement of used oil.

B. ISSUE: UNFAIR COMPETITION

1. NORA's Complaint or Comment:

NORA asserts that the Illinois EPA's regulatory proposal will impose regulatory burdens that will undermine an Illinois used oil recycler's ability to compete with marketers of virgin oil products (e.g., Tr. pp. 30, 47), and out-of-State used oil recyclers. (E.g., Tr. pp. 38, 54.)

2. Illinois EPA's Response:

Although repeatedly making the claim, NORA has never explain why used oil burner fuel is inherently at a competitive disadvantage over virgin fuel oil. (See Tr. p. 53.) The addition of the permitting requirement for certain used oil management facilities in the Illinois EPA's proposal is a prospective approach to insure proper used oil management before environmental problems occur. The permitting process will insure that the used oil management facilities operating procedures and design are in compliance with the appropriate *existing* environmental standards. The Illinois used oil recyclers that make up NORA's membership are currently subject to those standards and claim to be in compliance.

Assuming that the used oil recyclers are currently in compliance with existing substantive standards, there should be no changes in their operating costs as a result of adoption of this proposal. If their facilities are well run there should be no additional burden of complying with the terms and conditions of a permit. If they are competitive with marketers of virgin oil products now, they should remain so if this proposal is adopted. It is interesting to note that at the third hearing, the Illinois EPA repeatedly asked NORA why the regulatory "burden" of a permit is prohibitive and would run recyclers out of business now, when previously the majority of the members operated, apparently successfully, under State permits. (Tr. pp. 55-56, 97, 132.)

No answer was ever obtained.

With regard to its claim that a permit requirement would result in Illinois used oil recyclers being placed at a competitive disadvantage with out-of-State used oil recyclers, NORA cited the hypothetical example of an Illinois used oil recycler that wanted to use a Chicago commercial storage facility to store used oil that would be subject to a permit requirement under the Illinois EPA's proposal. The Chicago facility did not want to obtain a permit so it chose not to do business with the recycler. NORA contrasted this situation with an Indiana recycler that took identical to a commercial facility in East Chicago, Indiana, with no permit requirement, and concluded:

> So it means that the [Illinois] recycler can't use that [Chicago] commercial facility probably and any other one, but an out-of-state recycler, in fact can use the East Chicago facility. Is there not a discriminatory effect as a result of this proposed regulation?

(Tr. pp. 92-93.)

Despite assertions like this, NORA never did explain just what the alleged discriminatory effect on the Illinois recycler was, and why the Illinois recycler could not merely take its used oil across the border to the Indiana facility for commercial storage, a practice that is common in the industry.

In contrast to NORA's claims that the present proposal will put them at a competitive disadvantage with out-of-State recyclers, being permitted as an existing facility in Illinois may actually provide NORA's members with a competitive advantage. Operating under a permitted status may actually enhance their competitive position. For example, at the third hearing, Board Member McFawn posed the following question to a member of NORA:

Do you think the presence of a permit and holding a permit would somehow make those potential customers that much less inclined?

Mr. Rundell: I think the stigma of a material being a waste at one time and the potential of that liability carrying forward makes it difficult to market.

(Tr. p. 126.) Mr. Rao then pointed out that both the "stigma" of used oil being a waste and the potential for liability exist today, independently of the Illinois EPA's proposal to require permits. (Tr. p. 128.)

With respect to the potential liability issue, a used oil recycling facility that transfers what it claims to be on-specification used oil fuel not under manifest to an unpermitted Illinois facility, runs the risk of potential liability in the event that the used oil turns out actually to be off-specification or on-specification used oil that still meets the statutory definition of special waste due to the presence of other contaminants. The receiving facility is also at risk. If the recycling facility is permitted, and the permit includes a description of the recycling process and the particular waste stream involved, and further when in that particular process the used oil ceases to be waste and is no longer regulated, it would seem that both a recycler who is in compliance with the permit and the receiving facility would be in a much enhanced position with respect to any potential liability.

Mr. Lenz, a NORA member, explained at the third hearing that his major concern was not a requirement to obtain a permit for his own facility, but rather the fear that the Illinois EPA would require used oil fuel burners to be permitted. He agreed with Member McFawn that "[i]f anything, the permit might make you more legitimate." (Tr. pp. 128, 129.) Mr. Harris, NORA's general counsel, also admitted that "the fact of having a permit in and of itself doesn't create any particular burden ...." (Tr. p. 129.) He reiterated, however, that one of the major concerns of

NORA was fear that Illinois EPA might intrude into the activities of the burner, which might then result in adverse market conditions for used oil fuel blenders. (Tr. pp. 128-132.) However, as both Mr. Rao and Mr. Dragovich pointed out, under the proposal, burners of on-specification used oil as fuel are not subject to permit requirements. (Tr. 143, 145.)

One additional example where having a permit may actually result in a competitive advantage to an Illinois recycler, when compared to an out-of-State recycler attempting to do business in Illinois, is the manifesting requirements of 35 Ill. Adm. Code 809.301 and 809.302(a). Illinois permitted facilities are eligible for the use a multi-stop manifest. However, since the multi-stop manifest is tied to a permit, an out-of-State recycler is ineligible for a multi-stop manifest, but is still subject to the manifest requirements, cited above. Therefore, it is far more convenient for a permitted recycler with a multi-stop manifest capability to make used oil pick ups from individual generators than it is for an unpermitted recycler who must obtain a separate manifest from each generator.

NORA'S COUNTER PROPOSAL

NORA's Position

Representatives of NORA proposed that there should be a bright line to delineate when used oil is a special waste and when it is a commodity. NORA contends that Illinois EPA's desire to require permits for some used oil management facilities is primarily, or solely, a concern about used oil that has very little, or no, economic value, and thus is less likely to be stored and managed properly. (Eg., Tr. p. 40.) Accordingly, NORA has proposed that only used oil that has no or little value be regulated as a special waste and deemed subject to permit requirements. They suggested two different methods to determine this bright line. One proposed method deems used oil that does not meet the used oil fuel specification of 35 Ill. Adm. Code

739.111 ("off-spec"), or used oil that does meet the regulatory used oil fuel specification ("on-spec")but that also contains, by volume, 10% or greater bottom sediment and water ("BS&W"), to be subject to permit requirements and managed as a special waste. Accordingly, under NORA's proposal, management of on-spec used oil with less than 10% BS&W by volume would be deemed permit exempt. (See, e.g., Tr. pp. 40-41.) NORA suggested that an agreed upon minimum BTU value could just as easily be substituted for the BS & W test to determine a bright line between a waste and a commodity. The second method is based on an ASTM specification for boiler fuel for asphalt plants.

Illinois EPA's Response

The issue that NORA was attempting to address is not directly related to the present regulatory proposal. It arises from the fact that at some point during the process of recycling used oil it moves from being a special waste, subject to regulation as used oil, to a valuable commodity, and at that point it is no longer subject to regulation. Initially, NORA argued that the used oil fuel specification of 35 Ill. Adm. Code 739.111 should be the bright line.

35 Ill. Adm. Code 739.111 sets out certain specifications for used oil that is burned for energy recovery, or fuel produced from used oil by processing, blending, or other treatment. The specifications set forth maximum allowable levels of arsenic, cadmium, chromium, lead, flash point and total halogens. This used oil fuel specification generally does not apply to mixtures of used oil and characteristic or listed hazardous waste that still exhibit a hazardous waste characteristic, used oil contaminated with pcbs and used oil containing more than 1,000 ppm total halogens. The used oil fuel specification provides that once used oil that is to be burned for energy recovery has been shown not to exceed any specification and the person making that showing complies with the requirement to determine that the oil fuel meets specification by

appropriate analysis and retains copies of the analysis for three years (35 Ill. Adm. Code 739.172), complies with the required notice provision (35 Ill. Adm. Code 739.173), and retains the required shipment record for delivery to the burner (35 Ill. Adm. Code 739.174(b)), the used oil is no longer subject to regulation under the Part 739 used oil management standards.

Meeting the fuel specification could, potentially, result in the material becoming inherently commodity-like and therefore no longer deemed a waste, and thus not subject to further environmental regulation, if it actually burned for energy recovery. On the other hand, what NORA apparently initially misapprehended, is that in some cases, even though no longer regulated as "used oil" under Part 739, the material may still meet the definition of special waste under Illinois law if it contains contaminants other than those listed in the used oil fuel specification that render it unsuitable as a commodity. (Tr. p. 115.) (See, also 415 ILCS 5/3.53, 5/3.45(c) and 5/3.17.) In addition, the specification for used oil fuel may not be appropriate for re-refined used oil lubricants. Moreover, the practice in the industry sometimes results in accumulation storage of used oil until market conditions produce a buyer, that may or may not be a used oil fuel burner.

At the hearing, NORA conceded, however, a logical nexus between used oil that is of such poor quality or of such low oil content that it is not recyclable, thus suitable only for disposal, and the lack of financial incentives to manage the oil responsibly, and thus agreed that such used oil should be subject to enhanced regulatory controls. (See, e.g., Tr. pp. 40, 109, 166.) While this category of used oil is indeed a concern to the Illinois EPA, it is not the Illinois EPA's only concern. The testimony of Larry Eastep amply illustrated that Illinois' experience with serious environmental contamination from facilities managing used oil was a result of their poor operational practices, not the poor quality of their used oil. The historical record does not

support the proposition that only low economic value used oil has been, or is capable of being released into the environment.

Neither of NORA's proposals to create a bright line between special waste and commodity was supported with technical information which would establish that used oil meeting these limits would always be a commodity. According to NORA's own testimony, used oil near the 10% BS&W limit is of questionable economic value and may not be usable in that condition. (Tr. pp. 40, 109, 166, 173.) The second proposal, the ASTM standard, even if appropriate for boilers at asphalt plants, is probably not appropriate for lubricants or some other fuel uses.

Any regulatory proposal for a bright line for identifying when used oil is a commodity should also consider all aspects of the used oil recycling industry. Such a proposal is not within the scope of this proceeding, and the Illinois EPA was and is unprepared to recommend adoption of NORA's proposal without further study. The 10% BS & W was admittedly an arbitrary figure. (Tr. p. 166.) Given the statutory definitions of waste and special waste, establishing a bright line like NORA desires might even require an amendment to the Act.

The Illinois EPA is not suggesting that NORA does not have a legitimate concern. This is particularly true as it relates to the practice of NORA's concern accumulating used oil in off-site commercial storage facilities to store on-spec used oil that may or may not meet the definition of special waste. (Eg., Tr. pp. 70-81, 169-175.) NORA's obvious concern stems from its assertion that no third-party, off-site commercial storage facility will willingly submit to the permitting process just to rent interim storage space to used oil recyclers. (E.g., Tr. pp. 41.) Accordingly, the recycling facility must be able to make the determination that its on-spec used oil is also not a special waste, before transporting it to an off-site commercial storage facility or

risk potential liability for violating Section 21(d) of the Act, 35 Ill. Adm. Code 809.301 and 35 Ill. Adm. Code 809.302(b).

Section 21(d) of the Act generally prohibits any person from conducting any waste storage, waste treatment, or waste disposal operation, for wastes not generated on-site by such person's own activities, without a permit issued by the Illinois EPA. 35 Ill.Adm.Code 809.301 prohibits the transportation of non-hazardous special waste without a special waste manifest and 35 Ill. Adm. Code 809.302(b) prohibits the delivery of any non hazardous special waste to a facility that does not have "a current, valid operating permit" issued by the Illinois EPA.

NORA's opposition to the Illinois EPA's proposal on this grounds is misplaced, however, because under the current statutory definitions and regulations, used oil recyclers and storage facilities must make this determination today, independent of any permit requirements. This regulatory proposal was an attempt to address which facilities need permits and which facilities need to ship their waste under manifest. Addressing when a used oil becomes a commodity is beyond the scope of this proposal. Other portions of the general public or regulated community which may have had no objections to the concept of requiring permits for used oil management facilities may have an interest is this separate issue. Therefore, the Agency does not recommend adopting as part of these proceedings, either proposal for establishing a bright line for determining that used oil is no longer a solid waste.

COSTS OF COMPLIANCE

As previously stated, assuming that the used oil recyclers subject to permitting under this proposal are currently in compliance with existing substantive used oil management standards, there should be no significant changes in their daily operating costs as a result of the adoption of this proposal. If their facilities are well run there should be no additional financial burden of

complying with the terms and conditions of a permit. While Mr. Eastep suggested that it would be a good idea, 35 Ill. Adm. Code Part 807 does not require facilities other than sanitary landfills to post financial assurance for closure and post-closure care costs. Therefore, the only significant cost factor to the regulated community associated with this proposal would be the costs associated with preparing and submitting a permit application. Such costs can vary widely depending on the complexity of the facility and its operations, and the amount of data about its facility and equipment that already exists. Generally, a well run facility should already possess much of the data required for preparation of the application, thus further reducing the costs involved. Existing facilities under the proposal would generally not require a development permit, and if the facility already has an existing solid waste management permit for other regulated activities, a permit modification should be sufficient to permit the used oil management units.

It is again interesting to note that at the third hearing, the Illinois EPA repeatedly asked NORA why the regulatory "burden" of obtaining and possessing a permit would be prohibitive and would run used oil recyclers out of business now, when previously the majority of the members operated, apparently successfully, under State permits. (Tr. pp. 55-56, 97, 132.) No answer was ever obtained.

MISCELLANEOUS MATTER

At the third hearing, Board Member McFawn asked that the Illinois EPA send her a method of locating a report cited in Mr. Dragovich's testimony which referenced statistics on used oil. The US EPA web site that pertains to used oil is found at the following url address:: epa.gov\epaoswer\osw\topics.htm. The current Office of Solid Waste used oil contact is Mike Svizzero, whose telephone number is 703-308-0046. Mr. Dragovich has contacted Mr. Svizzero

and requested a copy of the specific report. To date, the Illinois EPA has not received a copy of the report.

CONCLUSION

This concludes the Illinois EPA's Supplemental Comments in this matter. The Illinois EPA has attempted in these Supplemental Comments to address what it understands to be the principle areas of concern raised during the third hearing. The Illinois EPA stands behind its proposal, as amended in the Final Comments of May 7, 1999.

WHEREFORE, the Illinois EPA hereby submits its Supplemental Comments for the Board's consideration and respectfully requests that the Board adopt the Illinois EPA's proposal in its entirety, including Errata Sheet Number 1 and the additional amendments addressed in these comments.

Illinois Environmental
Protection Agency

By: /Daniel P. Merriman/

Daniel P. Merriman
Assistant Counsel
Division of Legal Counsel

Dated: September 24, 1999

1021 N. Grand Ave. East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the attached SUPPLEMENTAL FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ADDRESSING ISSUES RAISED AT THE THIRD HEARING on behalf of the Illinois Environmental Protection Agency upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy M. Gunn, Clerk
Pollution Control Board
James R. Thompson Center
100 West Randolph St., Ste. 11-500
Chicago, Illinois 60601
(First Class)

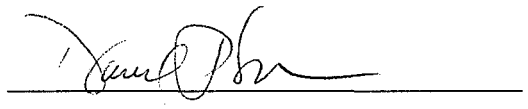
Matthew J. Dunn, Chief
Environmental Bureau
Office of the Attorney General
James R. Thompson Center
100 West Randolph St., 12th Floor
Chicago, Illinois 60601
(First Class)

Robert Lawley, Chief Legal Counsel
Department of Natural Resources
524 South Second Street
Springfield, Illinois 62701-1787
(First Class)

Joel Sternstein, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Ste. 11-500
Chicago, Illinois 60601
(First Class)

Service List (attached)
(First Class)

and mailing it from the Springfield, Illinois on September 24, 1999, with sufficient postage affixed.



THIS FILING SUBMITTED ON RECYCLED PAPER

SERVICE LIST (R99-18)

Matthew J Dunn, Chief
Environment Bureau
Office of the Attorney General
100 West Randolph St., 12th Floor
Chicago, IL 60601

Kimberly A Geving, Assistant Counsel
Illinois E.P.A.
Division of Legal Counsel
1021 North Grand Avenue East
Springfield, IL 62704-9276

Dorothy M. Gunn, Clerk
IL Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Christopher Harris, General Counsel
National Oil Recyclers Association
1439 West Babcock
Bozeman, MT 59715

Cynthia Hilton, Executive Director
Assoc. of Waste Hazardous Materials Transporters
2200 Mill Road
Alexandria, VA 22314

Katherine D. Hodge
Hodge & Dwyer
808 South Second Street
Springfield, IL 62704

Jeffrey Jeep
EMCO Chemical Distributors, Inc.
2100 Commonwealth Avenue
North Chicago, IL 60064

Robert Lawley, Chief Legal Counsel
Dept. of Natural Resources
524 South Second Street
Springfield, IL 62701-1787

Jennifer Marsh
Chemical Industry Council of Illinois
9801 West Higgins
Suite 515
Rosemont, IL 60018

Paul Pike
(MC-602)
Ameren Services
P.O. Box 66149
St. Louis, MO 63166

Sanjay K. Sofat
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, IL 62701

Joel J. Sternstein, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Vicki Thomas
JCAR
Wm. G. Stratton Bldg., Room 700
Springfield, IL 62706