

ILLINOIS POLLUTION CONTROL BOARD
September 7, 1995

IN THE MATTER OF:)
)
SPECIAL WASTE HAULING) R95-11
VEHICLE NUMBERS: AMENDMENT TO) (Rulemaking -Land)
35 ILL. ADM. CODE 809.401.)

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter comes before the Board on our own motion to amend the Board's "Vehicle Numbers" provision of the Special Waste Hauling regulations, 35 Ill. Adm. Code Part 809. We initiated this rulemaking on March 16, 1995 at the request of the Association of Waste Hazardous Materials Transporters (AWHMT). This rulemaking proposes to amend Section 809.401 by deleting the current provision found at that section and replacing it with new language which would allow owner/operators of vehicles that transport special waste to maintain the special waste hauling permit issued by the Illinois Environmental Protection Agency (Agency) within the vehicle, rather than to require that a permit number be displayed on the vehicle's exterior.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1992)). The Board is charged therein to "determine, define and implement the environmental control standards applicable in the State of Illinois (Section 5/5(b)). More generally, the Board's rulemaking charge is based on the system of checks and balances integral to Illinois environmental governance: The Board bears responsibility for the rulemaking and principal adjudicatory functions; the Agency has primary responsibility for administration of the Act and the Board's regulations, including today's proposed regulation.

By today's action, the Board is adopting the proposed amendments for the purpose of first notice, pursuant to the Illinois Administrative Procedure Act (5 ILCS 100/1-1 et seq. (1994)). Publication in the *Illinois Register* will follow today's action, whereupon a 45-day public comment period will begin during which interested persons may file additional public comment with the Board.

PROCEDURAL HISTORY AND BACKGROUND

The Board received the request to open this docket and initiate this rulemaking by letter from the AWHMT on February 22, 1995. In that letter, the AWHMT explained that Illinois' current rule on special waste hauler markings was potentially subject to a preemption challenge before U.S. DOT because it was inconsistent with federal marking requirements. AWHMT also

offered specific regulatory language which had been drafted in consultation with the Agency, and additionally, the AWHMT indicated the willingness to testify at hearings before the Board. On March 16, 1995, the Board opened this rulemaking docket and authorized at least two hearings on the proposed regulatory change as the rule would be one of general applicability. In our March 16, 1995 order, while we determined that we would not first notice the proposed rule until such time as the Board held hearings in this matter and provided an opportunity for public comment from the AWHMT and the Agency, we did set forth the proposed regulatory language.

Accordingly, two public hearings were held in this rulemaking docket before hearing officer Musette H. Vogel in Chicago on June 7, 1995 and in Springfield on June 21, 1995. The AWHMT presented the pre-filed testimony of Cynthia Hilton, the Executive Director of AWHMT, which was marked as Exhibit No. 1 and additionally, the Agency offered the pre-filed testimony of Michael F. Nechvatal, Manager of the Solid Waste Management Section which was entered as if read and marked as Exhibit No. 2.

During the course of the hearing, the Agency offered clarifications to the proposed language with which the AWHMT agreed. All testimony supports the adoption of the language as set forth in the Board's March 16, 1995 order and as amended by the Agency's testimony.

A public comment period was established at the hearing which expired on July 15, 1995. The Board received no public comments other than the original February 22, 1995 letter from the AWHMT which the Board has marked as public comment No. 1.

TECHNICAL AND ECONOMIC JUSTIFICATION

The Hazardous Materials Transportation Act (HMTA) was substantively amended in 1990 to provide the U.S. Department of Transportation binding, preemptive authority over duplicative and inconsistent non-federal rules impacting the transportation of hazardous materials including hazardous wastes. (Hilton Test., Exh.#1 at 1; 49 U.S.C Sec. 5125.) Specifically, with regard to marking requirements, Congress provided that non-federal requirements pertaining to marking of hazardous materials would be preempted unless the non-federal requirement was "substantively the same". Thus a non-federal requirement must "conform in every significant respect to the federal requirement. Editorial and other similar de minimis changes are permitted." (*Id.* at 2, citing 49 C.F.R. 107.202(d).) Congress further provided that non-federal requirements may be preempted by U.S. DOT if the non-federal requirements, as applied or enforced, create an obstacle to the accomplishment and execution of the HMTA or the hazardous materials regulations (HMRs). The HMRs

specifically provide that non-federal requirements, including marking requirements, that apply only to hazardous waste and that apply differently from or in addition to the HMRS are inconsistent with the HMTA. (*Id.* at 2, citing, 49 C.F.R. 171.3(c).)

In 1994, the U.S. DOT issued a preemption determination concerning hazardous materials marking requirements in the State of Michigan on the basis that Michigan's statutes and regulations were not substantively the same as the corresponding federal requirements and that they posed an obstacle to the accomplishment of the HMTA. (59 Fed. Reg. 6186, February 9, 1994.) Both the Agency and the AWHMT agree that Michigan's requirements for vehicle marking are similar to that of Illinois' marking requirements, and the similarity is such that Section 809.401 may also pose an obstacle to the accomplishment of the HMTA and the HMRS. (Nechvatal Test. Exh. #2 at 2.)

Specifically, the Board's current rule states:

Upon issuance of a special waste hauling permit, the owner and operator of any vehicle used to transport special waste except truck tractors as defined in Subpart A shall display a number issued by the Agency on opposite sides of the permitted vehicle following the words, "Licensed Special Waste Hauler: (number)." Numbers and letters shall not be less than two inches high and shall be removable only by destruction. Directly adjacent to said words and number, the vehicle owner and operator shall display a seal furnished by the Agency which shall designate the date on which the permit was issued.

The AWHMT believes that Illinois' rule as currently adopted is inconsistent with federal requirements. The AWHMT's support for amending the rule to allow the permit to be carried in the cab of the vehicle is based on several legal and technical justifications. Its concerns are:

- 1) The size of the marking and the requirement that the number must be on all licensed vehicles shows that its intent is to alert the public and enforcement personnel of risk presented by the transportation of hazardous waste.

- 2) Because hazardous wastes are found in every DOT hazard class, there is no technical justification to distinguish the marking of vehicle transporting hazardous waste from those transporting other types of hazardous materials.

- 3) Vehicles transporting hazardous waste typically

operate in a number of jurisdictions. To the extent that the public and local emergency responders in other jurisdictions are unfamiliar with Illinois' marking, confusion will result and safety will be undermined.

4) Unless, preempted [or amended by Illinois], other jurisdictions would have license to impose their own unique marking requirements. As do the Illinois requirements, other non-federal marking requirements that AWHMT is familiar with provide unique size and placement standards. No non-federal marking requirement that AWHMT is aware of provide reciprocity for the marking requirements of another jurisdiction. The possibility exists that motor carriers could be in situations where vehicles otherwise in compliance with the HMRs would be precluded from entering jurisdictions because the marking requirements of the jurisdiction conflict with the marking requirements of another non-federal jurisdiction.

5) Because of the permanent nature of the Illinois markings, they cannot be physically removed without great hardship when vehicles are empty or transporting non-hazardous waste loads. The permanent nature of the Illinois marking requirements violates the prohibitions in the HMTA and the HMRs against labeling or placarding vehicles that do not contain hazardous materials. Congress provided in the 1990 amendments that non-federal requirements would be preempted unless substantively the same as the federal requirements, and also provided that "no person shall by marking or otherwise, represent that a hazardous material is present in a ...motor vehicle..if the hazardous materials are not present." (49 U.S.C.Sec. 5104(a) and 49 C.F.R. 171.2(f).)

While economic justification in this rule is more of ancillary matter than the immediate need to address the question of potential preemption, the AWHMT also offered testimony that there will be an economic savings to business operations under the proposed amendment. The AWHMT believes that there will be saving from less transportation disruptions and moreover, if the rule is amended, this paves the way for the Agency to create a standard form, which the AWHMT and the Agency are currently negotiating. This form would track the vehicle and the permit through the use of a VIN number rather than the license plate number, which according to the AHWTA, will lead to less paperwork and fewer times of having to shut down a trucking fleet to exchange papers when the license plate changes. The AHWTA offered at hearing an example of New York's tracking form. (Tr. at 20, Exh. #3.)

AGENCY'S RECOMMENDED LANGUAGE

In the pre-filed testimony and at hearing, the Agency has recommended a clarification to the proposed language. The Agency suggests that we add the concept that in addition to the vehicle owner/operator having to disclose the special waste hauling permit to the Agency, any representative of the State of Illinois, or the receiving facility, the permit must also be shown to any generator of special waste.

CONCLUSION

The Board believes that there is sufficient evidence in the record warranting the proposal of the rule amendment to Section 809.401 as drafted by AWHMT and the Agency for first notice. We also accept the Agency's recommended change and incorporate it into our proposed rule. The Board will again review the record in this matter upon completion of the first notice period to determine whether the record continues to support moving toward final adoption.

ORDER

The Board hereby propose for first notice the following amendment to 35 Ill. Adm. Code Section 809.401. The Clerk of the Board is directed to file this proposed rule with the Secretary of State.

TITLE 35: ENVIRONMENTAL PROTECTION SUBPART G: WASTE DISPOSAL

CHAPTER I: POLLUTION CONTROL BOARD SUBCHAPTER h: SOLID WASTE AND SPECIAL WASTE HAULING

PART 809 SPECIAL WASTE HAULING

SUBPART A: GENERAL PROVISIONS

Section

809.101 Authority, Policy and Purposes
809.102 Severability
809.103 Definitions

SUBPART B: SPECIAL WASTE HAULING PERMITS

Section

809.201 Special Waste Hauling Permits - General
809.202 Applications for Special Waste Hauling Permit -
Contents

- 809.203 Applications for Special Waste Hauling Permit -
Signatures and Authorization
- 809.204 Applications for Special Waste Hauling Permit - Filing
and Final Action by the Agency
- 809.205 Special Waste Hauling Permit Conditions
- 809.206 Special Waste Hauling Permit Revision
- 809.207 Transfer of Special Waste Hauling Permits
- 809.208 Special Waste Hauling Permit Revocation
- 809.209 Permit No Defense
- 809.210 General Exemption from Special Waste Hauling Permit
Requirements
- 809.211 Exemptions for Special Waste Haulers

SUBPART C: DELIVERY AND ACCEPTANCE

Section

- 809.301 Requirements for Delivery of Special Waste to Haulers
- 809.302 Requirements for Acceptance of Special Waste from
Haulers

SUBPART D: VEHICLE NUMBERS AND SYMBOLS

Section

- 809.401 Vehicle Numbers
- 809.402 Special Waste Symbols

SUBPART E: MANIFESTS, RECORDS AND REPORTING

Section

- 809.501 Manifests, Records, Access to Records, and Reporting
Requirements and Forms

SUBPART F: DURATION OF PERMITS AND TANK NUMBERS

Section

- 809.601 Duration of Special Waste Hauler Permits and Tank
Numbers

SUBPART G: EMERGENCY CONTINGENCIES FOR SPILLS

Section

- 809.701 General Provision

SUBPART H: EFFECTIVE DATES

Section

- 809.801 Compliance Date

809.802 Exceptions

SUBPART I: HAZARDOUS (INFECTIOUS) HOSPITAL WASTE

Section

- 809.901 Definitions
- 809.902 Disposal Methods
- 809.903 Rendering Innocuous by Sterilization
- 809.904 Rendering Innocuous by Incineration
- 809.905 Recordkeeping Requirements for Generators
- 809.906 Defense to Enforcement Action

Appendix A Old Rule Numbers Referenced

AUTHORITY: Implementing Sections 5, 10, 13 and 22 and authorized by Section 27 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111½, pars. 1005, 1010, 1013, 1022, and 1027).

SOURCE: Adopted in R76-10, 33 PCB 131, at 3 Ill. Reg. 13, p. 155, effective March 31, 1979; emergency amendment in R76-10, 39 PCB 175, at 4 Ill. Reg. 34, p. 214, effective August 7, 1980 for a maximum of 150 days; emergency amendment in R80-19, 40 PCB 159, at 5 Ill. Reg. 270, effective January 1, 1981 for a maximum of 150 days; amended in R77-12(B), 41 PCB 369, at 5 Ill. Reg. 6384, effective May 28, 1981; amended in R80-19, 41 PCB 459, at 5 Ill. Reg. 6378, effective May 31, 1981; codified in R81-9, 53 PCB 269, at 7 Ill. Reg. 13640; recodified in R84-5, 58 PCB 267, from Subchapter h to Subchapter i at 8 Ill. Reg. 13198; amended in R89-13A at 14 Ill. Reg. 14076, effective August 15, 1990; amended in R91-8 at 16 Ill. Reg. 130, effective January 1, 1992; amended in R95-11 at 19 Ill. Reg. _____, effective _____.

Section 809.401 Vehicle Numbers

~~Upon issuance of a special waste hauling permit, the owner and operator of any vehicle used to transport special waste except truck tractors as defined in Subpart A shall display a number issued by the Agency on opposite sides of the permitted vehicle following the words, "Licensed Special Waste Hauler: (number)." Numbers and letters shall not be less than two inches high and shall be removable only by destruction. Directly adjacent to said words and number, the vehicle owner and operator shall display a seal furnished by the Agency which shall designate the date on which the permit was issued.~~

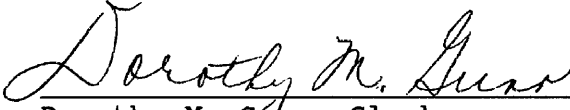
The owner and operator of any vehicle, except truck tractors as defined in Subpart A, which is used to transport special waste shall list each such vehicle on the special waste hauling permit application. Upon issuance of a special waste hauling permit,

the owner and operator of any such vehicle used to transport special waste shall maintain within the vehicle a legible photocopy of the special waste hauling permit. Issuance of the special waste hauling permit shall be disclosed by the owner and operator of the vehicle to any representative of the State of Illinois (including, but not limited to, the Agency), any generator(s) of the special waste, or any treatment, storage, or disposal facility which has handled, is handling, or will handle the special waste. Upon request by such representative, the photocopy shall be made available by the owner and operator of the vehicle for review. The owner and operator of the vehicle shall also comply with any otherwise applicable federal regulations.

(Source: Amended at 19 Ill. Reg. _____, effective _____.)

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7th day of September, 1995, by a vote of 7-0.



 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board