

ILLINOIS POLLUTION CONTROL BOARD

March 7, 1996

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

Adopted Rule. Final Order.

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

On March 16, 1995, at the request of the Association of Waste Hazardous Materials Transporters (AWHMT), the Board initiated this rulemaking which proposes to amend Section 809.401 (35 Ill. Adm. Code Part 809). The proposal deletes the current provision found at Section 809.401 and replaces it with new language which would allow the 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.

This matter came before the Board on our own motion to amend the "Vehicle Numbers" provision of the Special Waste Hauling regulations in Section 809.401. First notice of the proposed rule was published at 19 *Illinois Register* 13182 (September 22, 1995). During the first notice period, the Board received two public comments. The Board proceeded to second notice on December 20, 1995. At its meeting of February 20, 1996, the Joint Committee on Administrative Rules (JCAR) noted a certificate of no objection to the rules.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (1994)). 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.

Today the Board adopts the amendment as final and directs the Clerk to submit to the Administrative Code Division of the Office of Secretary of State for filing and assignment of an effective date pursuant to Section 5 of the Illinois Administrative Procedure Act (5 ILCS 100/5-40(d) (1994)).

## 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 the United States Department of Transportation (U.S. DOT) because it was inconsistent with federal marking requirements. The AWHMT also offered specific regulatory language which had been drafted in consultation with the Agency, and additionally, the AWHMT indicated 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 the AWHMT (Exhibit No. 1) and the Agency offered the pre-filed testimony of Michael F. Nechvatal, Manager of the Solid Waste Management Section (Exhibit No. 2).

During the course of the hearings, the Agency offered clarifications to the proposed language with which the AWHMT agreed. All testimony supported 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 second hearing which expired on July 15, 1995. The Board received no public comments at that time other than the original February 22, 1995 letter from the AWHMT which the Board has marked as Public Comment Number 1 (PC 1).

By order of September 7, 1995 the Board adopted its own proposal for first notice. First notice publication occurred at 19 *Illinois Register* 13182 (September 22, 1995). As part of the first notice proposal, the Board included recommended language from the Agency adding the generator of special waste to the list of persons to whom the vehicle owner/operator must disclose the special waste hauling permit. In response to the first notice publication, the Board received two additional public comments which are discussed herein.

By order of December 20, 1995 the Board adopted its proposal for second notice. The Board made minor editorial changes as requested by the Joint Committee on Administrative Rules (JCAR). The matter was accordingly filed with JCAR which voted a certificate of no objection to the adoption of the proposal on February 20, 1996.

## TECHNICAL AND ECONOMIC JUSTIFICATION

The Hazardous Materials Transportation Act (HMTA) was substantively amended in 1990 to provide the U.S. DOT with 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 the 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 hazardous 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 the AWHMT is familiar with provide unique size and placement standards. No non-federal marking requirement that the 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 an 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 AWHMT, 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 AWHMT offered at hearing an example of New York's tracking form. (Tr. at 20, Exh. #3.)

### **PUBLIC COMMENTS RECEIVED DURING FIRST NOTICE**

Two additional public comments were filed during the first notice period. The public comment from Mid-West Truckers Association, Inc. (PC 2), which is comprised of over 2500 companies operating over 50,000 trucks, fully supports the rule as proposed at first notice.

The public comment from Browning-Ferris Industries (BFI) (PC 3) generally supports the Board's proposal of Section 809.401 as necessary to avoid preemption by the U.S. DOT regulations and to insure Illinois is consistent with federal law. BFI makes several comments regarding the implementation of the rule.<sup>1</sup> BFI's public comment also includes the following recommended language: "the owner and operator of any vehicle, except truck tractors as defined in Subpart A, which is used to transport special waste, shall apply for a special waste hauling permit [application]". (PC 3 at 1.) However, the Board will not adopt this amendment to the present proposal since this requirement already exists in Section 809.202. (Ill. Adm. Code 809.202.)

Additionally, BFI believes that the present proposal would be further clarified as follows: "[u]pon issuance of a special waste hauling permit, the owner or operator of any such vehicle used to transport special waste shall maintain within the vehicle or truck tractor, as defined in Subpart A, a legible photocopy of the special waste hauling permit." (PC 3 at 1-2.) Again, we decline to make this change because the term, "vehicle", as defined in Section 809.103 (Ill. Adm. Code 809.103) encompasses the term "truck tractor". An owner/operator may accordingly carry the permit within the cab of truck tractor as well as in the trailer. The Board also notes that the addition of "truck tractor" at this point would prove inconsistent and confusing with the first line of the proposal since truck tractors are an exception to the waste hauling permit application requirement.

The Board also acknowledges the receipt of minor editorial revisions from JCAR. These changes are reflected in the order. The Board finds that the proposed rule is technically feasible and economically reasonable as required in the Act (415 ILCS 5/27) for adoption of the rule. The Board finds that the record before us justifies adoption of its proposed rule. Accordingly, we today adopt that rule.

### **ORDER**

The Board hereby adopts the amendment as final and directs the Clerk to submit to the Administrative Code Division of the Office of Secretary of State for filing and assignment of an effective date pursuant to Section 5 of the Illinois Administrative Procedure Act (5 ILCS

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<sup>1</sup> As noted during the hearing, implementation of the rule upon adoption, including the design of both the application and permit, will be performed by the Agency. (Tr. at 18, 20.)

100/5-40(d) (1994)). The proposed language is indicated by underlining and the proposed deletions are indicated by striking out the previous rule.

TITLE 35: ENVIRONMENTAL PROTECTION  
 SUBTITLE G: WASTE DISPOSAL  
 CHAPTER I: POLLUTION CONTROL BOARD  
 SUBCHAPTER i: 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 (Repealed)
- 809.902 Disposal Methods (Repealed)
- 809.903 Rendering Innocuous by Sterilization (Repealed)
- 809.904 Rendering Innocuous by Incineration (Repealed)
- 809.905 Recordkeeping Requirements for Generators (Repealed)
- 809.906 Defense to Enforcement Action (Repealed)

#### Appendix A Old Rule Numbers Referenced

**AUTHORITY:** Implementing Sections 5, 10, 13 and 22 and authorized by Section 27 of the Environmental Protection Act [415 ILCS 5/5, 10, 13, 22 and 27].

**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; effective September 30, 1983; 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 R91-18 at 16 Ill. Reg. 130, effective January 1, 1992; amended in R95-11 at 20 Ill. Reg. \_\_\_\_, effective \_\_\_\_\_.

#### SUBPART D: VEHICLE NUMBERS AND SYMBOLS

##### Section 809.401 Vehicle Numbers

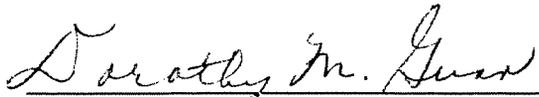
~~Upon issuance of a special waste hauling permit, the owner and operator of any vehicle used to transport special waste except truck tractors as defined in Subpart A shall display a number issued by the Agency on opposite sides of the permitted vehicle following the words, "Licensed Special Waste Hauler: (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 20 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 7<sup>th</sup> day of March, 1996, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board