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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

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

P.C. #18

NOTICE

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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 ENVIRONMENTAL PROTECTION AGENCY AND PROPOSED AMENDMENTS TO ADDRESS ISSUES RAISED AT HEARING of the Respondent, the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: Kimberly A. Geving

Kimberly A. Geving
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DATE: May 6, 1999
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

FINAL COMMENTS OF THE ILLINOIS ENVRIONMENTAL PROTECTION AGENCY AND PROPOSED AMENDMENTS TO ADDRESS ISSUES RAISED AT HEARING

The Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorney, Kimberly A. Geving, and pursuant to 35 Ill. Adm. Code 102.320, respectfully submits these FINAL COMMENTS AND PROPOSED AMENDMENTS TO ADDRESS ISSUES RAISED AT HEARING in the above-captioned matter to the Illinois Pollution Control Board ("Board").

It is the Illinois EPA's contention that the proposed regulations filed in this matter with the Board and the corresponding Errata Sheet and proposed amendments set out in these comments constitute a solid and well-supported proposal. The Illinois EPA believes that the Board should adopt the proposal as submitted by the Illinois EPA, including changes that were made through Errata Sheet Number 1 and additional amendments that will be addressed in these comments.

A. Background

On November 2, 1998, the Illinois EPA filed a "Motion to Sever the Docket" 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 docket R98-29. On December 17, 1998 the Board granted the Illinois EPA's motion and opened docket R99-18 to address the used oil issues. Hearings were held February 25, 1999 and March 1, 1999.

During the course of the hearings on docket R99-18 some 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 the second hearing on March 1, 1999. However, a couple of issues remained outstanding, and the Illinois EPA committed to address those issues in its FINAL COMMENTS by suggesting some language changes to the rules.

B. Issues of Concern at Hearing

The issues that the Illinois EPA believes were left unsettled at hearing are as follows: 1) Which existing facilities will need local siting?; and 2) How will the Illinois EPA phase in the permitting requirements?

1. Local Siting Approval

Currently, facilities that manage used oil (as defined by 35 Ill. Adm. Code 739.100) are deemed "permitted-by-rule" so long as they comply with the Part 739 management standards. If the proposed amendments to 35 Ill. Adm. Code 807 are enacted, they will require certain permitted-by-

rule facilities that manage used oil (as defined by 35 Ill. Adm. Code 739.100) to obtain a permit pursuant to Part 807.

Based on the wording in Section 39(c) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/39(c)), two conditions must be met before the Illinois EPA may require proof of local siting approval as a condition of a permit approval. First, the application must be for a development or construction permit (not an operating permit) and second, the facility must meet the definition of "new" pollution control facility. Section 39(c) of the Act provides that "no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof that the location of said facility has been approved" by the relevant local governing body "in accordance with Section 39.2 of this Act." Taking that a step further, used oil management facilities that are currently permitted-by-rule generally meet the definition of "pollution control facility" found in Section 3.32(a) of the Act. Looking at Section 3.32(b)(1), one sees that a "new pollution control facility" is defined as "a pollution control facility initially permitted for development or construction after July 1, 1981." There is no provision that requires all pollution control facilities or even all new pollution control facilities to obtain local siting. Therefore, even though Section 39(c) of the Act limits the Illinois EPA's ability to issue development and construction permits to those facilities that have local siting approval, it is not a general prohibition against "un-sited" new pollution control facilities.

The Board has previously held that due to the language of Section 39(c) of the Act, an inquiry as to local siting approval is unnecessary and immaterial in applications for permits other than development and construction permits--even if the facility never obtained local siting approval. (See Sushi, Ltd. v. Illinois EPA)(November 15, 1989), PCB 89-150.) Thus, used oil management facilities permitted-by-rule may exist and operate without ever having obtained local siting. These facilities would, of course, still be subject to any applicable zoning laws and restrictions.

2. Phasing In The Permit Requirement

Due to Section 10-65(b) of the Administrative Procedure Act ("APA")(5 ILCS 100/10-65), some phase-in period may be required for existing permitted-by-rule facilities to obtain their State operating permits. Without a phase-in period, upon the effective date of these amendments a used oil management facility that is currently operating lawfully without an Illinois EPA-issued operating permit (i.e., permitted-by-rule) would be faced with the choice of either ceasing operations or risking liability for penalties associated with operating without a permit. Fundamental fairness and due process, in addition to Section 10-65(b) of the APA, will likely require a phase-in period for existing facilities during which they will be allowed to continue operating in a permitted-by-rule status until they receive their Illinois EPA-issued permits (analogous to RCRA interim status).

The most logical approach seems to be accepting that a pre-existing permitted-by-rule used oil management facility falls into the category of an "existing solid waste management site," and does

not require a development permit. This approach conforms to the plain meaning of the existing regulations and allows for much simpler changes to the rules. Those proposed changes follow in Paragraph C below.

C. Proposed Amendments

If existing (i.e., previously permitted-by-rule) used oil management facilities will not be required to obtain an Illinois EPA development permit, and thus will not need to provide proof of local siting approval to obtain a permit pursuant to Section 39(c) of the Act, the following amendments to 35 Ill. Adm. Code 807 should be adopted:

Section 807.104 Definitions (adding additional definitions)

"Existing used oil management facility" means a used oil management facility that managed used oil as defined in 35 Ill. Adm. Code 739.100 in accordance with the applicable used oil management standards of 35 Ill. Adm. Code 739 on [DATE of rule adoption], and on or before [DATE 90 days after adoption of rules] notified the Agency of its used oil management activities on forms prescribed by the Agency. An existing used oil management facility is an existing solid waste management site as described in 35 Ill. Adm. Code 807.202(b).

"Used oil management facility" means a used oil transfer facility, a used oil processor, a used oil marketer who markets used oil other than that generated by its own activities from the site where it is generated, a used oil burner, and a petroleum refining facility, as defined in 35 Ill. Adm. Code 739.100.

The first new definition identifies those used oil management facilities that were in operation pursuant to the "permit-by-rule" procedures of 35 Ill. Adm. Code 739 on the effective date of these amendments as those who were in operation on that date, were in compliance with the applicable

management standards of Part 739, and who had notified the Illinois EPA of their used oil activities by use of the Illinois EPA's prescribed used oil notification form. By identifying existing used oil management facilities as existing solid waste management sites, such facilities who seek to continue their existing operation without modification are not subject to the requirement to obtain a Development Permit issued by the Illinois EPA pursuant to 35 Ill. Adm. Code 807.201.

The second new definition facilitates bringing under the permit requirements only those used oil facilities subject to 35 Ill. Adm. Code 739 that the Illinois EPA testified at hearing should be regulated.

Section 807.105 Relation to Other Rules

a. Persons and facilities regulated pursuant to 35 Ill. Adm. Code 700 through 749 are not subject to the requirements of this Part or of 35 Ill. Adm. Code 811 through 815 and 817. However, if such a facility also contains one or more units used solely for the disposal of solid wastes, as defined in 35 Ill. Adm. Code 810.103, such units are subject to requirements of this Part and 35 Ill. Adm. Code 811 through 815 and 817. Used oil management facilities who do not manage used oil solely in units subject to regulation pursuant to 35 Ill. Adm. Code 724 and 725 are also subject to the requirements of this Part.

This amendment makes used oil management facilities as defined in 35 Ill. Adm. Code 807.104, except for those RCRA facilities who choose to manage used oil solely in RCRA regulated units, subject to the permit requirements in Part 807.

Section 807.202 Operating Permits

a. New Solid Waste Management Sites. Subject to such exemption as expressly provided in Section 21(e) of the Act ~~(Ill. Rev. Stat. 1982, ch. 111 1/2, par. 1021(e)~~ 415 ILCS 5/21(e)) as to the requirement of obtaining a permit, no person shall cause or allow the use or operation of any solid waste management site for which a Development Permit is required under Section 807.201 without an Operating Permit issued by the Agency, except for such testing operations as may be authorized by the Development Permit.

b. Existing Solid Waste Management Sites.

1. Subject to such exemption as expressly provided in Section 21(e) of the Act ~~(Ill. Rev. Stat. 1982, ch. 111 1/2, par. 1021(e)~~ 415 ILCS 5/21(e)) as to the requirement of obtaining a permit, no person shall cause or allow the use or operation of any existing solid waste management site without an Operating Permit issued by the Agency not later than one year after the effective date of these Regulations.

2. All applications for Operating Permits shall be submitted to the Agency at least 90 days prior to the date on which such permit is required; however, the Agency may waive such provision when appropriate. Existing used oil management facilities must apply to the Agency for an initial operating permit, or, if already permitted pursuant to this Part for management of wastes other than used oil, for an initial supplemental permit for management of used oil as defined by 35 Ill. Adm. Code 739.100, within 90 days of [effective date of these amendments], and may continue to operate as a used oil management facility in accordance with all of the applicable management standards of 35 Ill. Adm. Code 739 and any other applicable provisions of the Act and regulations thereunder, until the final Agency decision on the application has been made and any final Board decision on any appeal pursuant to Section 40 of the Act has been made, unless a later date is fixed by order of a reviewing court. To the extent that an application for an initial used oil management operating permit, or an application for a supplemental used oil management permit, seeks authorization to engaged in used oil management activities other than those conducted on [effective DATE of these amendments], the facility is not an existing used oil management facility and is subject to the provisions of subsection (a) above.

This amendment allows those existing used oil management facilities that have been operating in accordance with the "permit-by-rule" procedures of 35 Ill. Adm. Code 739 up to 90 days following the effective date of this amendment to file an application for an operating permit with the Agency, and to continue operating pursuant to pursuant to pre-existing "permit-by-rule" status until final disposition of the application. The latter portion of this amendment is similar to the provisions of 35 Ill. Adm. Code 813.302, and is consistent with the requirements of Section 10-65(b) of the APA.

Section 807.202(b)(4)

4. Notwithstanding the provisions of 35 Ill. Adm. Code 807.205(g), the Agency may, if necessary to prevent an unmanageable workload, and upon written notice to the applicant, extend the date for taking final action on an application for an existing used oil management facility's initial operating permit, or initial used oil management supplemental permit for a period not to exceed 180 days from the date of the filing thereof.

Although there are not many used oil management facilities presently known to the Illinois EPA based upon the notification provisions of 35 Ill. Adm. Code 739, this new subsection 807.202(b)(4) is being added to allow for the possibility that a large number of used oil management facilities claiming permit-by-rule status will notify, or register with, the Illinois EPA prior to the effective date of these proposed amendments, thus achieving existing used oil management facility status. Allowing the extension of the Illinois EPA's application review period will reduce the

likelihood of an unmanageable workload and the resulting risk of granting a permit by default in accordance with 35 Ill. Adm. Code 807.205(g).

D. Response to Comments Filed by NORA

The Illinois EPA received the comments filed by the National Oil Recyclers Association ("NORA") on April 20, 1999 and believes that many of their comments deserve a response.

First, in response to NORA's comment that the regulations should not be more stringent than the minimum federal standards, it should be noted that there is no requirement or restriction prohibiting State waste management standards from being more stringent than their federal counterpart. Federal regulations under RCRA are intended to establish *minimum* national standards defining acceptable waste management. Section 3009 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, the Solid Waste Disposal Act Amendments of 1980, and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6929, prohibits a state from imposing requirements that are *less* stringent than the federal standards, but specifically provides that, "[n]othing in this chapter shall be construed to prohibit any State. . .from imposing any requirements. . .which are *more* stringent than those imposed by such regulations." (Emphasis added.) Moreover, it should also be noted that this proposal does not amend or modify *any* federal standards. The State used oil management regulations of 35 Ill. Adm. Code 739, which are identical-in-substance to the federal Standards for the Management that are found in 40 CFR Part 279, are not being

amended by this proposal. Rather, this proposal amends only the 35 Ill. Adm. Code 807 regulations establishing a State non-hazardous permit program. Additionally, even though a State regulation may properly be so, the Illinois EPA contends that the proposed amendments to 35 Ill. Adm. Code 807 are not more stringent than the federal standards. The federal used oil management standards of 40 CFR Part 279 contemplate the possibility of a permit requirement for some used oil management facilities. For example, 40 CFR 279.31(b)(2) provides that owners or operators of all used oil collection centers must be properly "registered/licensed/permitted/recognized by a state/county/municipal government to manage used oil." In its September 23, 1993 Opinion in R93-4, adopting the identical-in-substance used oil management standards as (then) new 35 Ill. Adm. Code 739, the Board solicited comment as to whether the federal regulations "contemplated the creation of a permit process." USEPA responded, among other things, that the administrator had reserved the right to require owners and operators to obtain a permit if necessary to protect human health and the environment. (In the Matter of RCRA Update, USEPA Regulations (7/1/92-12/31/92), R93-4, Adopted Rule, Final Order (September 23, 1993), p. 76.) Thus there is nothing improper or extraordinary about amending Part 807 to make it clear that certain of the used oil management facilities regulated under Part 739 must obtain permits from the Illinois EPA.

Second, NORA claimed that the proposed amendments would put in-state facilities and transporters at an economic disadvantage to their out-of-state competitors because the out-of-state

competitors would not be subject to transporter permit or manifest requirements. Currently, out-of-state facilities are subject to the same requirements as in-state facilities when transporting used oil to a facility in Illinois or from an Illinois generator. The special waste must be transported by a licensed special waste transporter and accompanied by a manifest unless an exemption in 35 Ill. Adm. Code 809.210 or 809.211 applies. None of the current or proposed exemptions exclude from the regulatory requirements out-of-state transporters transporting used oil to a facility or transporting from a generator in Illinois. The proposed amendments to Parts 807 and 809 would exempt used oil from the manifest and special waste transporting requirements only when transporting in quantities less than 55 gallons to a collection facility or aggregation point operating in accordance with Part 739. This exemption would apply equally to both in-state and out-of-state facilities and transporters in the same manner as the current regulations and would not allow an advantage based upon whether or not the transporters' operations are based in Illinois.

Third, NORA expressed concern that the proposed amendments would require expensive changes to the used oil facilities' operating procedures and equipment. We do not agree. A review of those facilities that registered with Illinois EPA or USEPA lead us to believe that the majority of those facilities that would require a permit have previously operated under an Agency permit and would not be subject to new operating conditions. There is at least one permit, however, that was issued in the

1980s whose previously approved permit application does not include the information necessary to demonstrate compliance with the standards in Part 739.

NORA also contends that out-of-state facilities would have an advantage because of permit conditions. Permit conditions are used to ensure that the facility operator complies with the applicable regulations. Furthermore, permit conditions cannot be inconsistent with the Act or Board rule, and they must be necessary. Therefore, the Illinois EPA does not see how this favors out-of-state competitors.

NORA also commented that the oil fuel marketers and burners should not be subject to permitting, and on-specification used oil should not be subject to the special waste regulations. The proposed regulations would not regulate burners or marketers of on-specification fuel if the used oil met the definition of "re-refined oil" in Section 3.36 of the Act. Re-refined oil must meet substantially the same standards as new oil. Therefore, if the marketer or burner kept records demonstrating that the oil meets an industry standard for new oil, such as those established by the American Petroleum Institute, the facility would not be required to manage the oil as special waste. In our previous testimony we discussed the possibility that on-specification used oil may not necessarily be a marketable commodity since the used oil specification does not place a limit on bottom sediment, water, or other contaminants. Therefore, determining whether the used oil is a special waste should not be based solely on the specification found in Part 739. NORA indicated they would not object to a

reasonable minimum BS & W, but they did not suggest one. The proposed language requires the used oil to be both on-specification (as defined in Part 739) and re-refined oil (as defined in Section 3.36 of the Act) before the used oil is exempt from the special waste regulations. These proposed requirements are adequate to distinguish between used oil that is special waste and used oil that is exempt from the waste management regulations as a commodity.

NORA also raised questions about the sampling requirements for used oil shipments and stated that certification in lieu of analysis was burdensome. The regulations do not include specific sampling or certification requirements. Individual permits may establish waste analysis requirements for each facility. These conditions are site-specific and are meant to ensure that the facility accepts only those wastes that they are permitted to manage, and that the waste is properly identified to ensure it can safely be managed at the facility. If the applicant proposed other methods adequate to accomplish these goals, they could be approved during the permit review process.

NORA was also concerned about more stringent and restrictive regulations on storage tanks, but did not provide any specific examples of these issues. Part 739 requires tanks to be in good condition, not leaking, and equipped with secondary containment. Permit conditions are often established on a case-by-case basis to ensure compliance with these requirements. Industry standards, such as the standards of the American Petroleum Institute, recommend design standards and inspection procedures for petroleum tanks and are commonly used by industry to design and develop

operating and inspection procedures for oil storage tanks. Both the standards in Part 739 and the standards commonly employed by industry are also used in other states and would not subject Illinois facilities to an unfair economic disadvantage when compared to a properly operated out-of-state used oil facility. Any conditions imposed in a used oil management facility permit are merely for the purpose of ensuring the requirements of Part 739 are met.

NORA urged the Board to adopt a registration system in lieu of permitting. Many used oil facilities that accept large volumes of used oil have historically had environmental problems. These problems were the result of many factors including poor design, operation, maintenance, and waste analysis. We believe that permits provide a proactive approach to ensure these types of environmental problems do not occur in the future.

Finally, NORA commented that "We initially inquired about this issue on January 15, 1999 to the Illinois EPA. We never received a response until March 11. This left us very little time to respond before the April 9th deadline." As a result, NORA requested additional time to respond. The Illinois EPA did not receive a letter from NORA regarding this subject. Rather, we received a letter dated January 15, 1999 from Harris, Tarlow and Stonecipher, PLLC, but they did not indicate that the inquiry was on behalf of NORA, nor did they use NORA's letterhead. Harris, Tarlow and Stonecipher's letter indicated that they were aware of the proposed changes regarding permits and manifests and the fact that the Board oversees the rulemaking. They asked to be enlightened on the

upcoming proposal--specifically, whether used oil generators and processors would be subject to any new permitting or manifest requirements. At the time, there was no further information available beyond what was already available through the Board. Hearings were held on February 25, 1999 and March 1, 1999. On March 11, 1999, we responded with a very brief summary of the events and referred them to the Board for further information.

This concludes the Illinois EPA's comments in this matter. The Illinois EPA has attempted in these FINAL COMMENTS to address what it feels were the primary areas of concern left at issue during the hearings. Furthermore, the Illinois EPA stands behind its proposal, including the amendments proposed in these comments.

WHEREFORE, the Illinois EPA submits its FINAL COMMENTS and PROPOSED AMENDMENTS 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: Kimberly A. Geving

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Dated: May 6, 1999

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STATE OF ILLINOIS)
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PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached FINAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND PROPOSED AMENDMENTS TO ADDRESS ISSUES RAISED AT HEARING on behalf of the Illinois Environmental Protection Agency upon the person to whom it is directed, by placing a copy in an envelope addressed to:

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and mailing it from Springfield, Illinois on 5/6/99 with sufficient postage affixed.

Timothy A. Fleming

SUBSCRIBED AND SWORN TO BEFORE ME
this 6th day of May

Brenda Boehner
Notary Public

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-14-2001

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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