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SEP 24 1999

STATE OF ILLINOIS
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD *Pollution Control Board*

IN THE MATTER OF:)
)
AMENDMENTS TO PERMITTING FOR)
USED OIL MANAGEMENT AND USED)
OIL TRANSPORT 35 Ill. Adm. Code)
807 AND 809.)

R99-18
(Rulemaking - Land)

J.C. #17

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

Joel J. Sternstein, Esq.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: *Kath D. Hodge*
One of Its Attorneys

Dated: September 23, 1999

Katherine D. Hodge
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Pollution Control Board

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COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits the following Post-Hearing Comments with regard to the above-referenced rulemaking.

On November 2, 1998, the Illinois Environmental Protection Agency (“Agency”) filed proposed amendments to 35 Ill. Admin. Code Parts 807 and 809 with the Illinois Pollution Control Board (“Board”) pursuant to Sections 27 and 28 of the Environmental Protection Act (“Act”) (415 ILCS 5/27 and 5/28 (1998)) and 35 Ill. Admin. Code § 102.121. Hearings were held in this proceeding on February 25, 1999, in Chicago and on March 1, 1999, in Springfield. On March 29, 1999, IERG and the Agency filed a Joint Motion to Extend the Public Comment Period with the Board, which requested that the comment period be extended from April 9, 1999, to May 7, 1999. On April 12, 1999, the Board’s Hearing Officer issued an order granting the Joint Motion to Extend the Public Comment Period until May 7, 1999. IERG filed post-hearing comments to those hearings on May 6, 1999. On June 18, 1999, due to the volume of public comments received subsequent to the first and second hearings, the Board scheduled a third hearing, held in this proceeding in Chicago on August 23, 1999. At the third hearing on

August 23, 1999, the Board ordered that all public comments be filed by September 24, 1999. IERG hereby submits its post-hearing comments pursuant to the Board's August 23, 1999, third hearing.

As the Board is aware, this proceeding has generated much discussion and comments between the regulated community and the Agency. As set forth more fully below, IERG continues to be generally opposed to the permitting scheme for used oil management facilities contained in the Agency's rulemaking proposal in the above-referenced matter. IERG believes that as a matter of public policy, requiring these used oil facilities to obtain land permits is an unsound decision.

First, the Agency has not established the need for the Board to adopt permit requirements for used oil management facilities, which would result in a more stringent approach than the "permit-by-rule" scheme currently mandated by the United States Environmental Protection Agency ("USEPA"). In addition, the Agency's proposal would result in the imposition of permit conditions more stringent than the used oil management standards currently in effect and would result in used oil management facilities in Illinois being placed at a competitive disadvantage compared to competitors located out of state, due to increased costs of doing business in complying with the more burdensome requirements. IERG member companies, in turn, would be charged more for all used oil management services in Illinois. Finally, there is insufficient information in the record in this proceeding to establish the economic reasonableness and technical feasibility of the Agency's rulemaking proposal. All of the above are important policy considerations that the Board should consider when making its decision on this rulemaking proposal.

Initially, Subtitle C of the federal Resource Conservation and Recovery Act (“RCRA”) mandates a “permit-by-rule” scheme. USEPA adopted the federal used oil management standards, set forth in 40 C.F.R. Part 279, that establish various used oil management standards but do not require a permit for used oil facilities. The Board then adopted 35 Ill. Admin. Code Part 739 as an identical-in-substance rulemaking under Sections 22.4 and 27 of the Act (415 ILCS 5/22.4 and 5/27 (1998)). The Agency has failed to establish a need for permitting requirements more stringent than the federal “permit-by-rule” requirements.

As noted in IERG’s May 6, 1999, comments at the Board hearing in Springfield on March 1, 1999, the Agency indicated that it was not sure of the number of used oil facilities that would be impacted by the proposed rulemaking. (See pages 16 and 17, Hearing Transcript for R99-18, March 1, 1999.) The need for such permit requirements cannot be determined when the Agency knows neither the number of affected facilities nor particular “environmental risks” at such facilities.

In response to this comment, the Agency attempted to demonstrate such environmental risks by offering the testimonies of Lawrence Eastep, who summarized environmental concerns the Agency had at eight “typical used oil management facilities,” (see pages 15-21, Hearing Transcript for R99-18, August 23, 1999) and Leslie Morrow, who summarizes potential health risks and the toxicity of used oil (see pages 21-26, Hearing Transcript for R99-18, August 23, 1999). However, as the Agency fails to recognize, these examples of so-called environmental risks do not equate into mandating a permitting scheme for all used oil facilities over and above what USEPA, and indeed the Board, have already considered when adopting its “permit-by-rule” structure.

Further, the eight “typical used oil management facilities” referenced by Mr. Eastep were facilities which had compliance problems primarily in the 1970’s and 1980’s. To use facilities where compliance issues are over a decade old to demonstrate environmental risks is simply not adequate, given the almost daily changing and tightening of environmental regulations.

Further, since 1993 (the effective date of the permit-by-rule), the Agency has had a history of dealing with used oil management facilities. What has been the record? The Agency need only review its inspection records from 1993 forward and present them to the Board. Is there a history of problems? The Agency need only review its enforcement records regarding compliance inquiry letters, violation notices, referrals to the Attorney General’s Office, etc., and present it to the Board. Is there a history of enforcement activity? To the contrary, the Agency states that it cannot even get a good estimate of how many facilities would be affected by this proposal. Instead, all the Agency does is offer up eight so-called representative used oil facilities. If these facilities pose an environmental problem, would it not have made sense for the Agency - at some time between 1993 and today - to have called the USEPA and compared notes on who knows what about which facilities? If the Agency cannot produce inspection reports or enforcement records showing current environmental concerns and/or cannot identify the facilities affected by the proposed rule, the Board should not adopt the rulemaking proposal. Additionally, the Agency has not shown there to be an environmental benefit from requiring additional paperwork burdens on these used oil facilities. IERG believes that the Board cannot adopt this rulemaking proposal consistent with its obligations under Section 27(a) of the Act (415 ILCS 5/27(a)).

IERG has no debate with the Agency that State rules can be more stringent than federal rules; its dispute is that these rules simply are not needed. This proceeding is not one to fill a regulatory void. Instead, it is a proceeding that proposes to replace a regulatory structure that was adopted by the Board in 1993 based on a deliberate and reasoned decision. The decision was, at that time, to adopt by the identical-in-substance procedure, a permit-by-rule system for used oil waste management facilities. The identical-in-substance procedure was established to assure that Illinois rules are at least as stringent as the federal rules. However, over time, it has become clear that federal rules are far from lenient and very seldom does the Agency or the Board find a need to deviate from the federal model. In particular, RCRA regulations have never been considered lenient. The preamble to the adoption of 40 C.F.R. Part 279 makes it clear that the lack of need for a permit was not adopted without input from the regulated community and considerable deliberation by USEPA. The USEPA stated:

The majority of commenters believed that the permit-by-rule mechanism was unnecessary for implementation and enforcement of the used oil management system under part 279. EPA agrees with the commenters and has not established any permit-by-rule requirements for used oil facilities. The Agency believes that the recordkeeping requirements in part 279 will provide sufficient information for enforcement of the used oil management standards. The Agency decided against the permit-by-rule requirement because the requirements in today's rule are basic management practices that are largely self-implementing and do not require additional permit consideration of site-specific conditions.

57 Fed. Reg. 41604 (September 10, 1992).

IERG member companies are concerned that the imposition of a land permit requirement will put those used oil facilities subject to the permit requirement at a competitive disadvantage with respect to competitors located in other states. The costs

associated with applying for and obtaining a land permit and obtaining subsequent permit renewals are costs that would not be incurred by out of state competitors that operate under a "permit-by-rule" scheme. This may have the impact of discouraging the recycling of used oil when, from a public policy standpoint, the State of Illinois tries to encourage recycling of materials to the greatest extent possible.

In addition, there is insufficient information in this record to allow the Board to consider the economic reasonableness and technological feasibility of the Agency's rulemaking proposal. The Agency has presented no testimony regarding the specific types of requirements that used oil management companies will have to meet as a result of being required to obtain a state land permit; the Agency has presented no testimony on the costs associated with meeting the more burdensome permitting requirements.

Although the Agency filed a draft land permit with its August 6, 1999, pre-filed testimony of Theodore Dragovich, and attempted to estimate the costs associated with preparing the applicable permit applications at the August 23, 1999, hearing, nowhere did the Agency present any actual costs or demonstrate economical reasonableness or technical feasibility of complying with the proposed rulemaking. Instead the Board requested information from the National Oil Recyclers Association ("NORA") as to the costs of preparing the applicable permit applications.

Additionally, the August 9, 1999, pre-filed testimony and extensive comments at the August 23, 1999, hearing provided by Christopher Harris of NORA indeed supports many of IERG's concerns as delineated above, and IERG urges the Board to consider NORA's comments as well when deciding this rulemaking proposal.

In conclusion, due to the above reasons, IERG urges the Board not to adopt the above-referenced rulemaking proposal.

WHEREFORE, IERG appreciates the opportunity to participate in this proceeding and respectfully requests the Board to take action on the Agency's regulatory proposal consistent with these comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: Kath D. Hodge
One of Its Attorneys

Dated: September 23, 1999

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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served the attached COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP upon:

Ms. Dorothy M. Gunn
Clerk of the Board
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by depositing said documents via Airborne Express in Springfield, Illinois on or before 5:00 p.m. on September 23, 1999, and upon:

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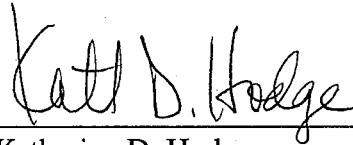
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Katherine D. Hodge