

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
PROPOSED AMENDMENTS TO THE)	R06-20
BOARD'S SPECIAL WASTE)	(Rulemaking -Land)
REGULATIONS CONCERNING)	
USED OIL, 35 ILL. ADM. CODE 808, 809)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY IN RESPONSE TO NORA'S POST-HEARING BRIEF, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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**COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY IN RESPONSE TO NORA'S POST-HEARING BRIEF**

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through one of its attorneys, Stephanie Flowers, and respectfully submits the following Comments in response to the Post-Hearing Brief filed with the Illinois Pollution Control Board ("Board") by the Association of Responsible Recyclers ("NORA") in the above-entitled matter on September 1, 2006.

1. FEDERAL AND STATE REGULATIONS

Throughout its post-hearing brief, NORA argues that the main purpose of the federal regulations was to promote the recycling of used oil. However, a review of 50 FR 49213, November 29, 1985, (Part One.I.A) and 57 FR 41566, September 10, 1992, (II.Background) clarifies the true goals of the federal used oil regulations. These documents indicate that the goal of the federal regulations is to provide management standards for used oil and for materials contaminated with used oil and that protection of human health and the environment from the hazards of used oil is the prime concern even if it discourages recycling of this material.

NORA also argues that the federal regulations at 40 CFR 279, took used oil out of the "realm of more rigorously regulated 'waste'." However, a review of the RCRA regulations,

another federal identical-in-substance rulemaking, clarifies that used oil still meets the definition of solid waste, but has its own management standards as a recyclable material. See 35 Ill. Adm. Code 721.106(a)(4), which states that,

“Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of 35 Ill. Adm. Code 720 through 728, but it is regulated under 35 Ill. Adm. Code 739.”

NORA argues that the federal regulations “entitle” all non-hazardous wastes contaminated with some used oil to be effectively exempt from Illinois’ special waste requirements and only regulated by Part 739. However, the Illinois EPA interprets the federal regulations as requiring non-hazardous waste mixed with used oil to meet the management standards in Part 739 but not preempting more stringent state regulation of these wastes. See also 57 FR 21528 dated May 20, 1992 which states that,

“[USEPA] also recognizes that several states regulate used oil as a hazardous waste, and some states regulate it as a special waste . . . A used oil handler must comply with all state requirements applicable to used oil in his/her state, in addition to any federal requirements that apply.”

See also 57 FR 41569 dated September 10, 1992 which states that,

“The [USEPA] has decided that these current regulations are protective but not complete or sufficient to protect human health and the environment from potential mismanagement of used oils that are recycled.”

Material contaminated with used oil is not “entitled” to be managed under less stringent regulation. Under the federal program materials that were previously unregulated, were now regulated if contaminated with used oil. Therefore, in the federal program there is an incentive not to mix non-hazardous waste that is unregulated with used oil that is regulated. In contrast, NORA’s proposal would provide the opposite incentive and would encourage mixtures of used

oil and other special wastes to take advantage of the reduced siting, operating and permitting requirements of used oil facilities compared to other special waste facilities. The Illinois EPA believes that NORA's proposal is a relaxation of the Illinois regulatory requirements for special waste.

2. EFFECT OF THE EXEMPTION ON RECYCLING

In its post-hearing brief, NORA argues that there is no distinction between used oil as defined at Section 739.100 and materials regulated as used oil at Section 739.110. However, USEPA carefully crafted the definition of used oil at 739.100 to include all oils that were used as lubricants and have been contaminated as a result of that use. The definition also attempted to discourage adulteration after use. See 57 FR 41574 dated September 10, 1992 which states that,

"Used oils that become adulterated after use should be subject to management standards that discourage this practice."

In contrast to the statement above, the Illinois EPA believes NORA's proposal encourages the mixing of other wastes into used oil by offering a manifest exemption for the mixture. But limiting the manifest exemption to used oil as defined and managed in accordance with Part 739.100, as the Illinois EPA has proposed, encourages the generator to keep waste streams separate for appropriate management and recycling.

NORA argues that, "the key here is that material regulated under Part 739 is not regulated as waste, but properly recyclable material". However, the Illinois EPA believes it is probable that other waste added into the used oil mixture (e.g. inks, solvents and coolants) will not be recycled, but will be burned with the used oil or treated in a waste water treatment unit. Some of the wastes added to used oil which will be blended for fuel do not have fuel value themselves and may contain constituents that are not appropriate to burn in that setting.

Also NORA argues that “the Agency’s position is . . . inconsistent with . . . federal laws that allow specific mixtures to be managed as used oil.” However, although the mixtures of used oil and other non-hazardous special waste are subject to the used oil management standards at Part 739, once the free flowing oil is removed, the other waste is no longer subject to these standards. Therefore, the Illinois EPA believes the mixtures should remain subject to the special waste manifests or else these other wastes will become unregulated, which is what occurs in the federal program. Illinois has chosen to regulate non-hazardous special waste and therefore the continued use of a special waste manifest is necessary to adequately track the other special waste, to alert burners that the used oil contains other special waste, and to provide the record necessary to determine whether the other special waste was handled, managed or burned inappropriately.

Other non-hazardous special wastes should be evaluated separately to determine if they should be exempted from hauling permits and manifests, and should not be exempt merely because the waste was mixed with used oil. Materials added to the used oil after generation should only be exempted from the manifest and hauling requirements if they meet the criteria in Sections 809.210, 809.211, or Section 808.121.

The purpose of regulating other materials as used oil under Section 739.110 is not to allow these other wastes to be classified as used oil. The purpose is to encourage separation of used oil and other wastes and to allow less federal regulation of non-hazardous solid waste once it was separated from used oil. See 57 FR 41581 dated September 10, 1992 which states that,

“[USEPA] encourages the separation of used oils from used oil/solid waste mixtures and from used oil-contaminated materials prior to management of the mixture. Used oils separated from mixtures containing other solid wastes should be recycled in accordance with [40 CFR 279].”

In their post-hearing brief, NORA has cited “McCoy’s RCRA Unraveled” to provide “information concerning what materials are subject to regulation as used oil”. However, this book includes the following disclaimers:

“This guidance manual addresses problems of a general nature related to the federal RCRA regulations. Persons evaluating specific circumstances dealing with the RCRA regulations should review state and local laws and regulations, which may be more stringent than federal requirements. In addition, a qualified professional should be enlisted to address any site-specific circumstances.”

As acknowledged in the text of this book, “McCoy’s RCRA Unraveled” is not to be considered regulations themselves, but merely the author’s interpretation of the regulations. Therefore, the Illinois EPA believes this document and NORA’s testimony regarding it should not be considered in the Board’s decision regarding this rulemaking.

In sum, the Illinois EPA believes that by indirectly encouraging mixtures of used oil with special waste, NORA’s proposal would have a negative impact on the ability to recycle each waste stream and that without the tracking of individual waste streams in mixtures, the wastes may be inappropriately handled, managed or burned.

3. NEED TO LIMIT THE EXEMPTION

In its post-hearing brief, NORA argues that it is seeking to “eliminate the burdens associated with manifesting of used oil.” The Illinois EPA can understand that appropriate paperwork is time consuming. However, the Illinois EPA believes that the use of a manifest is necessary for wastes that do not meet the definition of used oil because the used oil tracking system will only identify the waste as used oil and will not require the generator to have a record of the transportation and disposal of the non-hazardous special waste mixed with used oil.

USDOT shipping papers for non-hazardous materials will provide little additional information. The used oil tracking system will lead the transporter, emergency responders and receiving facilities to believe that the waste will behave like used oil.

NORA argues that “manifesting requirements . . . are a waste of time, paper, and money. Moreover, they are redundant with federally required tracking documents.” As stated above, proper paperwork is always time consuming. However, there should be no double tracking because a mixture of used oil and other special waste does not have to be documented twice. The Part 809 manifest will also satisfy the Part 739 tracking requirement. The Illinois EPA does not believe that the federally required USDOT shipping papers provide enough information for tracking of non-hazardous special waste. However, by their own testimony, NORA members also do not solely rely on the USDOT shipping paper for their own records.

NORA argues that “company tracking documents were put in evidence in this proceeding and bear similar, if not identical, resemblance to Illinois manifesting documents.” Although this statement may be truthful, these business records are not required by Part 739 and not all industry businesses will keep such thorough records unless it is required. The business records submitted in evidence go beyond the minimum regulatory requirements for Part 739 used oil tracking. Therefore, the Illinois EPA believes that if NORA members keep manifest-like records for their business, it should not be burdensome for the company to fill out a Part 809 manifest. Since NORA’s argument is not sound, the Illinois EPA believes that there is another reason for NORA’s pursuit of a manifest exemption for mixtures. The Illinois EPA believes the real reason for NORA’s pursuit of a manifest exemption for mixtures of used oil and other special waste is so that the other special waste that usually must go to a permitted and sited special waste facility

may be hidden in the used oil and sent to an unpermitted, unsited used oil facility to be processed.

NORA argues that “the Illinois approach to used oil . . . is inequitable” and that “the Illinois situation is unusual in that it designates used oil as a special waste.” However, this is not accurate. Illinois is not the only state that designates used oil as a special waste and is not the only state that uses a manifest for mixtures of used oil and other special waste. Used oil regulations vary from state to state and while some states only require compliance with the federal regulations, others require hauling permits, manifests, and other tracking papers for mixtures of used oil and other non-hazardous special waste. Furthermore, it is the understanding of the Illinois EPA that the exemption of used oil from the definition of special waste is not the issue before the Board.

NORA also argues that the Illinois EPA proposal is inconsistent with the encouragement of recycling and states, “the Agency’s position virtually negates the intended positive impact of NORA’s proposal.” This statement is also inaccurate. The special waste regulations have been in place for years and, throughout this time, facilities have been recycling used oil and used oil mixtures in Illinois. Furthermore, currently both out-of-state and in-state used oil transporters must use manifests and obtain a hauling permit to transport special waste, including used oil, in Illinois. The Illinois EPA proposal will allow haulers of used oil not containing other special waste to be exempt from the hauling permit and manifest requirement and therefore will encourage the out-of-state competitors to recycle used oil at Illinois facilities. If this is not the positive impact intended, the Illinois EPA must question the true intent of NORA’s proposal.

4. INCENTIVE FOR MIXING AND THE DEMISE OF THE SPECIAL WASTE PROGRAM

The Illinois EPA believes that should NORA's proposal be adopted by the Board, the Illinois EPA will lose regulatory control over non-hazardous special waste and the special waste regulations at Part 808 and Part 809 will be effectively eliminated. NORA's proposal will allow all non-hazardous special waste mixtures to be relabeled 'used oil' and be managed solely under the Part 739 regulations because the proposal does not specify a minimum quantity of used oil that needs to be added to the waste mixture before the mixture may be relabeled 'used oil'. After the mixture is relabeled in tracking documents as only 'used oil', the mixture may be received by used oil facilities that have less stringent permitting and siting requirements than special waste facilities. The Illinois EPA believes that the less stringent permitting, siting, and recordkeeping requirements for used oil facilities will be an incentive for facilities to combine used oil with other special waste and relabel the mixture as 'used oil'.

In its post-hearing brief, NORA refers to other waste subject to regulation under Part 739 as "used oil like substances". NORA proposes that the Illinois EPA should not be concerned with used oil like substances as long as they are being managed by used oil handlers. NORA implies that the waste will always have valuable amounts of recyclable oil and therefore will be managed properly. However, although this may be true for high grade used oil products, the Illinois EPA knows that many facilities also profit by collecting generator fees and disposing of the mixtures as low grade used oil fuel. The Illinois EPA believes that many of these facilities will abuse the used oil manifest exemption to receive special waste that must normally be managed at a facility that has siting and has been permitted to manage special waste. The Illinois EPA has already had experience with such practices in this industry.

NORA describes, in its post-hearing brief, its members' commitment to guiding principles. Although the Illinois EPA commends NORA for its good business practices, these guiding principles are not followed by all companies in the industry and are not enforceable by the Illinois EPA in its duty to protect human health and the environment. Therefore the Illinois EPA believes that should NORA's proposal be adopted by the Board, abuse of the exemption will occur. Enforcement against facilities that accept waste containing small amounts of used oil would be difficult, since under NORA's proposal there is no minimum amount of used oil specified that must be added to the waste mixture before it may be relabeled as used oil.

As indicated in previous testimony, used oil handlers also manage waste such as plastic pellets, carbon filter media, surfactants, water based paint, water based ink, emulsion solutions, grain/water/oil mixture, cleaning compound, sludge, wash water, super abrasive, sand, tank sludge, water based coolants, and barge bilge water. These wastes should not receive a manifest exemption and the receiving facility should not be exempt from permits and siting because a few drops of oil were added to these wastes after generation. NORA has not proposed any way to distinguish when the waste is used oil that will be recycled and when the waste will be mainly non-hazardous special waste containing small amounts of used oil, except to say that the waste will be managed by a used oil handler.

NORA argues that the "Agency's position is contrary to the status quo" and that "NORA's language does not change the way the used oil industry does business, nor does it seek to change what is or is not entitled to be treated as used oil pursuant to current regulations." However, the special waste manifesting and hauling regulations already exist and already apply to used oil. The Illinois EPA is not seeking a new category of waste or new interpretation of Part 739 as alleged by NORA. The Illinois EPA is merely asking the Board to limit the new special

waste manifest exemption in Part 809 to used oil as defined and managed in accordance with Part 739.100. This does not mean that the used oil mixtures that NORA said are currently being picked up for recycling would no longer be recycled. It only means that these mixtures would still have to be transported under a manifest. In addition, the Illinois EPA's proposed wording would not change the regulatory status of waste currently exempt from manifesting under other regulations.

NORA has argued that "no real evidence was presented regarding any danger with the current program" and the "Agency has the ability to enforce against any of those companies who are not complying with Part 739." The Illinois EPA believes NORA has mischaracterized the Illinois EPA's concerns as a failure to enforce existing special waste regulations. However, the Illinois EPA's real concern is that the exemption as proposed by NORA is not adequate to insure that important information about the waste is conveyed to the receiving facility, waste handlers, emergency responders and the Illinois EPA. According to NORA's proposal the addition of small amounts of used oil to other waste would allow the other waste to go without a manifest or any identification to an unsited, unpermitted facility that is only registered to accept used oil. The Illinois EPA believes this is inconsistent with the cradle-to-grave tracking of special waste required in the current special waste regulations. The Illinois EPA is concerned that since there is no minimum amount of used oil that must be added to a waste to make it subject to Part 739, NORA's proposed exemption would result in abuse of the manifest system and also of the local siting approval requirements in Section 39.2 of the Illinois Environmental Protection Act ("Act") and of the permitting requirements in Section 21(d) of the Act.

The Illinois EPA requests that the Board find that Section 739.110 does not allow a person to avoid the solid waste permit requirements of Section 21(d) of the Act and the local

siting requirements of Section 39.2 of the Act by intentionally contaminating solid waste with used oil.

The Illinois EPA also requests that the Board, for the reasons stated above, adopt the alternate language as provided by the Illinois EPA in its comments and testimony to accomplish the manifest exemption and hauling permit exemption.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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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 COMMENTS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY IN RESPONSE TO NORA'S POST-HEARING BRIEF upon the persons to whom they are directed, by placing a copy of each in an envelope addressed to:

Dorothy Gunn, Clerk,
Illinois Pollution Control Board
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Chicago, Illinois 60601

William Richardson, Chief Legal Counsel
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and mailing it by First Class Mail from Springfield, Illinois on October 10th, 2006, with sufficient postage affixed.

Kimberly Best

SUBSCRIBED AND SWORN TO BEFORE ME
This 10th day of October, 2006.

Brenda Boehner

Notary Public

