

**John Therriault - Re: exempts**

**From:** Mike McCambridge  
**To:** Connelly, Deborah  
**Date:** 9/1/2011 4:27 PM  
**Subject:** Re: exempts  
**CC:** Crowley, Kathleen; Girard, Tanner; Therriault, John; Tipsord, Marie

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**Docketing Instructions for John Therriault:** Please put a copy of this e-mail as a "public comment (late filed)" in consolidated docket ~~R11-2/R11-16~~, adopted by the Board on August 18, 2011, and as a "public comment" in reserved docket ~~R12-7~~.

**Response to Question Raised by Deborah Connelly:**

**Summary:** As ever, I thank you for communicating a possible ambiguity in the language of a recent amendment. As is explained below, the Board used the federal language in the questioned segment. Basically, a "non-empty container" is a container that is not "empty," as such is defined in the Empty Containers Rule. An "empty" container can contain minimum amounts of hazardous waste that are set forth in the Empty Containers Rule. The Empty Containers Rule deems that an "empty" container is not subject to the hazardous waste regulations.

USEPA recently added the language that you question. The language was a departure from the language USEPA previously used in other provisions to describe a container that contains too much residue to be deemed an "empty" container by the Empty Containers Rule. Further, USEPA did not this time follow its former practice of citing back to the Empty Containers Rule for definition of the term used. I will make a note of the issues that you raised, and the Board can consider whether some change is necessary the next time 35 Ill. Adm. Code 722 is open for amendments in the coming months.

**Details:** Subsection (f) in 35 Ill. Adm. Code 722.123 uses the same language as corresponding 40 C.F.R. 262.23 with regard to the return of hazardous waste and residues in non-empty containers. This language relates back to the Empty Containers Rule in 35 Ill. Adm. Code 721.107, which corresponds with 40 C.F.R. 261.107. Subsection (b) of that rule defines an "empty" container in functional terms that allow a container to be "empty" while still containing a minimum residue of hazardous waste; subsection (a) excludes residues in "empty" containers from regulation as hazardous waste.

Subsection (f) of 35 Ill. Adm. Code 722.123 relates to use of the hazardous waste manifest form for return shipments of hazardous waste and non-empty containers of hazardous waste to the hazardous waste generator. USEPA added this subsection (f) in the omnibus hazardous waste corrections of March 18, 2010. USEPA explained that addition of subsection (f) corrects an error of omission in an earlier action that modified the hazardous waste manifest system. See 75 Fed. Reg. 12989, 96 (Mar. 18, 2010); see also 70 Fed. Reg. 10776, 82 (Mar. 4, 2005) (discussing return shipments of hazardous waste and non-empty containers of hazardous waste).

Subsection (f) of 35 Ill. Adm. Code 722.123 does not define what objects, persons, or activities are regulated under the hazardous waste rules. Subsection (f) is limited to setting forth the mechanics of the hazardous waste system. This provision prescribes how a hazardous waste generator must use the manifest when a designated facility rejects a shipment of hazardous waste and returns it to the generator. The counterpart requirements for the designated facility that rejects and returns the shipment appear in 35 Ill. Adm. Code 724.171, 724.172, 725.171, and 725.172, which correspond with 40 C.F.R. 264.71, 264.72, 265.71, and 265.72.

Interestingly, 35 Ill. Adm. Code 724.172 and 725.172 each use "exceed the quantity limit for 'empty' containers" and refer to the Empty Containers Rule of 35 Ill. Adm. Code 721.107 for definition of the term. See 35 Ill. Adm.

Code 724.172(a)(3) and 725.172(a)(3) (corresponding with 40 C.F.R. 264.72(a)(3), (d)(1), and (g) and 265.72(a)(3), (d)(1), and (g)). This direct use of the defined term "empty containers," the use of quotation marks on the word "empty," and the reference to the Empty Containers Rule for definition of the term avoids confusion.

While USEPA's use of "container residues contained in non-empty containers" in 40 C.F.R. 722.23(f) (and in corresponding 35 Ill. Adm. Code 722.123(f)) could be read as intending a different meaning, such a meaning would ignore the overall context of the hazardous waste regulations. Under the hazardous waste rules, the only "non-empty containers" that a generator would receive as returned from a designated facility would be containers that are not "empty" as defined by the Empty Containers Rule. Further, a container that contains hazardous waste residue and which is "non-empty" would contain hazardous waste. Thus, that container would be subject to hazardous waste manifesting and record-keeping requirements, unless the container contained so little residue as to be deemed "empty" by the Empty Containers Rule of 35 Ill. Adm. Code 721.107.

**Conclusion:** I will put a note on this provision for future consideration of the issue that your question highlights. As it happens, Board docket number R12-7 is presently reserved for an amendment to another of the hazardous waste manifest provisions in 35 Ill. Adm. Code 722. The statutory due date for completion of Board action in R12-7 is presently June 22, 2012.

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>>> "Connelly, Deborah" <connelly@ilga.gov> 8/30/2011 10:17 AM >>>  
Only out of curiosity, what the heck are "container residues contained in non-empty containers" (722.123(f)(3))?  
What is a non-empty container?

I'll be reading with the boss all week, so can't talk on the phone.