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(415) 856-7059
jodismith@paulhastings.com

April 7, 2008

26635.00011

VIA E-MAIL WGIN@DTSC.CA.GOV AND UPS OVERNIGHT

Watson Gin, Deputy Director
Hazardous Waste Management Program
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Re: **Petition for Review of Final Permit Decision for Bakersfield Transfer, Inc.
1620 East Brundage Lane, Bakersfield, California 93307 (EPA ID # CAL
000 282 598)**

Dear Mr. Gin:

The following petition for review of the Final Standardized Hazardous Waste Facility Permit ("Permit") for Bakersfield Transfer, Inc ("BTI") is being submitted on behalf of Demenno/Kerdoon ("D/K"). D/K submitted comments on BTI's Draft Permit on January 11, 2008 concerning the requirement for PCB testing without regard for the destination of the used oil being shipped from BTI. The Department of Toxic Substances Control ("DTSC") responded to D/K's comments on the PCB testing requirement in the BTI Draft Permit in a "Response to Comments" document dated March 7, 2008.

D/K has previously submitted comments, a petition for review, and an appeal brief on the same PCB testing requirements challenged at BTI in the context of the permit for the American Oil Company ("AOC"). The issues D/K raised concerning the PCB testing requirements for the AOC permit are the same issues that D/K has raised concerning the PCB testing requirements in the BTI permit. In the Response to Comments document for BTI, DTSC provided their statements from the October 19, 2007 "Final Decision on Appeal from Facility Permit Decision" for AOC which altogether denied D/K's appeal of the PCB testing requirements for AOC. D/K takes issue with many of DTSC's statements made in the order denying the appeal for the AOC permit. D/K's position regarding those responses is relevant for the BTI Permit because the issues are the same and D/K wishes to avoid receiving the same responses in the context of this petition. D/K believes that the issues discussed in this letter regarding the PCB testing requirements are issues which DTSC should, in its discretion, review, and therefore meet the requirements for a petition for review as described in California Code of Regulations, title 22, section 66271.18.

Watson Gin, Deputy Director

April 7, 2008

Page 2

Negative Impacts on Transfer Facilities and Transporters in California.

D/K provided examples in its appeal of the AOC permit explaining how the PCB testing requirements will have an adverse effect on used oil transfer facilities in rural areas of California. DTSC responded that, based on information available to the Department, PCB testing requirements will not have a negative statewide impact and further that the transportation pattern of used oil from rural areas to instate receiving facilities will not be changed. D/K disagrees with this conclusion by DTSC and requests that DTSC specify the information it has relied upon in reaching this conclusion.

Negative Impacts on Communities Near Used Oil Recycling Facilities.

D/K explained in its appeal of the AOC permit that the option of testing individual trucks at the receiving facility would result in increased truck traffic in the vicinity of the receiving facilities. DTSC stated that the PCB testing procedures will result in decreased idling emissions and wait times at used oil receiving facilities. D/K believes that DTSC is reaching this conclusion based on speculation and not on any collected data or studies regarding how the PCB testing requirements will affect truck traffic and/or wait times at used oil receiving facilities. This type of analysis would have been performed if DTSC had analyzed this standard under the California Environmental Quality Act. D/K therefore requests that DTSC perform a review under CEQA, or at a minimum, explain the data or other information used to reach this conclusion.

The Permit Condition Requiring PCB Testing is an Underground Regulation.

D/K explained in its appeal of the AOC permit that the PCB testing requirements are a regulation as defined in Government Code section 11342.600 because they implement the Department's statutory mandate by adopting standard of general application. As also noted in D/K's earlier appeal, because this standard was not adopted in accordance with the Administrative Procedures Act ("APA"), it constitutes an underground regulation. If DTSC had adopted this standard as a regulation pursuant to proper procedures, then the CEQA analysis discussed above would have been performed and the associated environmental impacts properly assessed and addressed.

DTSC responded to this comment by concluding that the PCB testing requirements are not a rule or standard of general application, but are requirements imposed only in a specific case. This response is disingenuous. The PCB testing requirements are clearly not being imposed only in a specific case. The requirements are being imposed at all used oil transfer facilities. In addressing this specific requirement, DTSC stated in its June 15, 2007 PCB Policy that "[i]t is critical that this Department be consistent in its permit requirements for like facilities." This statement, and DTSC's pattern and practice of consistently applying the PCB testing requirements in each used oil transfer facility permit renewal, clearly indicates that the PCB testing requirements are a rule of general applicability that should be subject to the APA. D/K therefore maintains its position that the PCB testing requirements are an underground regulation.

Watson Gin, Deputy Director
April 7, 2008
Page 3

Further, DTSC stated in their response that the PCB testing requirements are intended to ensure that a receiving facility accepts legally authorized used oil. This statement implies that receiving facilities have been accepting used oil containing concentrations of PCBs above the legal thresholds and that this is a problem that DTSC is trying to correct through the PCB testing requirements. As D/K's comments stated, proper procedures are already in place at in-state used oil receiving facilities to ensure that only legally acceptable used oil is received. Therefore, D/K asserts that additional testing requirements for oil sent to facilities issued permits by DTSC are unnecessary. If there have been violations of the Hazardous Waste Control Law and the hazardous waste regulations concerning acceptance of used oil containing high concentrations of PCBs at receiving facilities, then DTSC should use that information as a basis for a rulemaking. The administrative records for the BTI and AOC permits include no such information.

Finally, we note that DTSC has placed significance on the fact that AOC did not object the PCB testing requirement in its permit. However, the absence of their objection does not mean that the requirements are therefore necessary or appropriate. AOC unfortunately does not have enough experience yet in complying with the used oil regulations, as they have historically been only a 10-day transfer facility operating under the requirements of California Code of Regulations, title 22, section 66263.18. Because AOC is a new facility and has never operated, they cannot be fully aware of how the PCB testing requirements may affect their operations or the operations at receiving facilities.

D/K appreciates your consideration of this petition for review of the PCB testing requirements in the BTI Permit and maintains that these comments raise critical issues related to the permit that DTSC must review. If you have any questions or require additional information, please do not hesitate to contact me.

Very Truly Yours,

//original signed by//

Jodi Smith
for Paul, Hastings, Janofsky & Walker LLP

cc: Bruce Demenno, Demenno Kerdoon
Rosemary Domino, Asbury Environmental
Ray LeClerc, DTSC
Mohinder Sandhu, DTSC