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(916) 552-6830
roberthoffman@paulhastings.com

April 11, 2008

26635.00019

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

Peggy Harris, P.E., Division Chief
Department of Toxic Substances Control
1001 "T" Street, 11th Floor, MS 11A
P.O. Box 806
Sacramento, CA 95812-0806

Re: **Comments in Response to Issues Granted Review on Appeal of Permit for
Advanced Environmental, Inc. - 13579 Whittram Avenue, Fontana, CA
92335 (Docket HWCA 07/08-P003)**

Dear Ms. Harris:

On behalf of Advanced Environmental, Inc. ("AEI"), we are submitting these comments in response to the Order Partially Granting Petition for Review ("Order") issued by the Department of Toxic Substances Control ("DTSC") on February 13, 2008, and the Public Notice of Permit Appeal Comment Period issued by DTSC on February 27, 2008, for the Standardized Hazardous Waste Facility Permit ("Permit") for AEI.

Supporting Statement of Reasons

As AEI explained in its petition for review of October 23, 2007 (Attachment 1), DTSC made numerous changes to the language in AEI's draft permit after AEI's last opportunity to review and comment. These changes were never discussed with AEI and were not made available for public review. When AEI representatives learned that permit conditions had been changed, they contacted DTSC in an attempt to discuss them but were informed by the project manager that he was instructed not to reveal or discuss the changes. This left AEI no choice but to submit a petition for review of their own permit in order to raise objections regarding the new problematic conditions. The comments in AEI's petition for review and this appeal comment letter raise significant operational and policy matters which AEI believes that DTSC should, in its discretion, review.

The permit issues discussed in this letter are organized according to the appeal comment number they were assigned in the DTSC Order.

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Appeal Comment 3

Part V, Condition M.6.

This condition states “[t]he Permittee shall log the results of all tests performed and the documents shall be retained for at least three (3) years at the facility for inspection.” In its petition for review, AEI had requested clarification of what is meant by the term “log,” and stated that they understand “log” to mean “record” in the operating record. AEI also provided suggested revisions to the language of the permit condition which clarified this understanding.

In the Order, DTSC denied AEI’s request for review of this permit condition and failed to provide any clarification of what is meant by the term “log”. Thus, AEI will comply with what they believe to be the meaning of the term “log”. AEI records the laboratory test results on the receiving ticket for a particular shipment of hazardous waste. This receiving ticket, with the associated laboratory results and the manifest(s) used for the particular shipment, are maintained as part of the operating record for the facility as required by California Code of Regulations, title 22, section 66264.73. These documents shall be retained for at least three (3) years at the facility for inspection.

Appeal Comments 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 (Total Halogen Testing)

In its petition for review, AEI provided detailed explanations regarding why the permit conditions discussed in appeal comments 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 for total halogen testing are unworkable. AEI hereby incorporates by reference and reiterates the arguments made in their petition for review regarding these permit conditions and attaches them to this letter (see Attachment 1). Provided below are suggestions or specific language for each of the permit conditions discussed in Appeal Comments 4 through 13.

Part V., Condition N.2.c.(1)(A)

"[t]he Permittee may rebut the rebuttable presumption pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b), including updated and approved versions of the test methods specified in section 66279.90(b) which have been approved by EPA, or by complying with conditions N.2.c.(1)(B) through (G) below, which are the only other means of demonstrating that the used oil does not contain halogenated hazardous waste for the purposes of California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) and this Permit."

Part V., Condition N.2.c.(1)(B)

"The Permittee shall obtain from the generator or transporter a copy of the Generator’s Waste Profile Worksheet (GWPW) and the analytical results for the halogen content used to rebut the presumption."

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Part V., Condition N.2.c.(1)(C)

"The Permittee shall review this documentation and confirm that the GWPW is less than 365 days old, and that the halogen content specified on the analytical used to rebut the presumption was prepared by a laboratory certified in accordance with the Environmental Laboratory Accreditation Program by using the test methods specified in California Code of Regulations, title 22, section 66279.90(b)."

Part V., Condition N.2.c.(1)(E)

"The Permittee shall review the documentation discussed above and place it into the operating record. This documentation must contain a certification made by the generator that the used oil was not mixed with any halogenated hazardous wastes so that the rebuttable presumption may be rebutted pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)."

Part V., Condition N.2.c.(2)

"Option 2. For used oil received from a single generator and when the generator does not provide a Waste Profile Sheet, the Permittee may rebut the presumption only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b), including updated and approved versions of the test methods specified in section 66279.90(b) which have been approved by EPA, accompanied by a determination that the rebuttable presumption is rebutted pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)."

Part V., Condition N.2.c.(3)

"Option 3. For used oil received from multiple generators and when the transporter provides fingerprint test data for each generator using EPA Test Method 9077."

Part V., Condition N.2.c.(3)(B)(i)

This condition incorporates the same problems identified in Option 1 and permit conditions Part V., N.2.c.(1)(A) through (E). Suggested revised language for those permit conditions has been provided above.

Part V., Condition N.2.c.(4)

"Option 4. For used oil received from multiple generators, and when the transporter cannot provide fingerprint data for each generator using EPA Test Method 9077, but the transporter has collected individual samples from each generator and retained the samples along with the load."

Part V., Condition N.2.c.(4)(A)(ii)

This condition incorporates the same problems identified in Option 1 and permit conditions Part V., N.2.c.(1)(A) through (E). Suggested revised language for those permit conditions has been provided above.

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Part V., Condition N.2.c.(5)

“Option 5. For used oil received from multiple generators, and when the transporter cannot provide fingerprint data or retained samples as discussed in Options 3 and 4 above, the Permittee may rebut the presumption only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b) and pursuant to the procedures and criteria described in California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2).”

Appeal Comment 14

Part V., Condition O.2.

This permit condition states: “All outgoing used oil shall be tested for PCBs to ensure that the used oil load does not contain PCBs at a concentration of 2 ppm or greater. The Permittee shall test the used oil from each storage tank for PCBs pursuant to the procedures specified in Condition O.2.a below or the Permittee shall comply with the requirements in Condition O.2.b, which provide for the receiving facility to test the used oil for PCBs.”

AEI appealed this testing condition in its petition for review. AEI maintains that they should not be limited to testing an onsite storage tank or requiring a receiving facility to test each individual truck for PCBs. AEI sends the used oil they receive to the DeMenno/Kerdoon (“D/K”) recycling facility in Compton, California. The D/K facility consolidates individual loads of used oil into receiving tanks and tests those tanks for PCBs as specified in their DTSC-approved facility Waste Analysis Plan. As AEI explained in its appeal, it is impractical, unnecessary and unfair to require either AEI to test onsite or require D/K to apply a different testing protocol than that specified in its approved WAP. Truck by truck testing is inconsistent with D/K’s existing permit and will result in the facility being required to comply with two overlapping sets of PCB testing requirements. This condition places AEI at a competitive disadvantage with transporters who otherwise can take their oil directly to D/K or other receiving facilities.

Jodi Smith of our firm submitted comments on behalf of D/K in their appeal of the American Oil Company (“AOC”) permit, which raised numerous environmental and regulatory issues regarding a similar PCB testing procedure. We incorporated those comments by reference in AEI’s October 23, 2007 petition for review and hereby incorporate by reference and attach those comments (including the policy arguments and legal objections raised therein) in this comment letter. D/K’s submittals to DTSC regarding the AOC permit are attached to this letter as Attachment 2.

In DTSC’s October 19, 2007 “Final Decision on Appeal from Facility Permit Decision” for American Oil Company, DTSC denied D/K’s appeal concerning PCB testing on each

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truck-to-truck transfer. AEI would like to take this opportunity to respond to the following statements made in DTSC's denial of the appeal for the AOC permit.

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 in-state receiving facilities will not be changed. AEI 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. AEI 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. AEI therefore requests DTSC to explain the data or other information used to reach this conclusion, or in the alternative, perform a review under CEQA.

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 the 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 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

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applicability that should be subject to the APA. AEI therefore supports D/K's position that the PCB testing requirements are an underground regulation.

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 DTSC is trying to correct through the PCB testing requirements. As D/K's comments stated, proper procedures are already in place at used oil receiving facilities to ensure that only legally acceptable used oil is received. Therefore, AEI asserts that additional testing requirements are not necessary. 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 PCB's at receiving facilities, then DTSC should use that information as a basis for a rulemaking. The record for the AEI permit includes 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. Due to the fact that AOC is a new facility and has never operated under their permit, they cannot be fully aware of how the PCB testing requirements may affect their operations or the operations at receiving facilities.

AEI therefore requests that this permit condition and Condition O.2.b be revised to allow AEI to send used oil to permitted in-state facilities and tested for PCBs according to the receiving facility's WAP.

Appeal Comments 15, 16, 17, 18, 19 and 20 (PCB Testing)

In its petition for review, AEI provided detailed explanations regarding why the permit conditions discussed in appeal comments 15, 16, 17, 18, 19 and 20 for PCB testing were not workable. AEI has provided a general comment regarding Appeal Comment 14 that explains why the PCB testing requirements are unnecessary and should be completely removed from the permit. However, if the PCB testing requirements remain in the AEI permit, then certain specific requirements must be revised or removed for AEI to be able to properly follow the PCB testing requirements. AEI hereby incorporates by reference the problems identified in their petition for review regarding these permit conditions and attaches them to this letter. AEI would, however, like to reiterate in this letter the necessary revisions to the language, or reasons for removal of the permit condition, for each of the permit conditions discussed in Appeal Comments 15 through 20.

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Part V., Condition O.2.a.(4)

“If the used oil contains PCBs at a concentration of 2 ppm or greater, a second sample shall be obtained and tested. The second sample shall be obtained using sampling equipment that is new or has been cleaned using an appropriate decontamination procedure.”

Part V., Condition O.2.b.(1) and b.(2)

“If the Permittee elects to send used oil to a recycling facility that has not been issued a treatment permit by DTSC, the Permittee shall provide written instructions to the receiving facility that directs it to test the used oil for PCBs to ensure that the used oil load does not contain PCBs at a concentration of 2 ppm or greater. The instructions shall, at a minimum, direct the receiving facility to do all the following:

(1) Take a sample for PCBs testing directly from the Permittee’s used oil load and test the Permittee’s used oil load separately from any other load.

(2) Do not unload the truck or commingle the Permittee’s used oil load with any other used oil at the receiving facility until PCBs testing indicated that the Permittee’s load does not contain PCBs at a concentration of 2 ppm or greater.

If the Permittee elects to send the used oil to a recycling facility issued a treatment permit by DTSC and have the facility test the used oil for PCBs, the receiving facility shall comply with the provisions of its approved Waste Analysis Plan.”

Part V., Condition O.2.b.(4)

AEI requests that this condition be revised to apply only to receiving facilities that do not hold DTSC issued permits.

Part V., Condition O.2.b.(5)

This requirement is unnecessary and there is no regulatory requirement to support it. There is no need for the used oil receiving (recycling) facility to provide written test results within 24 hours. Therefore, this condition must be removed entirely from the permit.

Part V., Condition O.2.b.(6)

This condition adopts a standard of general application that is unnecessary and there is no regulatory requirement to support it. The standard for used oil is 5ppm. This standard is inconsistent with both California and federal regulatory schemes for used oil. Therefore, this condition must be removed entirely from the permit.

PaulHastings

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Part V., Condition O.2.b.(7)

This condition adopts a standard of general application that is unnecessary and there is no regulatory requirement to support it. This standard is inconsistent with both California and federal regulatory schemes for used oil. Therefore, this condition must be removed entirely from the permit.

AEI maintains that these appeal comments raise critical issues related to the permit that DTSC must review. AEI again respectfully requests that DTSC make the requested revisions to the permit conditions and reissue the permit. If you have any questions or require additional information about these comments, please feel free to contact me at (916) 552-2881 at your convenience.

Sincerely,

// original signed by //

Robert P. Hoffman

for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Attachments

RPH:eav

cc: Rosemary Domino - Advanced Environmental, Inc.
Watson Gin, DTSC
Mohinder Sandhu, DTSC
Norman Riley, DTSC

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Attachment 1

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San Francisco
Shanghai
Stamford
Tokyo
Washington DC

(916) 552-6830
roberthoffman@paulhastings.com

October 23, 2007

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

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

Re: **Petition for Review of Standardized Hazardous Waste Facility Permit
(Series B) for Advanced Environmental, Inc., 13579 Whittram Avenue,
Fontana, California 92335 (EPA ID # CAT 090025711)**

Dear Mr. Gin:

On behalf of Advanced Environmental, Inc., we are submitting this petition for review of certain conditions of the Final Series B Standardized Hazardous Waste Facility Permit ("Permit") decision for Advanced Environmental, Inc. ("AEI") issued by the Department of Toxic Substances Control ("DTSC") on September 24, 2007.

AEI submitted comments to DTSC on the draft permit in April 2005, and some of the issues raised by AEI in those comments have been resolved to AEI's satisfaction. However, since the issuance of the draft permit and AEI's subsequent comments, DTSC made numerous revisions to the language of the permit which were never communicated to AEI or made available to the public for review. When AEI learned of the possibility of additional changes, AEI's environmental manager contacted DTSC in an attempt to review and discuss them with DTSC staff. The request to review the permit language was denied and DTSC would not discuss them. Due to the fact that DTSC would not make the terms of the permit available for public comment or engage in a dialogue concerning these changes, AEI must raise its objections and concerns regarding these new changes to the permit at this time in a petition for review. AEI is also seeking review of objectionable permit conditions identified in earlier comments.

AEI has organized the issues raised in this petition by the sections in which they appear in the permit. The following are all issues for which AEI requests that DTSC exercise its discretion and review.

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Part V., Condition C.

This condition of the permit discusses the phase-in and phase-out of various tank units at the facility and states that “[t]he Permittee shall not operate any phase of Unit #2 until the Permittee has ceased operating old Units #8, #9, and #12.” This restriction is unreasonable, unnecessary and inconsistent with a transition between old and new units. Unit #8 will become Unit #11 in the new permit, and Units #9 and #12 will be taken out of service completely. Even if AEI were to operate all tanks in Units #2, #8, #9 and #12 simultaneously, they would not exceed the permitted storage capacity for the facility. Further, the secondary containment for all of the tanks in Unit #2 will be constructed prior to the construction of any of the tanks which will be placed inside of it. Therefore, AEI must be able to begin operating tanks in Unit #2 in phases, as the tanks are constructed and subsequently certified, and at the same time tanks in Units #9 and #12 are being taken out of service.

AEI also requests a change or clarification to the use of the word “operating” in this condition. This condition also states: “[t]he Permittee shall not operate new Unit #3 until it has ceased operating old Unit #11”, “[t]he Permittee shall not operate new Unit #4 until it has ceased operating old Unit #10”, “[t]he Permittee shall not operate new Unit #5 until it has ceased operating Old Unit #10.” These restrictions, if literally applied, are unreasonable, unnecessary and inconsistent with a transition between old and new units. AEI does not understand DTSC’s reasoning for restricting the operation of new Units #3, #4, and #5 until old Units #11 and #10 have ceased operating. Even if AEI were to operate all of the tanks in Units #1, #3, #4, #5, #10 and #11 simultaneously, they would not exceed the permitted storage capacity for the facility. Therefore, AEI must be allowed to have waste being stored in tanks in old Units #10 and #11 when they begin operating new Units #3, #4 and #5. However, once new Units #3, #4 and #5 begin operating, AEI will not receive any more waste into Units #10 and #11.

AEI’s requests that this condition be revised to state:

“ The Permittee may begin operating phases of Unit #2 as the tanks are constructed and subsequently certified. The Permittee shall not operate new Unit #3 until it has ceased receiving waste in old Unit #11. The Permittee shall not operate new Unit #4 until it has ceased receiving waste in old Unit #10. The Permittee shall not operate new Unit #5 until it has ceased receiving waste in old Unit #10.”

Part V., Condition E.

The condition states: “[t]he Permittee shall not accept or store any RCRA hazardous waste.” While AEI is not permitted to accept RCRA hazardous wastes generated off-site, there is the possibility that RCRA hazardous wastes could be generated on-site as part of maintenance operations (e.g., painting of tanks). Any RCRA hazardous wastes generated

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on-site would need to be accumulated (i.e., stored) pursuant to the requirements of 22 CCR 66262.34 prior to shipment off-site to a hazardous waste management facility permitted to receive RCRA hazardous wastes. Therefore, this condition must be revised to clarify that AEI may store any RCRA hazardous wastes which may be generated on-site. AEI requests that this condition be revised to state:

“The Permittee shall not accept or store any RCRA hazardous wastes generated off-site.”

Part V., Condition M.6.

This condition states: “[t]he Permittee shall log the results of all tests performed and the documents shall be retained for at least three (3) years at the facility for inspection.” AEI requests clarification of what is meant by the term “log”. AEI assumes the term “log” means “record” in the operating record. AEI records the laboratory test results on the receiving ticket for a particular shipment of waste received. This receiving ticket, with laboratory results attached, as well as the manifest(s) used for the particular shipment, becomes part of the operating record for the facility, as required by 22 CCR 66264.73. AEI requests that this condition be revised to state:

“The Permittee shall maintain written results of all tests performed in the facility operating record, and the documents shall be retained for at least three (3) years at the Facility for inspection.”

Part V., Condition N.2.c.(1)(A)

This condition states: “[t]he Permittee may rebut the rebuttable presumption pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b) or by complying with conditions N.2.c.(1)(B) through (G) below, which are the only other means of demonstrating that the used oil does not contain halogenated hazardous waste for the purposes of California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) and this Permit.”

22 CCR section 66279.90(b) specifies four test methods that may be used to test used oil for halogens: Method 8010B, Method 8021A, Method 8240B, Method 8260B. EPA SW-846 test methods are often updated and provided with updated nomenclature to indicate a new and approved version of the same test method. However, 22 CCR 66279.90(b) is not often revised to list the approved updated versions of the test methods listed in that section. For example, EPA has recently adopted test method 8021B to test used oil for halogens. EPA test method 8021B is an updated and approved version of EPA test method 8021A. While 22 CCR 66279.90(b) does not specifically list EPA test method 8021B, its use should be allowed by DTSC due to the fact that it is simply an updated and

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approved version of EPA test method 8021A. Therefore, AEI requests that this condition be revised to state:

"[t]he Permittee may rebut the rebuttable presumption pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b), including updated and approved versions of the test methods specified in section 66279.90(b) which have been approved by EPA, or by complying with conditions N.2.c.(1)(B) through (G) below, which are the only other means of demonstrating that the used oil does not contain halogenated hazardous waste for the purposes of California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) and this Permit."

Part V., Condition N.2.c.(1)(B)

This condition states: "[t]he Permittee shall obtain from the transporter a copy of the Generator's Waste Profile Worksheet (GWPW), attached to the manifest." AEI will not rebut the presumption regarding high halides unless the generator provides analytical prepared by a laboratory certified in accordance with the Environmental Laboratory Accreditation Program by using the test methods specified in California Code of Regulations, title 22, section 66279.90(b). Thus, the permit condition should require that the analytical results used to rebut the presumption be attached to the manifest.

In addition, the GWPW and the analytical used to rebut the presumption are not attached to the manifest. Those documents may accompany the load or precede the receipt of the load. Thus the reference to "attached to the manifest" must be removed. These documents may also be provided by the generator. Thus, a reference to the generator must be included. AEI requests that this condition be revised to state:

"The Permittee shall obtain from the generator or transporter a copy of the Generator's Waste Profile Worksheet (GWPW) and the analytical results for the halogen content used to rebut the presumption."

Part V., Condition N.2.c.(1)(C)

This condition states: "The Permittee shall review this documentation and confirm in the operating log that the GWPW; 1) is less than 365 days old, ii) is based on a representative sample of the waste, and iii) was analyzed by a laboratory certified in accordance with the Environmental Laboratory Accreditation Program by using the test methods specified in California Code of Regulations, title 22, section 66279.90(b)."

First, AEI objects to the term "confirm in the operating log". The GWPW which accompanies the manifest contains the date that it was last annually renewed. The person receiving the shipment of waste for AEI can therefore verify that the GWPW is less than

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365 days old without further reference to a log or elsewhere in the operating record. Further, in the future AEI's electronic waste tracking system will electronically alert the proper personnel before the profile is due to be renewed each year.

Second, AEI objects to the requirement that AEI confirm that the GWPW was based on a representative sample of the waste. AEI has no means of confirming that the generator's waste analysis was based on a representative sample of the waste, and should not be required to do so. AEI cannot force the generators to properly comply with the waste identification requirements of 22 CCR section 66262.11. Only DTSC and the Certified Unified Program Agency can enforce the regulatory requirements for generators. AEI must rely on the generator's legal obligation to properly comply with waste identification requirements. The waste identification requirements of 22 CCR section 66262.11(b)(1) require that the waste is tested "according to the methods set forth in article 3 of chapter 11 of this division..." Article 3 of chapter 11 requires that generators follow the testing methods in the U.S. Environmental Protection Agency's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods." Each method contained in this manual describes the type of sample which is required to properly run the test method. Therefore, this requirement to confirm that the GWPW was based on a representative sample of the waste must be removed.

Third, the scope of the requirement for analytical prepared by a laboratory certified in accordance with the Environmental Laboratory Accreditation Program is overbroad. The only analytical that must be prepared by a laboratory certified in accordance with the Environmental Laboratory Accreditation Program is the analytical used to rebut the presumption. Thus, the scope of the analytical requirement must be clarified.

AEI requests that this condition be revised to state:

"The Permittee shall review this documentation and confirm that the GWPW is less than 365 days old, and that the halogen content specified on the analytical used to rebut the presumption was prepared by a laboratory certified in accordance with the Environmental Laboratory Accreditation Program by using the test methods specified in California Code of Regulations, title 22, section 66279.90(b)."

Part V., Condition N.2.c.(1)(E)

This condition states: "[t]he Permittee shall review the documentation discussed above and enter into the operating log the reason that the rebuttable presumption can be rebutted pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)." The requirement to enter into the "operating log" the reason that the rebuttable presumption can be rebutted is redundant and unnecessary. A generator may sign a separate Waste Oil Certification letter certifying that its oil has been rebutted per 22 CCR sections 66279.10(b) (1) and (b) (2) and that the used oil has not been mixed with any

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halogenated hazardous wastes. Such letters accompany the GWPW and the manifest or are submitted in advance. For used oils containing greater than 1,000 parts per million ("ppm") of halogens, AEI's review of this certification statement is an appropriate procedure to rebut the presumption. The analytical results (as well as the manifest and GWPW) are maintained in the operating record. Therefore, this condition should be revised to properly reflect the procedure used to rebut the presumption and record documentation in the operating record. AEI requests that this condition be revised to state:

"The Permittee shall review the documentation discussed above and place it into the operating record. This documentation must contain a certification made by the generator that the used oil was not mixed with any halogenated hazardous wastes so that the rebuttable presumption may be rebutted pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)."

Part V., Condition N.2.c.(1)(A) and (2)

This condition states: "[t]he Permittee may rebut the rebuttable presumption pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b) or by complying with conditions N.2.c.(1)(B) through (G) below, which are the only other means of demonstrating that the used oil does not contain halogenated hazardous waste for the purposes of California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) and this Permit."

22 CCR 66279.90(b) specifies four test methods that may be used to test used oil for halogens: Method 8010B, Method 8021A, Method 8240B, Method 8260B. EPA SW-846 test methods are often updated and provided with updated nomenclature to indicate a new and approved version of the same test method. However, 22 CCR 66279.90(b) has not been revised to list the updated and approved versions of the test methods listed in that condition. For example, AEI uses EPA test method 8021B to test used oil for halogens. EPA test method 8021B is an updated and approved version of EPA test method 8021A. While 22 CCR 66279.90(b) does not specifically list EPA test method 8021B, its use should be allowed by DTSC due to the fact that it is simply an updated and approved version of EPA test method 8021A. Therefore, AEI request that this condition be revised to state:

"[t]he Permittee may rebut the rebuttable presumption pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b), including updated and approved versions of the test methods specified in California Code of Regulations, title 22, section 66279.90(b) approved by EPA, or by complying with conditions

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N.2.c.(1)(B) through (G) below, which are the only other means of demonstrating that the used oil does not contain halogenated hazardous waste for the purposes of California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2) and this Permit."

Part V., Condition N.2.c.(3)

This condition states: "Option 3. For used oil received from multiple generators (Consolidated Loads) and when the transporter provides fingerprint test data for each generator using EPA Test Method 9077." The parenthetical reference to "(Consolidated Loads)" creates an implication that the category refers to shipments arriving using a consolidated manifest. Shipments received by AEI from multiple generators are not always "consolidated loads" where only a consolidated manifest was used. AEI receives shipments from multiple generators under the following three scenarios:

- The shipment (truck load) arrives under one or more consolidated manifests;
- The entire shipment is comprised of used oil from multiple generators, with each generators portion having its own manifest;
- The shipment is comprised of a combination of used oil under a one or more consolidated manifests and used oil from multiple generators, with each generators portion having its own manifest.

Therefore, this condition must be revised to eliminate any implication that used oil received from multiple generators is limited to a consolidated load using a consolidated manifest.

AEI requests that this condition be revised to state:

"Option 3. For used oil received from multiple generators and when the transporter provides fingerprint test data for each generator using EPA Test Method 9077."

Part V., Condition N.2.c.(3)(B)(i)

This condition states: "The Permittee shall obtain the fingerprint test data referenced in N.2.c.(3) above from the transporter; and

- (i) For any generator whose used oil has a concentration that exceeds 1000 ppm total halogens, the Permittee shall receive and have on file proper documentation and follow the procedures in option 1 above."

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This condition incorporates the problems identified in Option 1, which further emphasized the need to cure those problems. Our appeal of those conditions discussed above is incorporated herein.

Part V., Condition N.2.c.(4)

This condition states: "Option 4. For used oil received from multiple generators (Consolidated Loads) and when the transporter cannot provide fingerprint data for each generator using EPA Test Method 9077, but the transporter has collected individual samples from each generator and retained the samples along with the load."

For the same reasons described above for Part V., Condition N.2.c.(3) regarding the three scenarios under which AEI may receive used oil from multiple generators, this condition must be revised so that used oil received from multiple generators is not restricted to consolidated loads using a consolidate manifest. AEI requests that this condition be revised to state:

"Option 4. For used oil received from multiple generators, and when the transporter cannot provide fingerprint data for each generator using EPA Test Method 9077, but the transporter has collected individual samples from each generator and retained the samples along with the load."

Part V., Condition N.2.c.(4)(A)(ii)

This condition states: "For any generator whose used oil has a concentration that exceeds 1000 ppm total halogens, the Permittee shall receive and have proper documentation on file prior to acceptance and follow the procedures in option 1 above."

This condition incorporates the problems identified in Option 1, which further emphasized the need to cure those problems. Our appeal of those conditions discussed above is incorporated herein.

Part V., Condition N.2.c.(5)

This condition states: "Option 5. For used oil received from multiple generators (Consolidated Loads) and when the transporter cannot provide fingerprint data or retained samples as discussed in Options 3 and 4 above, the Permittee may rebut the presumption only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b) accompanied by a determination that the rebuttable presumption is rebutted pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)."

First, for the same reasons described above for Part V., Condition N.2.c.(3) and Part V., Condition N.2.c.(4) regarding the three scenarios under which AEI may receive used oil

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from multiple generators, this condition needs to be revised so that used oil received from multiple generators is not restricted to consolidated load using a consolidate manifest.

Second, AEI objects to the permit condition's requirement that analytical data be "accompanied by a determination that the rebuttable presumption is rebutted pursuant to California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)." 22 CCR section 66279.10(b) states that persons may rebut the presumption by "demonstrating through analytical testing or other means of demonstration that the used oil does not contain such hazardous waste." According to this section, and AEI's own procedures, the analytical test results themselves are the determination that the presumption can be rebutted. These analytical results are also placed in the facility operating record. Therefore, there is no need to create an extra "determination" document that is not called for by the regulations. Accordingly, this requirement should be deleted. AEI requests that this condition be revised to state:

"Option 5. For used oil received from multiple generators, and when the transporter cannot provide fingerprint data or retained samples as discussed in Options 3 and 4 above, the Permittee may rebut the presumption only through analytical testing in accordance with the test methods specified in California Code of Regulations, title 22, section 66279.90(b) and pursuant to the procedures and criteria described in California Code of Regulations, title 22, section 66279.10(b), (b)(1) and (2)."

Part V., Condition O.2.

This condition states: "All outgoing used oil shall be tested for PCBs to ensure that the used oil load does not contain PCBs at a concentration of 2 ppm or greater. The Permittee shall test the used oil from each storage tank for PCBs pursuant to the procedures specified in Condition O.2.a below or the Permittee shall comply with the requirements in Condition O.2.b, which provide for the receiving facility to test the used oil for PCBs."

AEI appeals the alternative testing condition set out in the permit. This provision allows only 2 methods for testing for PCBs. Specifically, AEI should not be limited to testing an onsite storage tank or requiring a receiving facility to test each individual truck for PCBs. AEI sends used oil to the DeMenno/Kerdoon recycling facility in Compton. The D/K facility consolidates individual loads of used oil into receiving tanks and tests those tanks for PCBs as specified in the facility Waste Analysis Plan. It is impractical, unnecessary and unfair to require receiving facilities permitted by DTSC to test AEI's used oil on a truck by truck basis. This is inconsistent with D/K's existing permits and will result in the facility being required to comply with two overlapping sets of PCB testing requirements. In the alternative, it is unfair to AEI to for either test onsite or require D/K to apply a different testing protocol than that specified in its approved WAP. This places AEI at a

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competitive disadvantage with transporters who otherwise can take their oil directly to D/K or other receiving facilities.

We note that our firm has submitted comments on behalf of D/K in their appeal of the American Oil permit that has raised numerous environmental and regulatory issues regarding a similar PCB testing procedure. We hereby incorporate those comments and the policy arguments and legal objections raised therein by reference and attach those letters hereto. The permit should acknowledge the existing in-state management scheme and allow waste to be tested at permitted in-state facilities pursuant to the facility WAP. It may make sense to require out-of-state facilities to test individual trucks because the oil could legally be commingled with high PCB oil. Or it may make sense to require trucks bound for out-of-state facilities to be tested on a truck by truck basis for similar reasons. It makes no sense to do so for AEI, which sends all of its oil to D/K.

AEI requests that this condition or Condition O.2.b be revised to allow AEI to send used oil to D/K and be tested for PCBs according to the facility's WAP.

Part V., Condition O.2.a(4)

This condition states: "If the used oil contains PCBs at a concentration of 2 ppm or greater, a second sample shall be obtained and tested after cleaning the sampling equipment using the permanganate cleanup procedure." This permit condition does not allow for use of another separate piece of sampling equipment. There is no reason to require the second sample to be obtained using the same piece of sampling equipment which was used to collect the first sample. The only standard that should be specified is that any additional samples must be taken using sampling equipment that has been cleaned using the permanganate cleaning procedure. Therefore, this condition must be revised to reflect this necessary sampling flexibility. Also, pursuant to TSCA regulations, Stoddard solvent should be used to decontaminate equipment contaminated with PCBs, not permanganate. AEI requests that this condition be revised to state:

"If the used oil contains PCBs at a concentration of 2 ppm or greater, a second sample shall be obtained and tested. The second sample shall be obtained using sampling equipment that is new or has been cleaned using an appropriate decontamination procedure"

Part V., Condition O.2.b.(1) and b.(2)

These conditions state: "If the Permittee elects to have the receiving facility test the used oil for PCBs and the receiving facility agrees to test the used oil for PCBs in accordance with the Condition O, the Permittee shall provide written instructions to the receiving facility that directs it to test the used oil for PCBs to ensure that the used oil load does not contain PCBs at a concentration of 2 ppm or greater. The instructions shall, at a minimum, direct the receiving facility to do all the following:

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(1) Take a sample for PCBs testing directly from the Permittee's used oil load and test the Permittee's used oil load separately from any other load.

(2) Do not unload the truck or commingle the Permittee's used oil load with any other used oil at the receiving facility until PCBs testing indicated that the Permittee's load does not contain PCBs at a concentration of 2 ppm or greater."

As noted above, AEI sends its used oil to D/K. The conditions in Part V., Condition O.2.b.(1) and (b)(2) are inconsistent with D/K's WAP. It is inappropriate for DTSC to require AEI to provide instructions to a permitted hazardous waste facility to handle waste in a manner inconsistent with its WAP. It is not an appropriate response to state that AEI can test the waste onsite. While true, that position places AEI in a different position from other D/K customers and could result in costs not imposed on other used oil management companies.

In addition, as noted in comments submitted on behalf of D/K in the American Oil appeal, the standards imposed in these conditions also constitutes an underground regulation with potentially significant environmental consequences due to the failure to comply with the APA and CEQA.

AEI requests that these conditions be revised to state:

"If the Permittee elects to send used oil to a recycling facility that has not been issued a treatment permit by DTSC, the Permittee shall provide written instructions to the receiving facility that directs it to test the used oil for PCBs to ensure that the used oil load does not contain PCBs at a concentration of 2 ppm or greater. The instructions shall, at a minimum, direct the receiving facility to do all the following:

(1) Take a sample for PCBs testing directly from the Permittee's used oil load and test the Permittee's used oil load separately from any other load.

(2) Do not unload the truck or commingle the Permittee's used oil load with any other used oil at the receiving facility until PCBs testing indicated that the Permittee's load does not contain PCBs at a concentration of 2 ppm or greater.

If the Permittee elects to send the used oil to a recycling facility issued a treatment permit by DTSC and have the facility test the used oil for PCBs, the receiving facility shall comply with the provisions of its approved Waste Analysis Plan."

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Part V., Condition O.2.b.(4)

This condition states, "Write the manifest number on the written test results for the used oil that was tested."

As noted above, AEI sends its used oil to D/K. The conditions in Part V., Condition O.2.b.(4) is inconsistent with D/K's WAP. It is inappropriate for DTSC to require AEI to provide instructions to a permitted hazardous waste facility to handle waste in a manner inconsistent with its WAP. It is not an appropriate response to state that AEI can test the waste onsite. While true, that position places AEI in a different position from other D/K customers and could result in costs not imposed on other used oil management companies.

AEI requests that this condition be conformed to apply only to receiving facilities that do not hold DTSC issued permits.

Part V., Condition O.2.(b)5

This condition states: "Provide the Permittee with written test results within 24 hours after the test has been performed. The written test results shall clearly show whether or not the used oil loads contains PCBs at a concentration of 2 ppm or greater."

This requirement is unnecessary and there is no regulatory requirement to support it. There is no need for the used oil receiving (recycling) facility to provide written test results within 24 hours. Therefore, this condition must be removed entirely from the permit.

Part V., Condition O.2.b.(6)

This condition states: "Reject the load if the test results show that the used oil contains PCBs at a concentration of 2 ppm or greater."

This standard adopts a standard of general application that is unnecessary and there is no regulatory requirement to support it. The standard for used oil is 5ppm. This standard is inconsistent with both California and federal regulatory schemes for used oil. Therefore, this condition must be removed entirely from the permit.

Part V., Condition O.2.b.(7)

This condition states: " Provide a signed certification, under penalty of perjury, for each set of test results, to the Permittee stating that the receiving facility has followed all of the Permittee's written instructions for each used oil load received from the Permittee."

This standard adopts a standard of general application that is unnecessary and there is no regulatory requirement to support it. This standard is inconsistent with both California

Paul Hastings

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and federal regulatory schemes for used oil. Therefore, this condition must be removed entirely from the permit.

Part V., Condition U.2.

This condition states: "The Permittee shall completely empty the wastes from the tank and then pressure wash and/or steam clean the inside of the tank to remove all visible waste residues before the usage is changed." With respect to used oil and oily water, there is no reason to pressure wash or steam clean a tank before switching tank service between these wastes. These waste streams are all compatible petroleum/oil-based wastes that have met acceptance standards. AEI requests that DTSC only require these tanks to be completely emptied prior to switching service between these wastestreams. Further, pressure washing and/or steam cleaning of a used oil, oily waste, or contaminated petroleum products tanks unnecessarily creates more hazardous waste which must then be properly managed. AEI sees no need for this requirement and is confused as to why DTSC has required this type of tank cleaning when switching between petroleum/oil-based waste streams.

AEI requests that this condition be revised to state:

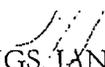
"The Permittee shall completely empty the wastes from the tank to remove all visible waste residues before the usage is changed."

AEI believes that this petition for review raises important compliance issues related to the permit for the facility that DTSC must, in its discretion, review. AEI respectfully requests that DTSC make the changes requested and reissue the permit or grant this petition for review on all of the issues raised that are not accommodated and set a briefing schedule for the appeal pursuant to 22 CCR 66271.18(c). If you would like to discuss this petition for review, you may feel free to contact me at (916) 552-2881 at your convenience.

PaulHastings

Watson Gin, Deputy Director
October 23, 2007
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Sincerely, 
// original signed by //

Robert P. Hoffman 
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

RPH:cav

Attachments

cc: Raymond LeClerc, DTSC
Rosemary Domino, Advanced Environmental, Inc.

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Attachment 2

Atlanta
Beijing
Brussels
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Stamford
Tokyo
Washington, DC

(415) 856-7059
jodismith@paulhastings.com

May 22, 2006

26635.80319

VIA E-MAIL TO AWONG@DTSC.CA.GOV

Alfred Wong
Project Manager
Department of Toxic Substances Control
700 Heinz Avenue, Suite 300
Berkeley, CA 94710

Re: DeMenno/Kerdoon Comments on American Oil Company Draft Standardized
Hazardous Waste Facility Permit

Dear Mr. Wong:

The following comments on the Draft Standardized Hazardous Waste Facility Permit ("Permit") for the American Oil Company ("American Oil") are being submitted on behalf of DeMenno/Kerdoon ("D/K"). D/K wishes to provide the following comments on this Permit in the context of DTSC's recent aborted effort to call in permit modifications for PCB testing at all in-state used oil transfer facilities. D/K believes that the requirement for PCB testing on each truck-to-truck transfer, without regard for the destination of the waste, would set a precedent for other transfer facilities. Implementation of this proposal at all in-state transfer facilities would adversely affect the California used oil industry and California consumers. D/K proposes that DTSC instead limit the mandatory PCB testing to all tankers of used oil that will be sent out of state. If the oil will be processed in-state at a permitted treatment and recycling facility, the oil should be tested at the in-state facility consistent with that facility's WAP. D/K also proposes that DTSC enhance compliance with Health and Safety Code Section 25250.09.

At D/K's Compton facility, each tank receiving used oil must be tested to determine whether the used oil contains less than 2 ppm PCBs. If a tank contains PCBs at a concentration of 2 ppm or greater, D/K must trace the source of the PCBs back to the individual shipment by testing samples that are collected from each of the incoming trucks prior to transferring their loads into a tank. If any of the individual loads contains PCBs at a concentration of 5 ppm or greater, D/K must dispose of the entire tank as PCB-containing hazardous waste.

In its recent call-in letters to used oil transfer facilities, DTSC sought to impose PCB testing requirements on storage tanks prior to shipment to recycling facilities that are

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similar to the PCB testing on truck-to-truck transfers that it now proposes at American Oil. The conditions requiring PCB testing for each truck-to-truck transfer in this Permit are of grave concern to D/K because requiring such testing for used oil that is destined for in-state recycling is unnecessary, highly impractical and would pose tremendous delays in routine used oil transportation.

D/K understands that the proposed testing requirement is appropriate for oil that is being transported out-of-state because the standards for used oil are so much less stringent outside of California. However, imposing blanket PCB testing requirements on each transfer facility will discourage rather than encourage compliance with PCB testing requirements. Once a transporter drives to another state, the transporter is only required to meet the federal 50 ppm standard under TSCA. Deleting the option of sending the used oil to an in-state facility without testing will encourage transporters to flaunt the California regulations and ship waste out of state. As oil prices continue to increase with no end in sight, there is even more incentive for transporters to take oil out of state. Used oil can be used in a variety of ways under the federal regulations. Used oil can be reconditioned by removing impurities, introduced into a refining process as a feedstock to produce gasoline and coke, or processed and burned for energy recovery. Thus, oil that does not meet California standards for used oil and must be managed as a hazardous waste in California may be a valuable commodity in states with less stringent environmental regulations. If DTSC requires testing on each tank or truck load that is transferred to another truck, transporters will be more likely to simply make the Section 25250.9 certifications and then haul the used oil to another state for recycling.

Under the proposed requirements included in American Oil's draft permit, if a truck is destined for in-state recycling, that truck would be required to sit idle at the transfer station until a sample of the used oil can be collected and tested. The practical reality is that in many cases, there will be a lapse of two to three days between the time a truck reaches a transfer station and the time the test results of the truck's contents are received. Any number of scheduling issues play into this, including the timing of a truck's arrival and the analytical schedule and capacity of the contracted laboratory. In the meanwhile, the truck must remain idle and still loaded at the transfer facility until the testing is completed. Rather than wait up to several days for a load to be tested, the temptation will be to drive smaller trucks directly to a neighboring state to unload the oil. If this precedent is applied to tanks at transfer facilities, then bulking will not occur and individual trucks will be similarly incentivized to drive directly out-of-state. The end result of sending used oil with a high PCB content to other states is that an increasing proportion of used oil generated in California will be managed at out-of-state facilities with reduced environmental protections.

In addition, as more transporters take used oil out of the state without testing it for PCBs, there will be a huge negative economic impact on the transporters and recyclers who

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manage used oil in California. Inevitably, used oil meeting the recycled oil criteria will be trucked out of state by transporters unwilling to keep their trucks idle for several days while they wait for test results. As a result, California consumers will be impacted by higher costs for and reduced availability of recycled oil.

Health and Safety Code Section 25250.9 was adopted to ensure used oil generators are informed that their used oil may be sent to an out-of-state facility that does not meet stringent hazardous waste management standards when choosing whether to process used oil at a California facility or to send the used oil to another state. This statute evinces the Legislature's desire to keep used oil in-state and managed as hazardous waste. California standards include secondary containment, waste composition analysis and financial assurances. This legislative policy has helped prevent used oil from being dumped and it has successfully promoted used oil recycling. Enhanced enforcement of Section 25250.9 would ensure that all used oil is properly tested at California treatment and recycling facilities, making it unnecessary to test used oil at transfer facilities unless that oil will be transported to another state.

Additionally, D/K takes issue with the alternative testing condition set out in the permit. Specifically, it is impractical and unnecessary to require receiving facilities to test American Oil's used oil for PCBs as stated in Section V.I.2.b. Permitted California treatment and recycling facilities are required to test the used oil in accordance with their WAPs. D/K opposes the imposition of different testing requirements on California treatment and recycling facilities as proposed in American Oil's Permit. This is inconsistent with the facilities existing permits and will result in the receiving facility being required to comply with two overlapping sets of PCB testing requirements. As noted above, the draft permit should acknowledge the existing in-state management scheme and allow waste to be tested at permitted in-state facilities pursuant to the facility WAP. It may make sense to require out-of-state facilities to test individual trucks because the oil could legally be commingled with high PCB oil. However, it may make more sense to simply require trucks bound for out-of-state facilities to be tested on a truck by truck basis. This especially true given California's lack of jurisdiction over out-of-state facilities.

As a practical matter, truck-to-truck transfers only occur when a transporter is taking used oil out of state. Consequently, requiring PCB testing on truck-to-truck transfers, such as DTSC proposed to require at the American Oil transfer facility, may not affect the in-state management of used oil. However, D/K is concerned that if DTSC does not acknowledge the in-state option of having used oil tested at the treatment and/or recycling facility, then it will set the precedent for applying these standards to transfer facilities. D/K is also very troubled by the proposal to change practices at existing in-state facilities. This is either ill-conceived or a back door attempt to change existing facility WAPs without associated permit modifications. In either event, it is bad policy. A better model for enforcement would be to expressly require PCB testing requirements only on used oil that is destined for transport to an out-of-state facility.

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May 22, 2006
Page 4

D/K greatly appreciates your consideration of these comments.

Sincerely,

Original signed by Jodi Smith

Jodi Smith
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosure

cc: Bruce DeMenno, DeMenno/Kerdoon
Rosemary Domino, D/K Environmental
Mohinder Sandhu, Department of Toxic Substances Control

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Atlanta
Beijing
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Chicago
Hong Kong
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Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Stamford
Tokyo
Washington, DC

(415) 856-7059
jodismith@paulhastings.com

January 12, 2007

26635.00011

VIA E-MAIL WGIN@DTSC.CA.GOV AND U.S. MAIL

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

Re: **Petition for Review of Final Standardized Hazardous Waste Facility
Permit for American Oil Company: 13736-13740 Saticoy Street, Van Nuys,
CA 91402 (EPA ID No. CAD981427669)**

Dear Mr. Gin

The following petition for review of the Draft Standardized Hazardous Waste Facility Permit ("Permit") for the American Oil Company ("American Oil") is being submitted on behalf of Demenno/Kerdoon ("D/K"). D/K submitted comments on American Oil's draft permit on May 22, 2006 specifically concerning the requirement in the draft permit for PCB testing on each truck-to-truck transfer of used oil, without regard for the destination of the waste. The conditions requiring PCB testing for each truck-to-truck transfer in this Permit remain a serious concern to D/K. The requirement for such testing for used oil that is destined for in-state recycling is unnecessary. Moreover, it establishes a precedent, which if applied generally, would pose an obstacle to the routine collection and transportation of used oil in California. If this requirement were to be applied at all transfer operations, the end result would be to substantially increase truck traffic and miles driven in rural areas and increase truck waiting time and idling emissions in urban areas. This huge environmental impact would vastly increase the environmental footprint of DTSC's regulatory program. This change in testing protocol, and associated impacts, simply is not justified given that the current in-state testing requirements are sufficient to catch the minutely low incidence rate of PCBs in used oil.

D/K proposed in their comments that DTSC instead limit the PCB testing requirement to American Oil's tankers of used oil that will be sent out-of-state for recycling. D/K continues to believe that this would most appropriately balance DTSC's desire to reduce the potential for PCB contamination in used oil without causing a detrimental impact on the used oil hauling industry and the environment. In its Response to Comments document for American Oil's Permit, DTSC stated that the "permit conditions also provide flexibility in that it allows AOC either to test the outgoing oil for PCBs or to

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instruct the receiving facility to test the tanker truck containing the used oil load from AOC for PCBs." While D/K applauds DTSC's effort to provide permittees with the flexibility to most efficiently address site-specific and situation-specific conditions, D/K believes that the requirement for testing of truck-to-truck transfers of used oil for PCBs, when the used oil will be recycled in California, is truly unnecessary and is an issue that DTSC should, in its discretion, review. 22 Cal. Code Regs. §66271.18. The need for this requirement is not supported by substantial evidence and the consequences both for the in-state used oil industry and on the environment make this testing requirement a poor policy decision and an abuse of discretion.

As D/K pointed out in its comments, the current requirements at in-state recycling facilities for testing each tank receiving used oil for PCBs are effective and sufficient to identify PCB-containing oil and to ensure that PCB-contaminated oil is properly disposed of as hazardous waste. The PCB testing requirements that DTSC wishes to impose on American Oil would not significantly increase the efficacy of existing testing protocols – but would have significant unintended consequences in several ways.

DTSC underestimates the impact that requiring testing at transfer facilities will have on the used oil industry in rural areas. Used oil in rural areas is transported predominately in smaller bobtail trucks that must be filled and emptied on a daily basis in order for the transporters to remain economically viable. At the same time, most rural transfer facilities have only one receiving tank and are simply too small to have, as DTSC suggests, onsite laboratory testing facilities. Therefore, if DTSC applies the American Oil precedent at all transfer operations, each of these smaller transfer facilities will be required to lock down their tanks during the time it takes to drive a sample to the nearest regional laboratory and obtain analytical test results. As a practical matter, a transfer facility located in a rural area would be required to lock down its receiving tank for several days at a time. This will have a devastating effect on the viability of rural transfer facilities and the transporters that utilize them.

Rural transporters cannot remain in business unless they can unload oil on a daily basis. Rather than waiting idle for the local transfer facility to unlock its tank, transporters will be forced to drive to larger receiving facilities, most of which are located in urban areas. As a result, rural bobtail transporters will substantially increase the miles they must drive on a daily basis to pick up and deliver used oil. Both the number of trucks on the roads and the number of miles driven will increase significantly.

Moreover, the influx of rural transporters required to travel to larger facilities to deliver oil will decrease the unloading efficiency of larger facilities. D/K already has a large number of trucks on average queued up to unload every day. The addition of multiple bobtail loads per day from rural areas would increase the wait time for deliveries at D/K, and the corresponding decrease in efficiency for drivers would be significant.

Watson Gin, Deputy Director
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More importantly, in addition to decreasing the efficiency of the unloading operations, the increase in truck traffic would have a significant effect both on the local traffic on the roads and on truck emissions in the vicinity of receiving facilities. The long-term projected impact of the proposed PCB testing requirements would be to increase the impact that recycling facilities have on neighboring communities. D/K is committed to reducing the impact that its facilities have on the surrounding communities. Impacts due to increased traffic and longer wait times would be counterproductive to efforts to minimize the environmental impact of recycling operations. These impacts will be even more strongly felt at those facilities that are voluntarily testing incoming trucks for PCBs. These are real environmental and safety issues as opposed to the hypothetical threat underlying the proposed testing requirement.

D/K believes that DTSC has not considered the bigger picture in analyzing the ramifications that the PCB testing requirements contained in American Oil's Permit would have if applied at on small rural and large urban operations in the used oil industry. The current protocols used to test for PCBs in oil are already effective to eliminate PCBs in used oil destined for the California used oil market. Rather than significantly reducing PCB contamination in used oil, DTSC's testing protocol merely serves to impact DTSC's environmental footprint.

The application of the proposed testing requirement to oil bound for in-state recycling represents a fundamental change in DTSC regulatory policy. If intended to be applied statewide, it is a standard of general application that is subject to the rulemaking requirements of the APA. The rulemaking process is the appropriate mechanism for making such significant policy decisions. That process would allow for the unforeseen consequences of a such a significant change in DTSC policy to be fully vetted and reviewed under CEQA.

Therefore, we are appealing to DTSC to review the requirement in the American Oil permit for PCB testing of truck-to-truck transfers of used oil that will be recycled in California. D/K believes that the testing requirement is appropriate for used oil that is being transported out-of-state due to the fact that the standards for used oil are much less stringent outside of California. Any other facilities that have been subjected to a generic PCB testing requirement should be granted relief for used oil destined for in-state recycling. The level of regulation and its associated costs should be crafted to match the need and the benefit.

Watson Gin, Deputy Director
January 12, 2007
Page 4

D/K greatly appreciates your consideration of this petition for review of the PCB testing requirement in the American Oil Permit. If you have any questions or require additional information, please do not hesitate to contact me.

Very truly yours,

// original signed by //

JOHN J. JAMES
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

SJS:eav

cc: Bruce Demenno, Demenno/Kerdoon
Rosemary Domino, Asbury Environmental
Mohinder Sandhu, Dept. of Toxic Substances Control
Alfred Wong, Dept. of Toxic Substances Control

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**BEFORE THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES
CONTROL**

Order Granting Petition for Review of Two Conditions and Denying Review of Other Conditions for Decision for American Oil Company, EPA Id. No. CAD 981 427 669.

Order No. HWCA 06/07-P001

I. INTRODUCTION

Pursuant to California Department of Toxic Substances Control ("DTSC") Order Number HWCA 06/07-P001 ("Order") issued May 1, 2007 granting a petition for review the final permit decision for the American Oil Company storage and treatment facility located at 13736-13740 Saticoy Street, Van Nuys, California, DeMenno/Kerdoon ("D/K") hereby submits this brief. In its Order, DTSC granted D/K's petition for review of the provision within the Permit's "Special Conditions Applicable to All Permitted Units", Part V, Item I., concerning the requirement to conduct polychlorinated biphenyl ("PCB") testing at used oil transfer facilities.

II. STATEMENT OF REASONS

D/K submitted comments to DTSC on the American Oil Company's Draft Standardized Hazardous Waste Permit on May 22, 2006, and submitted a petition for review of the Final Standardized Hazardous Waste Permit on January 12, 2007. In both instances, D/K's concerns were the same – that DTSC is implementing a policy that changes the PCB testing requirements at used oil transfer facilities in a way that will have adverse unintended consequences for the used oil industry and the environment; and because the PCB testing requirements amount to a statewide change in the regulation of used oil that must be addressed through the rulemaking procedures established in the California Administrative Procedures Act

1 (“APA”) and the analytical framework of the California Environmental Quality Act (“CEQA”).
2 The imposition of uniform new PCB testing requirements at used oil transfer facilities without
3 comprehensive public review and comment constitutes project splitting and violates the principles
4 of transparency and open government.

5 A. DTSC’s PCB testing requirements at used oil transfer facilities will have adverse
6 unintended consequences for the used oil industry and the environment.
7

8 As D/K discussed in its Comments and its Petition for Review, there are important
9 policy concerns for California associated with DTSC’s requirement that used oil transfer facilities
10 test for PCB’s regardless of the destination of the used oil. The application of the proposed testing
11 requirement to used oil bound for in-state recycling represents a fundamental change in DTSC
12 regulatory policy. This policy change was effectuated by an internal DTSC memorandum issued
13 by Watson Gin, Deputy Director for Hazardous Waste Management Program, to Ray Leclerc,
14 Team Leader, Permit Renewal Team, dated March 15, 2007 (“DTSC PCB Policy”).¹ Rather than
15 reducing PCB contamination in waste oil, DTSC’s testing protocol will drive PCB-contaminated
16 oil out of state on single trucks and will increase the size and impact of DTSC’s environmental
17 footprint. These unintended and serious consequences would be documented in the public
18 comment process of an APA rulemaking and accompanying CEQA review. This adoption of this
19 statewide standard serves as a vivid illustration of the types of problems that can result from
20 agencies issuing underground regulations.
21

22 Requiring used oil transfer facilities to test for PCBs will have significant, negative
23 impacts on California used oil transfer facilities, used oil transporters, communities around used
24 oil recycling facilities, the used oil market, and the environment. As D/K pointed out in its
25 Comments, there are already adequate procedures in place to test used oil for PCBs when loads
26 are received at used oil recycling facilities. It is also evident that, if DTSC has determined that
27

28 ¹ The DTSC PCB Policy is attached as Exhibit A.

1 additional steps are required to address the possibility of PCBs in the instate used oil system,
2 approaches exist that are more focused, less costly, less disruptive of commerce and used oil
3 recovery, more protective of the environment, and would avoid the problems that will inevitably
4 result from DTSC's change in policy.

5 1. Negative Impacts on Transfer Facilities and Transporters in California

6 Requiring PCB testing at used oil transfer facilities will have a serious, deleterious
7 effect on the used oil transfer facilities in rural areas of California. Used oil in rural areas is
8 collected in relatively-small, "bobtail" trucks that must be filled and emptied on a daily basis in
9 order for the transporters to remain economically viable. At the same time, most rural transfer
10 facilities have only one receiving tank and are simply too small to have on-site laboratory testing
11 facilities. Therefore, these smaller transfer facilities would be required to lock down their tanks
12 during the time it takes to drive a sample to the nearest regional laboratory and obtain analytical
13 test results. As a practical matter, the DTSC PCB Policy will require transfer facilities in rural
14 areas to lock down their receiving tank for several days at a time. This will have a devastating
15 effect on the viability of rural transfer facilities and the transporters that utilize them.
16

17 Rural transporters cannot remain in business unless they can unload oil on a daily
18 basis. Rather than waiting idle for the local transfer facility to unlock its tank, transporters will be
19 forced to drive to larger receiving facilities, most of which are located in urban areas, or to out-of-
20 state facilities. As a result, rural bobtail transporters will substantially increase the miles they
21 must drive on a daily basis to pick up and deliver used oil. Both the number of trucks on the
22 roads and the number of miles driven will increase significantly and result in substantial
23 environmental and traffic impacts. In addition, the DTSC PCB Policy will have the perverse
24 effect of causing more used oil to leave California for states that have far less protective standards
25 for PCBs in used oil.

26 2. Negative Impacts on Communities Near Used Oil Recycling Facilities

27 DTSC's PCB testing requirement would increase the long-term impacts that
28

1 recycling facilities have on neighboring communities. The influx of transporters required to
2 travel to larger facilities to deliver oil will have a negative effect on unloading efficiency at larger
3 facilities. D/K already has a large number of trucks on average queued up to unload every day.
4 The addition of multiple bobtail loads per day from outlying areas would increase the wait time
5 for deliveries at D/K and create a significant, corresponding decrease in efficiency for drivers.
6 The resulting truck traffic would significantly impact both local roads and truck emissions in the
7 vicinity of receiving facilities. These are real environmental and safety issues for communities,
8 which are often environmental justice communities with multiple environmental challenges. The
9 problems local communities around large receiving facilities would face from the general
10 application of a PCB testing requirement at transfer facilities clearly illustrates that DTSC has
11 failed to consider the bigger picture consequences flowing from the DTSC PCB Policy. Members
12 of these communities have an unambiguous right under California law to engage in the public
13 comment process associated with DTSC's policy. California law places great importance on the
14 cumulative impact analysis in CEQA and implementation of the DTSC PCB Policy at individual
15 permitting projects undercuts the public's ability to assess and comment upon cumulative
16 impacts.

17 3. Out-of-State Transport and Negative Impacts on the Used Oil Market

18 Imposing blanket PCB testing requirements on each transfer facility will
19 discourage rather than encourage compliance with PCB testing requirements. Once a transporter
20 drives to another state, the transporter is only required to meet the federal 50 parts per million
21 ("ppm") standard under the federal Toxic Substances Control Act. Eliminating the option of
22 sending the used oil from a transfer facility to an in-state facility without prior testing will
23 encourage transporters to circumvent California standards and ship waste out of state. As fuel oil
24 prices continue to increase, there is even more incentive for transporters to take oil out of state.
25 Far more. Oil that does not meet California standards for used oil and must be managed as a
26 hazardous waste in California can be burned for energy recovery with high levels of impurities
27 and less stringent environmental regulations.
28

1 Health and Safety Code section 25250.9 was adopted to ensure used oil generators
2 are informed that their used oil may be sent to an out-of-state facility that does not meet stringent
3 hazardous waste management standards when choosing whether to process used oil at a
4 California facility or to send the used oil to another state. This statute evinces the Legislature's
5 preference to safely manage used oil. California standards include secondary containment
6 requirements, comprehensive waste composition analysis and financial assurance for closure and
7 corrective action. These legislative policies have helped prevent used oil from being dumped and
8 have successfully promoted used oil recycling. Proper enforcement of Section 25250.9 would
9 ensure that all used oil is properly tested and is the better approach to ensuring that PCBs do not
10 enter commerce.

11 DTSC's policy will result in transporters driving further and adversely impacting
12 the communities of the receiving facilities. In addition, more arriving trucks will remain idle and
13 loaded at transfer facilities. The end result will be a higher likelihood of sending waste oil with a
14 high PCB content to out-of-state facilities with reduced environmental protections. In addition, as
15 more transporters take used oil out of the state without testing it for PCBs, there will be a huge
16 negative economic impact on the transporters and recyclers who manage used oil in California.
17

18 4. Current PCB Testing Protocols and Reasonable Alternatives

19 The current protocols used to test for PCBs in oil are already effective to eliminate
20 PCBs in used oil destined for the California used oil market. At D/K's Compton facility, each
21 tank receiving used oil must be tested to determine whether the used oil contains less than 2 ppm
22 PCBs. If a tank contains PCBs at a concentration of 2 ppm or greater, D/K must trace the source
23 of the PCBs back to the individual shipment by testing samples that are collected from each of the
24 incoming trucks prior to transferring their loads into a tank. If any of the individual loads
25 contains PCBs at a concentration of 5 ppm or greater, D/K must dispose of the entire tank as
26 PCB-containing hazardous waste.

27 If a change is to be made to current practices, DTSC has ignored other, reasonable
28

1 alternatives that would highlighted in an APA rulemaking and CEQA review. For example,
2 another approach would be to limit the PCB testing at transfer facilities to waste oil that will be
3 sent out of state. This would assure that transporters do not take used oil out of state in an effort
4 to avoid more stringent California regulations. At the same time, limiting PCB testing at used oil
5 transfer facilities to outgoing loads destined for other states will minimize the bottleneck and
6 perverse incentives that the DTSC PCB Policy will have on the routine transportation of used oil
7 in California. Pursuant to the above alternative, used oil processed in-state at a permitted
8 treatment and recycling facility would continue to be tested at the in-state facility consistent with
9 that facility's WAP.

10 B. The DTSC PCB Policy Is An Underground Regulation

11 1. Any "Regulation" Not Adopted in Accordance with the APA is an
12 Underground Regulation

13 The APA provides that "[n]o state agency shall issue, utilize, enforce or attempt to
14 enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general
15 application, or other rule, which is a regulation as defined in Section 11342.600, unless the
16 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other
17 rule has been adopted as a regulation and filed with the Secretary of State pursuant to this
18 chapter."² "Regulation" is defined in the APA as "every rule, regulation, order, or standard of
19 general application or the amendment, supplement or revision of any rule, regulation, order, or
20 standard adopted by any state agency to implement, interpret, or make specific the law enforced
21 or administered by it, or to govern its procedure."³

22
23 Administrative interpretations in California that meet the definition of "regulation"
24 must be promulgated in accordance with the procedural requirements of the APA.⁴ If a regulation
25 was not promulgated pursuant to the APA, it is void and shall receive no deference from

26 ² Gov. Code § 11340.5(a) (emphasis added).

27 ³ Gov. Code § 11342.600; *California Advocates for Nursing Home Reform v. Bonta*, 106
28 Cal.App.4th 498, 506-507 (2003).

⁴ Gov. Code § 11340 *et seq.*

1 California courts. This serves to "prevent agencies from avoiding substantive APA requirements
2 by denominating regulations as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,'
3 and the like, and by placing rules in the internal organs of the agency such as manuals,
4 memoranda, bulletins" ⁵ Thus, "[t]he APA was designed in part to prevent the use by
5 administrative agencies of 'underground' regulations, and it is the courts, not administrative
6 agencies, which enforce that prohibition." ⁶

7
8 Any rule or standard of general application that is issued without going through
9 APA rulemaking procedures is an "underground regulation" pursuant to California law. An
10 "underground regulation" is defined as "any guideline, criterion, bulletin, manual, instruction,
11 order, standard of general application, or other rule, including a rule governing state agency
12 procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has
13 not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is
14 not subject to an express statutory exemption from adoption pursuant to the APA." ⁷ California
15 law further mandates that "[n]o state agency issue, utilize, enforce, or attempt to enforce any
16 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other
17 rule which is a regulation as defined in Section 11342.600," unless it has first gone through the
18 APA rulemaking process. Gov. Code § 11340.5.

19 2. DTSC set forth the new PCB policy in a Management Directive

20 As D/K stated in its Petition for Review of the American Oil Company Permit, the
21 application of the proposed PCB testing requirement for used oil bound for in-state recycling
22 represents a fundamental change in DTSC regulatory policy. This change in policy will affect the
23 decisions of generators and transporters as to how and where they ship their used oil. DTSC's
24 statewide policy establishing a uniform standard in which PCB testing requirements are imposed
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26 ⁵ *Armistead v. State Personnel Board*, 22 Cal.3d 198, 205 (1978) (quoting Senate Interim
Committee on Administrative Regulations, First Report to the 1955 Legislature, at 8-9).

27 ⁶ *Bonta*, 106 App.4th at 506 (citing *Kings Rehabilitation Center, Inc. v. Premo*, 69 Cal.App.4th
215, 217 (1999)).

28 ⁷ 1 C.C.R. § 250.

1 in hazardous waste facility permits is set forth in the DTSC PCB Policy, an internal memorandum
2 issued by DTSC senior management mandating a permitting requirement for the testing of PCBs
3 at all used oil transfer facilities in California with permit renewals pending. The DTSC PCB
4 Policy requires DTSC staff to include the obligation to test for PCBs in permits for used oil
5 transfer facilities. This obligation is not otherwise required by any law. The subject line of the
6 DTSC PCB Policy is "Testing for PCBs in Used Oil Transfer Facilities," and the document is an
7 instruction from senior DTSC management to DTSC's Permit Renewal Team instructing staff to
8 include a permitting requirement to "test all outgoing loads of mixed oil" for PCBs at used oil
9 transfer facilities. The DTSC PCB Policy clearly states: "Permits to be issued to used oil transfer
10 facilities as part of the Permit Renewal Team's efforts should contain this PCB testing
11 requirement." The DTSC PCB Policy further states that it is "critical" that DTSC be "consistent
12 with its permit requirements for like facilities." DTSC's adherence to the DTSC PCB Policy,
13 resulting in the imposition of the PCB testing requirement in the American Oil Company Permit,
14 raises important policy considerations that DTSC should, in its discretion, review. Moreover, the
15 inclusion of a permit condition resulting from implementation of an underground regulation is a
16 clearly erroneous conclusion of law.

17 3. The DTSC PCB Policy is a "Regulation" Subject to the APA
18 The DTSC PCB Policy is a "regulation," as defined in Government Code section 11342.600.
19 Pursuant to California law, "regulation" means every rule, regulation, order, or standard of
20 general application or the amendment, supplement, or revision of any rule, regulation, order, or
21 standard adopted by any state agency to implement, interpret, or make specific the law enforced
22 or administered by it, or to govern its procedure. Gov. Code § 11342.600.

23 The California Supreme Court has found that regulations subject to the APA have
24 two principal identifying characteristics.⁸ The first characteristic of a regulation is that the agency
25 must have intended for the rule to apply generally, rather than in a specific case.⁹ It is not,

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27 ⁸ *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 571 (1996) (citing *see Union of*
American Physicians & Dentists v. Kizer, 223 Cal.App.3d 490, 497 (1990)).

28 ⁹ *Tidewater*, 14 Cal.4th at 571.

1 however, necessary that the rule apply universally; “a rule applies generally so long as it declares
2 how a certain class of cases will be decided.”¹⁰ The second characteristic of a regulation is that
3 “the rule must ‘implement, interpret, or make specific the law enforced or administered by [the
4 agency], or govern [the agency’s] procedure.”¹¹ Under either characterization, the DTSC PCB
5 Policy is a “regulation” subject to the APA.

6
7 4. The DTSC PCB Policy is a Rule of General Applicability

8 The DTSC PCB Policy establishes a new policy for imposing PCB testing
9 requirements in hazardous waste facility permits. The DTSC PCB Policy states that “[t]he three
10 most recently drafted permits ... contain the requirement to test used oil for PCBs.” In addition,
11 this permit condition was imposed in a fourth permit — the American Oil Company Permit.
12 DTSC has imposed the PCB testing requirement in four out of the four most recent permits
13 drafted. DTSC’s consistent application of the PCB testing requirement as directed by the DTSC’s
14 PCB Policy demonstrates that the DTSC PCB Policy establishes a rule of general applicability.

15 The DTSC PCB Policy opens with the statement “[i]t is critical that this
16 department be consistent in its permit requirements for like facilities.” This is a clear expression
17 of DTSC’s intent to continue to impose the PCB testing requirement in permits for used oil
18 transfer facilities. “A written statement of policy that an agency intends to apply generally, that is
19 unrelated to a specific case, and that predicts how the agency will decide future cases is
20 essentially legislative in nature even if it merely interprets applicable law.”¹² Quasi-legislative or
21 interpretative regulations are subject to the APA.¹³ The DTSC PCB Policy is a written statement
22 of policy that DTSC intends to apply generally to all used oil transfer facilities. The DTSC PCB
23 Policy clearly declares how DTSC will draft future permits and thus the DTSC PCB Policy is

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25 ¹⁰ *Id.* (citing *Roth v. Department of Veterans Affairs*, 110 Cal.App.3d 622, 630 (1980)); *Bonta*,
106 Cal.App.4th 498 at 507 (citations omitted).

26 ¹¹ *Tidewater*, 14 Cal.4th at 571 (citing Gov. Code § 11342(g), repealed and continued without
substantive change, inter alia, in Section 11342.600 (“regulation” defined)); *California Advocates
for Nursing Home Reform v. Bonta*, 106 Cal.App.4th 498, 507 (2003) (citations omitted).

27 ¹² *Tidewater*, 14 Cal.4th at 574-75. (emphasis added).

28 ¹³ See, *Tidewater*, 14 Cal. 4th at 575.

1 quasi-legislative in nature.

2
3 It is clear on its face that the DTSC PCB Policy establishes a standard of general
4 application that implements, interprets and makes specific certain aspects of the law governing
5 used oil transfer facilities. As discussed above, the DTSC PCB Policy is an instruction from
6 DTSC senior management to the Permit Renewal Team to uniformly include a permitting
7 requirement in used oil transfer facility permits to "test all outgoing loads of mixed oil" for PCBs.
8 The DTSC PCB Policy instructs the DTSC Permit Renewal Team that it is "critical" to have
9 permitting consistency at used oil transfer facilities, and that a PCB testing requirement, along
10 with other testing requirements at transfer facilities, "is the only way for the facility to know
11 whether or not" it may legally receive a shipment of used oil. This language further indicates to
12 DTSC permitting staff that a PCB testing requirement must be included in all used oil transfer
13 facility permits. The DTSC PCB Policy plainly states that this requirement is to be applied to all
14 of the used oil transfer facilities on which the Permit Renewal Team is working. No statute or
15 official state regulation requires the inclusion of PCB testing requirements in the permits of used
16 oil transfer facilities. This permitting requirement is entirely created by the DTSC PCB Policy.

17 5. The DTSC PCB Policy Interprets Law Administered by DTSC and
18 Governs DTSC Procedure

19 The DTSC PCB Policy implements and interprets law administered by DTSC, as
20 well as governs the agency's procedure. The DTSC PCB Policy includes a table listing eighteen
21 used oil transfer facility permits that the Permit Renewal Team is now working on statewide, the
22 vast majority of which are permits set to expire in 2007. This table includes a column for
23 indicating whether a PCB testing requirement is currently included in each of the listed permits.
24 Of the permits that the Permit Renewal Team is working on, only one out of eighteen is shown to
25 have a PCB testing requirement as of March 15, 2007. However, as the DTSC Policy Memo
26 states, DTSC imposed the PCB testing requirement in the most recent three permits it drafted.
27 The requirement is also included in the American Oil Company Permit. Thus, DTSC has
28 consistently implemented the requirement in the four most recent permits.

1 The inclusion of the above-described table in the DTSC PCB Policy further
2 establishes that the document was issued with the clear intent that it be utilized to establish PCB
3 testing requirement in the permits for all of the used oil transfer facilities for which the Permit
4 Renewal Team is responsible. D/K does not have specific information about the status of each of
5 these permits; however, the DTSC PCB Policy is an unambiguous directive to the Permit
6 Renewal Team to include a PCB testing requirement in each of these permits. The Permit
7 Renewal Team has been instructed to apply this standard of general application to all the used oil
8 transfer facilities, and D/K expects that this regulatory requirement is already being introduced in
9 negotiations and draft documents, and will be increasingly utilized over the course of the year as
10 numerous existing permits are set to expire. Thus, the DTSC PCB Policy is also a “regulation”
11 because it is a rule that ‘implement[s], interpret[s], or make[s] specific the law enforced or
12 administered by [the agency], or govern [the agency’s] procedure.”¹⁴

13 The DTSC PCB Policy does not stop at simply requiring PCB testing at used
14 transfer facilities. It further implements, interprets, and specifies the law by mandating the exact
15 requirements associated with such testing. Specifically, the DTSC PCB Policy requires testing of
16 each outgoing load to determine whether it contains more than 2 ppm PCBs. Furthermore, in the
17 event that an outgoing load is determined to have greater than 2 ppm PCBs, retain samples from
18 the various constituent loads must be tested to determine whether any one of those loads
19 contained more than 5 ppm PCBs. Through these express permitting requirements, the DTSC
20 PCB Policy unquestionably creates a generally applicable standard that implements, interprets
21 and makes specific the law governing oil transfer facilities.

22
23 6. The DTSC PCB Policy is an Underground Regulation

24 As discussed above, the DTSC PCB Policy is clearly a regulation for the purposes of the APA.
25 DTSC has not undertaken an APA rulemaking to adopt regulations addressing the PCB testing
26 requirement set forth in the DTSC PCB Policy. Therefore, for the reasons detailed above, the

27 ¹⁴ *Id.* (citing Gov. Code § 11342(g), repealed and continued without substantive change, *inter alia*,
28 in Section 11342.600 (“regulation” defined)); *Bonta*, 106 Cal.App.4th at 507 (citations omitted).

1 DTSC PCB Policy is an “underground regulation,” as defined by 1 C.C.R. § 250, interpreted by
2 the Supreme Court of California, and set forth in this Brief.

3 7. DTSC Must Undertake a CEQA Evaluation of Potential Environmental
4 Impacts and Feasible Alternatives Before Adopting Regulations Imposing
5 PCB Testing at Used Oil Transfer Facilities

6 CEQA¹⁵ requires a California public agency to evaluate the potential
7 environmental consequences of its discretionary decisions (“projects” under CEQA) in order to
8 promote informed decision-making.¹⁶ An activity undertaken by a public agency that “may cause
9 either a direct physical change in the environment, or a reasonably foreseeable indirect physical
10 change in the environment” is a “project” subject to CEQA.¹⁷ Adoption of a specific regulation is
11 a discretionary decision (“project”). DTSC’s decision to begin imposing PCB testing
12 requirements for used oil transfer facilities as specified in the DTSC PCB Policy is both a specific
13 regulation and a “project” for purposes of CEQA.

14 Moreover, an environmental impact report (“EIR”) is necessary if there is a fair
15 argument that the project under review may have a potentially significant impact on the
16 environment.¹⁸ DTSC must prepare an EIR if “there is substantial evidence supporting a fair
17 argument that the project may have a significant impact on the environment.”¹⁹ If even a
18 reasonable inference can be made that such evidence exists, DTSC must prepare an EIR.²⁰ The
19 evidence does not need to be uncontradicted. Substantial evidence is demonstrated where there is
20 “enough relevant information and reasonable inferences from this information that a fair
21 argument can be made to support a conclusion even though other conclusions might also be
22 reached.”²¹ This brief presents ample evidence to support a fair argument that the testing regime

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24 ¹⁵ Public Resources Code §§ 21000 – 21177.

¹⁶ See, 14 CCR § 15002.

¹⁷ PRC § 21065.

25 ¹⁸ *Laurel Heights Improvement Ass’n v. Regents of University of California* (1993) 6 Cal.4th
1112, 1123.

26 ¹⁹ *Friends of the Old Trees v. Department of Forestry and Fire Protection* (1997) 52 Cal.App.4th
1383, 1396.

27 ²⁰

28 ²¹ *Id.* at 1402.

1 set forth in the DTSC PCB Policy will have adverse environmental consequences as a result of
2 recyclable used oil being shipped out of state to be disposed of a hazardous waste, and as a result
3 of increases in air emissions as individual truck mileage and truck idling time at transfer facilities
4 increases.

5 In addition to an analysis of the environmental impacts resulting from the
6 proposed regulations, DTSC must also prepare an analysis of feasible alternatives that will
7 mitigate potentially significant impacts. DTSC must “must independently participate, review,
8 analyze and discuss the alternatives in good faith.”²² Once DTSC reviews the statewide impacts
9 of imposing PCB testing at used oil transfer facilities and undertakes an analysis of the feasible
10 alternatives, it will become immediately apparent that the most feasible alternative is the current
11 regulatory regime – which does not require PCB testing at used oil transfer facilities.

12
13 **III. DTSC MUST NOT APPROVE THE PCB TESTING**
14 **REQUIREMENT IN THE AMERICAN OIL COMPANY PERMIT**

15 DTSC must formally adopt the PCB testing requirement as a regulation pursuant
16 to the APA. Until such time as DTSC does undertake a rulemaking to adopt this regulation,
17 DTSC must cease implementing the DTSC PCB Policy. As discussed above, an agency may not
18 implement an underground regulation. The PCB testing requirement should not be imposed in
19 any permits for used oil transfer facilities, including the American Oil Company Permit, until
20 DTSC has completed the necessary administrative procedures. Therefore, D/K requests that
21 DTSC remove the PCB testing requirement from the American Oil Company Permit.

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27 ²² *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*
28 (1980) 106 Cal.App.3d 893, 908-910.

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JODI SMITH
PAUL, HASTINGS, JANOFSKY
& WALKER LLP

// original signed by //

B _____
JODI SMITH

Attorneys for
DEMENNO/KERDOON

EXHIBIT A



Linda S. Adams
Secretary for
Environmental Protection



Department of Toxic Substances Control

Maureen F. Gorse, Director
1001 "I" Street
P.O. Box 806
Sacramento, California 95812-0806



Arnold Schwarzenegger
Governor

MEMORANDUM

To: Ray Leclerc, Team Leader
Permit Renewal Team

From: Watson Gin, Deputy Director for Hazardous Waste Management Program
Department of Toxic Substances Control *W. Gin*

Date: March 15, 2007

Subject: TESTING FOR PCBs IN USED OIL AT TRANSFER FACILITIES

It is critical that this department be consistent in its permit requirements for like facilities. Permits are very specific to the wastes allowed to be received. Permits include requirements for waste analysis plans that detail the testing the facility is to conduct prior to receiving wastes, designed to ensure that the wastes received are in line with the permit conditions. The PCB testing requirement along with other testing requirements at transfer facilities is the only way for the facility to know whether or not they are allowed to receive the shipment of used oil legally. The three most recently drafted permits (Riverbank Oil Transfer, Evergreen Oil/Carson, and Advanced Environmental) contain the requirement to test used oil for PCBs.

Used oil transfer facilities are not authorized to take other hazardous wastes. PCB concentrations higher than 5 ppm cause the oil to be considered hazardous waste, not used oil. The PCB testing requirement also allows DTSC and other enforcement agencies to know whether the transfer facility is following its permit. If the outgoing oil is found to be higher than 2 ppm PCBs, the assumption is, because of the dilution that occurs when loads are mixed, there is a high likelihood that one of the incoming loads was "hot" for PCBs. At that point the retained samples can be tested to trace it back to a load.

The permit requirement should allow the facility to retain a sample of each incoming load rather than test the incoming loads. The permit requirement should also require the facility to test all outgoing loads of mixed oil.

Permits to be issued to used oil transfer facilities as part of the Permit Renewal Team's efforts should contain this PCB testing requirement.

FACILITIES THAT THE PERMIT RENEWAL TEAM IS WORKING ON (18 TOTAL)

	COMPANY NAME	EXISTING PERMIT (13)	PERMIT EXPIRATION DATE	APPLYING FOR NEW PERMIT (4)	UNDER ISD (1)	HAS PCB CONDITION IN PERMIT (4)
1	Advanced Environmental Inc. ^(a)				X	X
2	Asbury Environmental	X	12/30/2007			
3	Bakersfield Transfer Inc.			X		
4	Bayside Oil	X	12/22/2007			
5	Chico Drain Oil - Chico	X	12/22/2007			
6	Chico Drain Oil - Fortuna	X	12/31/2007			
7	Clearwater Environmental	X	12/24/2007			
8	Crane Oil	X	12/23/2007			
9	D/K Dixon			X		
10	D/K Environmental - Vernon			X		
11	Evergreen - Davis	X	12/30/2007			
12	Evergreen - Fresno	X	12/30/2007			
13	Evergreen - Santa Maria	X	12/30/2007			
14	JW Butler	X	12/27/2007			
15	Oil Conservation Services ^(b)	X	12/23/2007			
16	Ramos Environmental Services	X	5/18/2009			
17	Remedy Environmental Services ^(c)			X		
18	San Joaquin Filter	X	12/23/2007			

(a) Public noticed but final permit not issued.

(b) May be closing.

(c) Primarily wastewater but may have used oil as result of separation process.

FACILITIES THAT THE PERMIT RENEWAL TEAM IS NOT WORKING ON (4 TOTAL)

1	American Oil Company ^(a)	X	1/16/2017			X
2	Automotive Environmental - Irwindale ^(b)	X	7/17/2010			
3	Evergreen - Carson ^(c)	X	10/14/2014			X
4	Riverbank Oil	X	3/13/2011			X

(a) Permit issued but appealed; Permit Renewal Team may handle depending on outcome of appeal.

(b) May require Agency Initiated Permit Modification

(c) May apply for full Non-RCRA permit as used oil recycling facility.