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June 16, 2008

26635.00019

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

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JUN 17 2008

DEPARTMENT OF TOXIC
SUBSTANCES CONTROL

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

Re: **Re-submission of 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"), please find attached for re-submission our April 11, 2008 letter containing 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.

On February 27, 2008, DTSC issued a Public Notice of Permit Appeal Comment Period for the Standardized Hazardous Waste Facility Permit ("Permit") for AEI. On April 11, 2008, AEI submitted the attached comment letter. On May 7, 2008, due to an error in the Public Notice, DTSC issued a new Public Notice stating that comments would be accepted through June 23, 2008. To ensure that DTSC considers AEI's previously-submitted comments, we are re-submitting those comments now as part of the second comment period.

If you have any questions or require further information, please feel free to contact me.

Sincerely,

// original signed by //

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

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April 11, 2008

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

Peggy Harris, P.E., Division Chief
Department of Toxic Substances Control
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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.

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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