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PIPER & MARBURY
L.L.P.
1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430
202-861-3900
FAX: 202-223-2085

BALTIMORE
NEW YORK
PHILADELPHIA
EASTON
LONDON

DOUGLAS H. GREEN
202-861-3847
FAX: 202-223-2085
DGREEN@PIPERMAR.COM

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HAND DELIVER

Thomas H. Beisswenger, Esq.
Office of General Counsel
U.S. Environmental Protection Agency
Mail Code 2366
401 M Street, S.W.
Washington, D.C. 20460

Re: Edison Electric Institute v. EPA, No. 93-1474 (D.C. Cir.)

Dear Tom:

Pursuant to our recent telephone calls, identified below are the issues remaining in the above-referenced litigation involving the Edison Electric Institute's ("EEI") challenge to EPA's May 3, 1993 used oil technical amendments (58 Fed. Reg. 26420) (the "1993 technical amendments") (attachment 1). Most of the issues can be resolved simply through the issuance of a letter to EEI confirming our position. However, resolution of the issue regarding the regulatory status of used oil containing PCBs will require a technical amendment to 40 C.F.R. § 279.10(i).

In short, we request that EPA issue a technical correction to 40 C.F.R. § 279.10(i) making clear that used oil containing 50 parts per million ("ppm") or greater PCBs is not subject to regulation under Part 279. In addition, we request written confirmation of the following points:

1. Soil containing used oil that is not free flowing, and that is burned in a boiler or industrial furnace, is not used oil and is not subject to regulation under Part 279.

2. Commercial sorbent products that are used to clean up used oil and that are burned for energy recovery as a means of disposal are not "used oil" because (1) the oil is not free-flowing, and (2) the predominant fuel value of the material is the commercial sorbent, not the used oil.

3. In cases where an entity engages in multiple used oil activities at distinct and separate portions of a single facility, each distinct activity is subject only to those portions of Part 279 applicable to that activity -- e.g., the portion of the facility engaged in used oil generation activities is subject only to the Part 279 generator requirements, while the portion of the facility engaged in used oil burning is subject only to the Part 279 burner requirements.

4. Used oil "marketers" who have already obtained EPA I.D. numbers do not have to renotify EPA regarding their used oil marketing activities.

5. The application of off-specification used oil fuel onto a coal pile or into a coal feed hopper for purposes of feeding the used oil into the boiler does not convert the coal into used oil fuel.

We discuss these issues below.

I. Technical [illegible] Used Oil Containing [illegible]

EEI requests that EPA issue a technical correction to 40 C.F.R. § 279.10(i) making clear that used oil containing PCBs at concentrations of 50 ppm or greater is not subject to regulation under the 40 C.F.R. Part 279 used oil management standards. This point was unambiguous in the original version of 40 C.F.R. § 279.10(i) as published on September 10, 1992, and was based on EPAs correct determination that regulation of this particular category of used oil is not necessary under Part 279

because it is comprehensively regulated under TSCA's PCB management standards codified at 40 C.F.R. Part 761. 57 Fed. Reg. 41566,41569 (Sept. 10, 1992).

When EPA amended this regulation in the 1993 technical amendments, we believe that the Agency was attempting simply to clarify that used oil containing concentrations of less than 50 ppm PCBs is subject to Part 279 (because this category of used oil is not subject to comprehensive regulation under the TSCA PCB standards). Obviously, EPA could not have intended the 1993 technical amendments to override the pre-existing, validly promulgated regulatory exclusion from Part 279 for used oil containing 50 ppm or greater PCBs. Such an action would have constituted a flagrant violation of the notice and comment requirements of the Administrative Procedure Act ("APA").

Nonetheless, we are concerned that the 1993 technical amendment to section 279.10(i) could be mistakenly construed as doing just that because, as currently written, the regulation is silent as to whether used oil containing PCBs at concentrations of 50 ppm or greater is subject to Part 279. Because many state programs are in the midst of adopting the Part 279 standards, it is imperative that EPA amend the regulation immediately to reaffirm that used oil containing 50 ppm or greater PCBs is not subject to the Part 279 program.

A. Background of PCB Provision

As originally promulgated on September 10, 1992, section 279.10(i) read as follows:

> (i) PCB contaminated used oil. PCB-containing used oil regulated under part 761 of this chapter [i.e., the TSCA PCB regulations] is exempt from regulation under this part [i.e., Part 279].

57 Fed. Reg. 41566, 41614 (attachment 2). This point was reiterated in the preamble to the September 1992 rule:

> [t]he manufacture, use, import, and disposal of polychlorinated biphenyls (PCBs) in used oils are controlled under the Toxic Substances Control Act (TSCA). TSCA controls the manufacture. import. use. and disposal of oils

> containing over 50 ppm PCBs. In addition, TSCA requires reporting of any spill of material containing 50 ppm or greater PCBs, into sewers, drinking water, surface water, grazing lands, or vegetable gardens . . . . Note that used oils containing less than 50 ppm of PCBs are covered under RCRA.

57 Fed. Reg. at 41569 (emphasis added) (attachment 3). This point also was made in EPAs response to comments document:

> [u]sed oils containing greater than 50 ppm PCBs are subject to TSCA regulation, rather than RCRA regulation. Thus, management requirements currently in place under TSCA supersede the newly promulgated used oil management standards if the used oil contains PCBs at a concentration of greater than 50 ppm.

EPA Public Comment and Response on Used Oil Proposed Rule: General Issues (Nov. 29, 1985), G. 10 (Relationship to Other EPA Programs -- TSCA) at comment UO 004 (emphasis added) (attachment 4).

Thus, prior to the 1993 technical amendments, EPA's position on used oil containing PCBs was unequivocal: used oil containing 50 ppm PCBs or greater was regulated exclusively by TSCA and was exempt from Part 279; used oil containing from 2 ppm (the level of detection) to 49 ppm PCBs was subject to regulation under Part 279.

In the preamble to the 1993 technical amendments, EPA voiced concern that the 1992 version of section 279.10(i) could be construed as overriding the pre-existing regulatory regime where used oil containing less than 50 ppm PCBs was subject to RCRA and to TSCA's regulations under 40 C.F.R. § 761.20(e). 58 Fed. Reg. at 26423.[1] Therefore, the 1993 technical amendment apparently was intended to

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[1] As a general rule, TSCA's substantive management controls only apply to materials that contain 50 ppm or greater PCBs (including used oil). See 40 C.F.R. § 761.1(b). Materials

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clarify what had always been the case: namely, that used oil containing less than 50 ppm PCBs (which is not subject to TSCA's substantive PCB management standards) is subject to the RCRA Part 279 used oil management standards and TSCA's administrative rules at 40 C.F.R. § 761.20(e) governing the marketing and burning of used oil containing less than 50 ppm PCBs.[2]

The problem, however, is that the 1993 technical amendment eliminated any reference to the pre-existing exclusion for used oil containing 50 ppm or greater PCBs. Section 279.10(i) now reads as follows:

> (i) Used oil containing PCBs. In addition to the requirements of 40 C.F.R. Part 279, marketers and burners of used oil who market used oil containing any quantifiable level of PCBs are subject to the requirements found at 40 C.F.R. § 761.20(e).

58 Fed. Reg. at 26425 (emphasis added). Because only used oil containing between 2 ppm and 49 ppm PCBs is subject to regulation under 40 C.F.R. § 761.20(e) (see 53 Fed. Reg. at 24211 (attachment 5)), the new regulatory language is completely

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containing less than 50 ppm PCBs are subject only to TSCA's administrative requirements applicable to the burning and marketing of used oil containing between 2 ppm and 49 pprn PCBs. See 40 C.F.R. § 761.20(e). See also 53 Fed. Reg. 24206, 24211 (June 27, 1988) (attachment 5). In addition to the administrative requirements under section 761.20(e), used oil containing between 2 ppm and 49 ppm PCBs has always been subject to RCRA's used oil management standards; indeed, section 761.20(e) cross-references RCRA's used oil standards (prior to promulgation of the Part 279 standards, this category of used oil was subject to RCRA's used oil management standards under 40 C.F.R. Part 266, subpart E).

2 When EPA issued the original version of section 279.10(i) that exempted used oil regulated under TSCA from the Part 279 standards, the Agency intended that the exclusion only cover used oil containing 50 ppm or greater PCBs. 57 Fed. Reg. at 41569. However, the regulation did not draw this distinction on its face, and EPA staff apparently was concerned that the exemption could be viewed as also exempting used oil containing less than 50 ppm PCBs from the Part 279 program.

silent as to the regulatory status of used oil with concentrations of 50 ppm or greater PCBs. This silence could be mistakenly construed as overriding EPAs unequivocal determination in 1992 that used oil containing 50 ppm or greater PCBs is not subject to Part 279. Such an interpretation, however, would be completely at odds with the Agency's pre-existing determination and would, in effect, mean that EPA had eliminated a substantive regulation without going through the requisite notice and comment required under the APA. EEI does not believe this was the Agency's intent.

B. Recommended Solution

In view of the confusion surrounding this issue, EEI requests that EPA amend section 279.10(i) to restore the regulation to its original contours. Specifically, EEI requests that EPA correct 40 C.F.R. § 279.10(i) to read as follows:

> (i) PCB contaminated used oil. Used oil containing PCBs at concentrations of 50 parts per million (ppm) or greater that is regulated under Part 761 is not subject to regulation under this Part. Used oil containing PCBs at concentrations of less than 50 ppm is subject to the requirements of this Part, and marketers and burners of such used oil are subject to the requirements at 40 C.F.R. § 761.20(e).

EEI respectfully requests that this technical correction be made as soon as possible so that state-approved used oil programs do not perpetuate this confusion.

II. Management of Materials Containing Used Oil That is Not Free-Flowing

EEI requests clarification regarding EPA's "no free-flowing oil" concept. The 1993 technical amendment clarified that materials containing used oil from which used oil has been removed to the extent possible such that "no visible signs of free-flowing oil remain in or on the material" are no used oil and are not subject to the Part 279 used oil management standards. 58 Fed. Reg. at 26425 (codified at 40 C.F.R. § 279.10(c)(1). Expressly excluded from this provision are materials "containing or otherwise contaminated with used oil that are burned for energy recovery." Id. § 279.10(c)(2) (emphasis added). In other words, materials that contain or are

contaminated with used oil that are burned for energy recovery are regulated as used oil fuel, even if the used oil contained in the material is not "free-flowing." This provision raises two issues on which EEI seeks clarification.

A. Status of Soils Contaminated with Used Oil

Utilities frequently manage soil containing trace amounts of used oil by burning the soil in utility boilers because combustion is the most practical and effective way to manage such non-hazardous materials. The soils do not contain free-flowing used oil and are not burned for energy recovery, but rather are burned in the boiler because this offers the most cost-effective management option for these materials. Because the soils are not burned for energy recovery, they fall within the general exclusion from the definition of used oil under § 279.10(c)(1) for materials that do not contain free-flowing used oil.

We understand that the Agency concurs with this position. EEI therefore requests that EPA confirm in writing the following points:

1. Soil containing used oil that is not free-flowing (e.g., soil that contains used oil from a spill) and that is not burned in an industrial boiler or furnace is not used oil and is not subject to regulation under. 40 C.F.R. Part 279; and

2. Soil containing used oil that is notfree-flowing and is burned in an industrial boiler or furnace, is not used oil and is not subject to Part 279 because the used oil contained in the soil is not being burned for energy recovery.

B. Status of Sorbent Materials Containing Used Oil

A related issue involves the burning of sorbent materials used to clean up used oil spills. After the cleanup process is complete, these sorbent materials -- e.g., commercial booms/pads -- are often burned in utility boilers. As part of the marketing of these products, the sorbents are intentionally manufactured using ingredients (e.g., polypropylene) that have a fuel value greater than 5,000 Btu/lb so that they can be

burned as fuel after the cleanup is complete.[3] This option makes economic and environmental sense because it allows companies engaged in spill response activities to recycle the cleanup materials in their boilers as a supplemental fuel, thus avoiding excessive land disposal costs and the uncertainties associated with any off-site management of waste materials.

EEI is concerned, however, that sorbent materials managed in the above manner could inadvertently be classified as "used oil fuel" under the 1993 technical amendments simply because they are being recycled as a fuel, even though the predominant fuel value of the material is the commercial sorbent, not the used oil. Indeed, this scenario is no different from the contaminated soil issue discussed above, except that here the material containing the used oil is a commercial sorbent that is intentionally manufactured to have a fuel value so that it can be burned for energy recovery when disposed.

EEI therefore seeks clarification from EPA that such sorbent materials are not "used oil" because (1) the oil is not free-flowing, and (2) the used oil is not being burned for energy recovery. Confirmation of this point is important to EEI members because the recycling of spill cleanup sorbent materials as a supplemental fuel has proven to be a cost-effective and environmentally sound management option that should not be discouraged.

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3 **Indeed, certain commercial cleanup products are marketed as having a fuel value ranging from 10,000 Btu/lb to 20,000 Btu/lb precisely because it makes environmental and practical sense to burn these products for energy recovery after they have been used to absorb spilled materials.**

III. Multiple On-Site Used Oil Management Operations

EEI requests confirmation regarding the application of the Part 279 management standards to multiple used oil operations at distinct portions of the same facility.

The regulations contemplate that a used oil handler might conduct activities regulated by more than one segment of the management standards. See, e.g., 40 C.F.R. § 279.20(b) (generators who conduct transportation, processing or burning activities must comply with the appropriate subpart); 57 Fed. Reg. at 41601 (under the definition of marketer in Part 279, "it is logically impossible for a facility to be only a marketer of used oil fuel"). Where an entity operates multiple facilities that carry on different used oil activities in geographically distinct locations, it is not difficult to determine which portions of Part 279 apply to each facility. Thus, for example, an entity may generate off-specification used oil fuel in Facility A and transport the used oil from Facility A to a geographically distinct Facility B, where it is burned for energy recovery. The entity clearly is subject only to the generator standards at Facility A and the burner standards at Facility B. Additionally, if the entity self-transports the used oil in amounts greater than 55 gallons, it is also subject to the used oil transporter standards.

In some cases, however, an entity operating a large, integrated facility in a single geographical location may conduct several different used oil handling activities within discrete portions of the facility. For example, the entity might generate off-specification used oil in Portion A, and transfer the used oil to Portion B of the same facility, a distinct and separate operation where the used oil is burned for energy recovery. Where Portion A and Portion B are separate, distinct portions of the same facility, they are no different from the geographically distinct facilities in the above example. Thus, Portion A is subject only to the generator standards, and Portion B is subject only to the burner standards. The only substantive difference in the second example is that the transfer of the used oil from Portion A to Portion B is not subject to the used oil transporter requirements. See § 279.40(1) (transporter standards do not apply to on-site transportation of used oil). EEI requests that EPA confirm that distinct and separate used oil activities conducted at the same facility are evaluated independently for purposes of determining applicable Part 279 standards.

EEI also requests confirmation regarding the requirements for EPA I.D. numbers at large facilities conducting multiple used oil operations. Specifically, if a

entity is processing used oil in one distinct portion of its facility and burning off-specification used oil in another distinct portion of its facility, EEI believes that the facility can use a single EPA I.D. number for the entire facility.

IV. Notification Obligation of Used Oil t

EEI requests clarification regarding the notification obligation of used oil marketers. Pursuant to 40 C.F.R. § 279.73, a marketer "who has not previously complied with the notification requirements of RCRA section 3010 must comply with [the notification] requirements and obtain an EPA identification number." Identical language appears in the other notification provisions of Part 279 (i.e., sections 279.42 (transporters), 279.51 (processors/re-refiners) and 279.62 (burners)). The preamble to the final rule indicates that transporters, processors/re-refiners and burners who already have notified EPA of their hazardous waste management or used oil activities and received an EPA I.D. number need not renotify the Agency. 57 Fed. Reg. at 41590 (transporters), 41594 (processors), 41599-600 (burners) (attachments 6-8).

The preamble to the final rule is silent on whether entities that already have EPA I.D. numbers need to notify the Agency if they are conducting marketing activities. The preamble explains that section 279.73 was a recodification of the notification provision for marketers previously codified at 40 C.F.R. § 266.43. 57 Fed. Reg. at 41601, Table VI.6 (attachment 9). The notification provision of former Part 266 required marketers who had obtained an EPA I.D. number to renotify the Agency if they undertook used oil marketing activities. See 50 Fed. Reg. 49164, 49195 (November 29, 1985) (attachment 10). In the 1992 rule, EPA originally indicated that the marketer provisions from Part 266 were recodified to Part 279 "without modification." The 1993 technical amendments indicated, however, that certain changes were made to the marketer provisions, although it was unclear whether any changes were made to the marketer notification provisions. See 58 Fed. Reg. at 26422.

EEI believes that a reasonable reading of section 279.73 is that marketers -- like transporters, processors and burners -- who have already obtained EPA I.D. numbers are not required to renotify the Agency of their marketing activities. Some states, however, have taken the position that Part 279 does not modify the former requirement in Part 266 for marketer re-notification. EEI, therefore, requests

that EPA confirm that entities with existing EPA I.D. numbers do not need to renotify the Agency if they are conducting marketing activities.

V. Application of Used Oil to Coal Piles

Finally, EEI seeks clarification regarding the regulatory consequences of applying off-specification used oil fuel to coal piles or into coal feed hoppers. This practice is conducted by a number of electric utilities because applying used oil to coal, which is then fed into a boiler, is often the most practical method for injecting the used oil into the boiler. EEI raises this issue because it is concerned that, under the circumstances described above, an overly literal reading of 40 C.F.R. § 279.10(d)(1) (which provides that "mixtures of used oil and fuels or other fuel products are subject to regulation as used oil") could be construed as converting the coal pile or feed hopper to "used oil fuel," with all the attendant consequences of the used oil storage requirements (e.g., storage in tanks or containers with secondary containment).

Such a reading of the regulations would be nonsensical. It would be virtually impossible to attempt to manage an entire electric utility coal pile in a container or tank simply because small amounts of used oil have been applied to the coal pile prior to the coal being inserted into the boiler.[4] One EEI member reports that its coal piles range in size from five to 50 acres and have a maximum height of four stories. We expect that these numbers are representative of coat piles throughout the industry.

Aside from being completely unworkable, this interpretation is wholly unnecessary from an environmental perspective. First, the primary intent of section 279.10(d)(1) is to ensure that used oil that is mixed with other fuels is burned only in qualified boilers and that such mixing is not used as a means to evade the Part 279 requirements. Off-specification used oil fuel that is applied to a coal pile or feed hopper prior to its injection into a boiler is managed in accordance with all applicable used oil burner requirements, including ensuring that the boiler is qualified to burn off-

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4 EEI notes that this issue is being raised only in the context of "off-specification" used oil fuel being applied to a coal pile because "specification" used oil that is burned for energy recovery is not subject to the 40 C.F.R. Part 279 standards. See 40 C.F.R § 279.11.

specification used oil fuel. Furthermore, prior to its application onto the coat pile, the used oil is stored in accordance with the applicable Part 279 storage requirements. Thus, the used oil is burned in a qualified device, and there is no intent to evade applicable used oil management standards.

Further, this practice is conducted by electric utilities in a protective manner. While there is no uniform used oil to coal ratio, based on discussions with EEI member companies, the amount of used oil that could potentially be applied to a coal pile is minute and inconsequential when compared to the total volume of the coal pile. Even for these extremely small volumes, the coal acts as an effective sorbent of oil and therefore makes it highly unlikely that any material volume of such oil would pose a run-off concern. Even assuming such 'effects could be identified, any possible run-off would be adequately addressed by a facility's coal pile runoff controls, which are often incorporated into a facility's NPDES permits. Finally, where such application takes place, it occurs on the active portion of the coal pile where the coal is generally inserted into the boiler within a week, if not on the same day. Again, this practice minimizes any possibility of run-off.

In short, EEI seeks confirmation only of the position that the mere application of used oil onto a coal pile or into a feed hopper does not convert the entire pile or hopper into used oil fuel, thus subjecting the pile or hopper to the used oil fuel storage requirements.

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Please call me after you have had an opportunity to review the above issues. We took forward to resolving this litigation as soon as possible.

Sincerely yours,

Douglas H. Green
Counsel to the Edison Electric Institute

cc: Eileen T. McDonough, Esq.

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