ILLINOIS POLLUTION CONTROL BOARD
August 2, 1984

IN THE MATTER OF:	)	
	)	R84-5
ILLINOIS CONTINGENCY PLAN	)	

FINAL OPINION. ADOPTED RULE.

OPINION OF THE BOARD (by J. Anderson):

This Opinion accompanies the Board Order of June 8, 1984.

A. Authority and Procedure

This rulemaking responds to Section 22.1(a) of the Environmental Protection Act (Ill. Rev. Stat. 1983, ch. 111½, par. 1022.1, as amended by P.A. 83-0983) (Act) which states:

> "The Board shall adopt within 180 days regulations which are identical in substance to federal regulations or amendments thereto promulgated by the Administrator of the U.S. Environmental Protection Agency to implement Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), as amended [CERCLA]. The provisions and requirements of Title VII of this Act shall not apply to rules adopted under this subsection. Section 5 of the Illinois Administrative Procedure Act relating to the procedures for rulemaking shall not apply to rules adopted under this subsection."

P.A. 83-0983 became effective on December 12, 1983, making the statutory deadline for the Board's adoption of these regulations June 9, 1984. To meet this mandate, the Board on its own motion opened a docket in this proceeding and developed a proposed rule. Hearings were held on the proposal in Springfield (April 13, 1984) and Chicago (April 25, 1984). The comment period closed on May 7, 1984. On June 8, 1984 the Board adopted final regulations which were codified as "Part 750: Illinois Hazardous Substances Pollution Contingency Plan" of Subtitle G of the Board's regulations. The adopted rule was published in the Illinois Register on July 27, 1984. The regulations became effective on July 16, 1984.

The Board notes with appreciation the assistance of Patricia F. Sharkey in drafting the proposal, conducting the hearings, and drafting the Final Rule and Opinion in this matter.

B. Scope and Effect of Plan

The Illinois Plan identifies the state agencies which are responsible for planning and response action whenever there has been a release or a substantial threat of a release of a hazardous substance at an Illinois site which is not the subject of a federal response action.* This Plan assigns the Illinois Environmental Protection Agency (IEPA) primary responsibility for state planning and response, while providing for coordination with other state agencies, local governments, the federal government and private citizens. Subpart D of the Plan contains detailed provisions for determining the appropriate extent of a response when a release or substantial threat of a release of a hazardous substance is involved. As explained below, the Illinois Plan does not address oil spills, except to the extent that a "hazardous substance," as defined in the Environmental Protection Act, may be involved. The provisions of this Plan are "identical in substance" to the National Oil and Hazardous Substances Pollution Contingency Plan (National Plan), although there are differences required by the State's organizational and statutory framework which are discussed below.

C. General Issues

1. Organization and Responsibility

The National Plan divides responsibility for response action among various federal agencies. There is no straight forward parallel to these divisions of responsibility in the state system. Even where Illinois arguably has parallel agencies, (e.g., the Department of Mines and Minerals and the Department of Conservation have some responsibilities which are parallel to those of the U.S. Department of the Interior) these agencies don't necessarily have parallel legal authority. For example, under the Act only the IEPA can use the Hazardous Waste Fund, while CERCLA authorizes various federal agencies to draw on the "Superfund" and pursue legal action.

After reviewing the statutory framework within which these regulations were adopted and will be used, as well as the comments of the potentially affected agencies, the Board believes that the thrust of the Illinois legislation is to make IEPA the "lead agency." Thus, the Final Rule does not adopt the federal

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*The Board notes that state response at sites which are listed on the National Priorities List and which are the subject of a federal response must be in compliance with the National Contingency Plan and undertaken pursuant to a contract or cooperative agreement with the federal government. (42 U.S.C. 104 and 105; 40 CFR 300.24.)

organization and responsibility provisions, but rather places primary responsibility for response action with the IEPA. It authorizes the IEPA to seek the cooperation of other state agencies where necessary, but it confers no new authority on other state agencies. However, the Final Rule does reflect the existing emergency response responsibilities of other Illinois agencies. For example, Section 750.202(c) requires that reports of hazardous substance releases to be made to the Illinois Emergency Services and Disaster Agency (IESDA) pursuant to that agency's established procedures for telephone notification. IESDA, in turn, must notify IEPA. (R. 61, April 13, 1984 Hearing.)

2. What is the appropriate role for local governments? May IEPA "delegate" or otherwise enter into "contracts and agreements" with local governments to perform clean-ups?

The original Board proposal placed units of local government in the role in which the National Plan places the states. The Proposed Rule "encouraged" local government participation in clean-ups, stated that local governments may enter into "contracts or cooperative agreements or written delegation agreements with IEPA pursuant to Section 4(r) of the Environmental Protection Act," and stated that IEPA may pay local governments out of the Hazardous Waste Fund for taking clean-up actions pursuant to these type of agreements.

Several participants in this proceeding argued that the National Plan did not provide and did not contemplate this type of role for local governments. They also argued that the Act's so-called "superfund" provisions did not contemplate this role for local governments. This, they argue, reflects the recognition that "local governments on the whole do not have the resources nor expertise concerning responses to hazardous substances which the State of Illinois has." (R. 14, April 25, 1984 Hearing.)

The Board agrees with these arguments and finds that local goverments cannot be given the same role under this Plan that the states are given under the National Plan. Therefore, as adopted, most of the references to local governments have been deleted. In the Final Rule Section 750.203 simply states:

> "Local government agencies are encouraged to include contingency planning for response consistent with this Plan in all emergency and disaster planning."

However, on a related point, the Board notes that any existing authority to contract or enter into cooperative agreements with local governments is unaffected by this Plan. IEPA argued that Section 22.2(d) of the Act (the Hazardous Waste

Fund Section) explicitly authorizes the Director to enter into "such contracts and agreements as necessary...to carry out the Agency's duties under this subsection." (P.C. 6.) The Board agrees with the IEPA that there is no reason to imply any limitation on IEPA's authority to contract for services with a unit of local government. In the Final Rule, there is no express or implied exclusion which would prevent the Agency from entering into contracts or agreements with local units of government.

3. Is it appropriate to include the oil spill provisions of the National Plan in this Plan?

The National Plan is 16 Federal Register pages long. It is broken into eight Subparts, two of which contain substantive directions for determining the appropriate response to oil spills and hazardous substance releases, respectively.

The industry and government witnesses in this proceeding agreed that it is neither desirable nor legally feasible to address oil spills in this rulemaking. Both IEPA and IESDA testified that the U.S. Coast Guard and U.S.EPA exercise jurisdiction over oil spills on all waters which may impact the navigable waters of the U.S., including all Illinois waterways. (R. 39-44, April 13, 1984 Hearing.) Mr. Jim Kelty, Manager of the IEPA Emergency Response Unit, testified with regard to the federal agencies response on oil spills: "They are very effective. If they can stretch--if they can in anyway define it as a navigable waterway, they'll just respond immediately." (R. 41, April 13, 1984 Hearing.) Thus, the oil spill provisions appear to be unnecessary in the Illinois Plan.

Furthermore, the Board's statutory authority to adopt the oil spill provisions in this rulemaking is questionable because the definition of "hazardous substance" in both CERCLA and the Act explicitly exclude petroleum, including crude oil, except to the extent that it is designated as a "hazardous substance" on some other basis. The federal oil spill language was originally promulgated by U.S. EPA pursuant to the Clean Water Act (33 U.S.C. 466 et seq.) and was repromulgated in the "revision" to the National Contingency Plan undertaken pursuant to Section 105 of CERCLA. But participants in this proceeding argued that the National Plan's oil provisions must have been both adopted and repromulgated pursuant to U.S. EPA's Clean Water Act authority, rather than CERCLA authority, since CERCLA excludes petroleum. Similarly, they conclude that the Board has no authority to promulgate the oil provisions of the Plan under Section 22.1(a) because that section only authorizes adoption of regulations which are "identical in substance" to the Federal rules implementing Section 105 of CERCLA. (R. 83-90, April 13, 1984 Hearing.)

The Board agrees that it is neither necessary nor within the Board's Section 22.1(a) authority to address oil spills. Accordingly, the Final Rule deletes all reference to oil discharges and related provisions.

4. Is full Board rulemaking required to add sites to the State Priorities List?

The original Board Proposal followed the National Plan's language which simply requires that a Priorities List be published for comment. (See 40 CFR 300.66(e) (3) and (4).) U.S. EPA promulgated the National Priorities List by a rulemaking which appears as Appendix B to the National Plan. But, notably, federal rulemaking is basically a "notice and comment" procedure. In contrast, Board rulemaking under the Act requires hearings, an Economic Impact Study and review by the Joint Committee on Administrative Rules in addition to Illinois Register publication and a 45-day comment period.

Industry participants in this proceeding argued that under the "identical in substance" limitation of this rulemaking the Board is constrained to adopt only the federal list in Appendix B. Agreeing that it would be absurd to adopt the out-of-state sites on that list, they argued the Board should, at this time, just adopt the Illinois sites on that list. However, they also admit that for policy reasons, i.e. it's cheaper for the state to participate in a federal clean-up, the Illinois plan should not apply to sites which are on the federal list. The gist of this argument is that the Board should adopt Appendix B, although it would be non-functional until new state priority sites are added to it in another rulemaking. (R. 72-76, April 13, 1984 Hearing.)

IEPA argued that full Board rulemaking is not required and, in fact, would not be "identical in substance" to the National Plan. They further argued that requiring rulemaking in order to undertake a planned, fund-financed clean-up would be inconsistent with Section 22.2(d) of the Act which states that IEPA "shall" use the Fund to take "whatever preventive or corrective action is necessary or appropriate in circumstances certified by the Governor and the Director." (P.C. 6.)

In keeping with the Attorney General's "Rules for Interpretation of Illinois Statutes and Constitutions," the Board declines to construe the term "identical in substance" to create an absurd consequence such as the adoption of a non-functional listing of sites. The Board agrees with IEPA that full Board-style rulemaking was not contemplated in the Federal Plan, nor would it be consistent with the certifcation procedure established in the other "Superfund" provisions of the Environmental Protection Act. As adopted, the Final Rule simply requires that a notice and comment procedure be followed, including publication in the Illinois Register.

5. Does "identical in substance" require that the Plan utilize the federal definition of "Hazardous Substance"?

Industry participants in this proceeding argued that the federal definition must be used in order to be "identical in substance." (R. 32, April 13, 1984 Hearing.) IEPA argued that the Act's definition should be used since this would encompass the same universe of substances the Act's "superfund" provisions encompasses, i.e. those substances on which IEPA is authorized to take preventive or corrective action under Section 22.2 and Section 4 of the Act. (P.C. 6.)

The Final Rule uses the Environmental Protection Act definition. Again, the standard "identical in substance" should not be interpreted to require the adoption of something absurd or inconsistent with the State's statutory program. In this case, the definition of "Hazardous Substance" was adopted in the same Public Act as the Board's mandate to adopt the Plan, therefore the conclusion that the state definition was contemplated is quite well supported. Also, from a practical perspective, it makes sense to have all state clean-ups subject to the same procedures.

D. Renumbering Differences Between Proposal and Final Version

In order to comply with the comments of the Secretary of State's Administrative Code Unit on codification form, the entire Part has been renumbered from Part 747 to Part 750. Proposed Subpart F has been renumbered as Subpart D. Proposed Subpart H has been renumbered as Subpart E.

Proposed Subparts D, E, and G have been deleted in response to comment. In the Proposed Rule Subpart D was simply "Reserved." As noted above, proposed Subpart E was deleted in response to comments that the Board is not authorized under Section 22.1(a) of the Environmental Protection Act to adopt the oil provisions of the National Contingency Plan. Subpart G, relating to trustees for Natural Resources, was deleted in response to the comment that the Act does not address liability for damages to or responsibility for managing natural resources. The fact that this is not addressed in the Act or this Plan does not impair the authority of the State and appropriate state agencies to manage, protect, and seek recovery for damages to the state's natural resources under other statutes or the common law.

ORDER

The above Opinion of the Board is hereby adopted.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion was adopted on the 2nd day of August, 1984 by a vote of 6-0.

Dorothy M. Gunn

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