

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
RCRA SUBTITLE C UPDATE, USEPA) R16-7
AMENDMENTS (January 1, 2015 through) (Identical-in-substance
June 30, 2015 and July 2, 2015)) Rulemaking- Land

NOTICE

Pollution Control Board
Attn: Clerk
100 W. Randolph St.
Suite 11-500
Chicago, IL 60601-3218
(Via COOL)

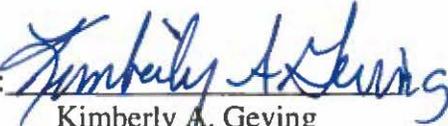
Office of Legal Services
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271
(Via First Class Mail)

Division Chief of Environmental Enforcement
Office of the Attorney General
100 W. Randolph St.
Suite 1200
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Michael McCambridge
Illinois Pollution Control Board
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Chicago, IL 60601-3218
(Via First Class Mail)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the Illinois EPA's **COMMENTS**, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Kimberly A. Geving
Assistant Counsel
Division of Legal Counsel

Date: May 2, 2016

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**COMMENTS OF THE ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY**

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA”), by and through one of its attorneys, Kimberly Geving, and submits its COMMENTS in the above-captioned matter to the Illinois Pollution Control Board (“Board”).

The Illinois EPA submits the following comments in response to the above-captioned matter:

A. General Comments

1. On page 61 of the Board’s Order, Section 720.131(d), the Board cites to “35 Ill. Adm. Code 721.4(a)(24).” There is no such section in Part 721. The Illinois EPA believes this citation should actually be “35 Ill. Adm. Code 721.104(a)(24).”
2. On page 74 of the Board’s Order, Table of Contents Section 721.511, the first word “of” should be removed. It isn’t in the title of Section 721.511 of the text of the rules.
3. On page 74 of the Board’s Order, Table of Contents, Section 721.958, the word “heavy” should be capitalized.
4. On page 74 of the Board’s Order, Table of Contents, Section 721.961, the word “valves” should be capitalized.
5. On page 74 of the Board’s Order, Table of Contents, Section 721.962, the words “skip period leak” should all be capitalized.
6. On page 127 of the Board’s Order, Section 721.104(a)(27)(F)(v), the word “subparts” should be capitalized.
7. On page 128 of the Board’s Order, Section 721.104(a)(27)(G)(v), the word “subparts” should be capitalized.

8. On page 219 of the Board's Order, Section 721.270, the citation to "Section 721.4(a)(27)" appears to be incorrect. The Illinois EPA believes the citation should actually be "Section 721.104(a)(27)."
9. On page 220 of the Board's Order, Section 721.275, the word "Secondary" in the heading should be in bold.
10. On page 228 of the Board's Order, Section 721.296(d)(3)(C), there is a colon after "Region 5" that does not appear to be necessary.
11. On page 237 of the Board's Order, Section 721.520(f)(4)(A), the word "The" in the first line should be lower case.
12. On page 254 of the Board's Order, Section 721.934(b)(4)(B), the phrase does not appear to read correctly. The Illinois EPA believes that the "but" should be "or."
13. On page 266 of the Board's Order, Section 721.935(c)(9), sixth line, "closedvent" should be hyphenated.
14. On page 290 of the Board's Order, Section 721.983(a)(1), the citation to "261.987" appears to be in error. The Illinois EPA believes that should actually be "721.987."
15. On page 304 of the Board's Order, Section 721.984(d)(3), the word "closedvent" should be hyphenated.
16. On page 305 of the Board's Order, Section 721.984(e)(3)(A), the word "remanufacture" should be "remanufacturer."
17. On page 306 of the Board's Order, Section 721.984(e)(3)(B)(i), the comma before "and" should be a semicolon.
18. On page 324 of the Board's Order, Section 721.986(d)(3)(A)(i), the word "remanufacture" should be "remanufacturer."
19. On page 325 of the Board's Order, Section 721.986(d)(4), the word "remanufacture" should be "remanufacturer."
20. On page 333 of the Board's Order, Section 721.988(a), the citation "261.987" appears to be incorrect. The Illinois EPA believes it should be "721.987."
21. On page 333 of the Board's Order, Section 721.988(b), the word "remanufacture" should actually be "remanufacturer."
22. On page 333 of the Board's Order, Section 721.989(a), the citation "261.987" appears to be incorrect. The Illinois EPA believes it should be "721.987."

23. On page 338 of the Board's Order, Section 721.989(h), the two references in that paragraph to "subpart VV" should be "Subpart VV."

24. On page 419 of the Board's Order, Section 724.981, the word "section" in the second line should be capitalized.

B. Specific Comments in Response to Board's Requests:

On pages 42-44 and page 51 of the Board's Opinion, the Board requested public comment on 22 specific issues. The Illinois EPA offers the following comments on those issues as they appear in the Opinion. For purposes of clarity, the Illinois EPA will rephrase the questions and then follow with its replies.

1. *Do the revisions to the federal language that change "material" to "hazardous secondary material" and "discarded" to "discarded material" in the exclusions clarify USEPA's intent?* The Illinois EPA agrees with these changes and believes they clarify the intent.
2. *Does calling the determination that deems a facility a "verified reclamation facility" or "verified intermediate facility" a "solid waste determination" (for the sake of consistency with the name for the existing procedure that USEPA chose to use) cause confusion? If so, what alternative designation could the Board use?* Because the regulations allow the appropriate administrative authority to deem an intermediate facility or a reclamation facility "verified" using a specified procedure and applying specified factor, the use of the term "solid waste determination" does cause some confusion. This is because the solid waste determinations and non-waste determinations are case-by-case determinations for a material from a specific generator, while the determination for a verified reclamation facility or verified intermediate facility would be facility specific and may not be material specific. This raises the question of whether a determination must be made of each material entering the "verified reclamation facility" or "verified intermediate facility." To clarify that the determination is facility specific instead of generator material specific, it may be better to designate the procedure as a "verified reclamation facility determination" and "verified intermediate facility determination."
3. *Does uniform use of "verified reclamation facility" and "verified intermediate facility" in the provision for second-party reclaimed HSM clarify USEPA's intent?* Yes.
4. *Has the Board appropriately narrowed the references to TSCA to the Industrial Function Codes listed in 40 C.F.R. 711.15(b)(4)(i)(C) table 8 for definition of "chemical functional uses"?* The Board language is certainly clearer than the federal language; however, the Illinois EPA doesn't have experience with Industrial Function Categories and could not determine if table 8 is all inclusive as the Board believes.

5. *Is the Board correct in interpreting that USEPA intended to include within the solvent remanufacturing exclusion all Industrial Function Codes other than that expressly excepted?* USEPA excluded the degreasing and cleaning solvents because they wished to focus on higher-value hazardous secondary materials that are being re-manufactured rather than discarded. See 44133 FR 76 dated Friday, July 22, 2011. Limiting the solvents to U030 and U015 would seem to be USEPA's intention.
6. *Has the Board appropriately directed regulated entities to the Agency for approval of any constituent-specific adjustment factors that the entities may wish to use in determining air emissions?* This approach is problematic for the Illinois EPA for two reasons: 1) The Illinois EPA has not been delegated authority for Part 724 Subpart CC; and 2) The Illinois EPA does not have a constituent specific list of fm25D factors and would have to do case-by-case evaluations, which the Board has already described as cumbersome and resource intensive. In the absence of Appendix J, the Board has not adequately delineated the case-by-case evaluations that sources would make and the determinations that the Illinois EPA would have to review. Not only does Appendix J include tables with values of fm25D for a large number of chemicals, this appendix codifies the methodology by which a source could determine these values. If the Board is committed to make the "fm25D option" available to sources, it must carry through in this rulemaking and include the values of fm25D and the methodology by which a source could determine these values to facilitate the use of this option. The Board's current proposal does not do this; therefore, the "fm25D option" would not be available to sources.
7. *Is there any reliable, comprehensive reference that the Board could incorporate by reference for constituent-specific adjustment factors?* As described by USEPA at 40 CFR 265.1084, constituent-specific adjustment factors (fm25D) can be obtained by contacting the Waste and Chemical Processes Group, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27710. This is the only known source for obtaining fm25D.
8. *Did the Board appropriately refer the regulated entity to the Agency for a written determination under section 39 of the Act (415 ILCS 5/39) that is subject to appeal under section 40 of the Act (45 ILCS 5/40) before the Board for the several operational determinations that the rules provide? (Including disagreement on emissions, volatile organic content, recordkeeping requirements for alternative emissions control equipment, or demonstration of control device performance; alternative monitoring frequency or analytical methods; use of results averaging; or appropriate use of engineering texts.)* This approach is problematic because RCRA permits are issued exclusively under Section 39(d) of the Act. In the case of a permitted facility, the determination would be part of a RCRA permit review subject to Sections 21(f) and 39(d). The permitting authority under Sections 21(d) and 39(a) do not apply to hazardous waste and do not seem to grant authority to do determinations authorized under RCRA. 35 Ill. Adm. Code 702.197 clearly lays out procedures for permit appeals and Illinois EPA determinations.

9. *Does uniform use of “partially-reclaimed” and “partial reclamation” in the provisions for partially reclaimed HSM clarify USEPA’s intent? Yes.*
10. *Does the Board correctly perceive that USEPA intends that partial reclamation of HSM in the process that generated it is deemed not “substantial,” and the HSM partially reclaimed in the process that generated it is ineligible for exclusion? Yes.*
11. *Does the Board correctly perceive that USEPA does not intend that reclamation in another process is necessarily “substantial”? Yes.*
12. *Is the Board correct in asserting that partial reclamation is “substantial” at the point the HSM acquires sufficient value that it will likely be purchased for further reclamation? The likelihood of purchase for further reclamation is not the only criteria. The Illinois EPA believes that the material must also be analogous to a product or raw material. In addition, the process that will use the secondary hazardous material needs to be similar to a process that uses virgin material. The additional treatment steps that are not present when the process uses virgin materials may indicate additional waste treatment is occurring and the reclamation may not be “substantial” until after those treatment steps have been completed.*
13. *Does the Board correctly perceive that the new procedural requirement “changed circumstances” will require reopening an existing solid waste determination, boiler determination, or non-waste determination? A change in circumstances would require a review to determine if the activity is now outside of the previously issued determination.*
14. *Does the mechanism of requiring initial Agency review of “changed circumstances” rather than requiring a petition directly to the Board, confer administrative economy without losing what USEPA intended to gain by review? The following scenario was described in the Board’s opinion: the Board could require the holder of the adjusted standard to send the description of changed circumstances to the Agency for preliminary determination whether the HSM continues to fulfill the criteria on which the adjusted standard was granted. If the Illinois EPA determines that the HSM does not fulfill the criteria, the Illinois EPA would notify the holder of the adjusted standard of that determination. Upon receipt of the Illinois EPA notification, the holder would re-apply for the adjusted standard. The Board proposes that a new adjusted standard is required whenever there is a change to an existing solid waste determination, boiler determination, or non-waste determination. The Board also indicated that it will issue a new adjusted standard, and not deny granting a new adjusted standard on the basis that it is not necessary, if the previously granted adjusted standard does not include a provision stating a compliant maximum term for the adjusted standard. To confer administrative economy, the Illinois EPA believes that the Illinois EPA determination described above should be an option and not a requirement. In the event the holder of the adjusted standard believes that the activity no longer continues to fulfill the criteria on which the adjusted standard was granted, it should not be necessary to get a determination from the Illinois EPA prior to applying to the Board. Under these circumstances, the holder of the adjusted standard should apply directly to the Board. The Illinois EPA would also like the Board to clarify*

when the adjusted standard remains in effect-- if the circumstances have changed and also under what circumstances when the operation must cease until a new adjusted standard is issued.

15. *Does the Board correctly perceive that USEPA intended the maximum 10-year fixed maximum term for solid waste determinations, boiler determinations, and non-waste determinations to apply to relief previously granted by the Board by existing orders?* At 1758 FR 80 dated Tuesday, January 18, 2015, USEPA stated, "The 10-year time frame also ensures that renewals occur regularly enough in order to evaluate significant changes in recycling processes, technologies, and market factors that may affect the terms of a variance or non-waste determination...A periodic time limit, in this case 10 years, however, triggers a re-review of the circumstances without relying on self-reporting by the facility." Based on these comments, the Illinois EPA believes that the USEPA intends that previously issued determinations also be subject to the 10 year term and re-review.

16. *Is the advent of the 10-year fixed maximum term for solid waste determinations, boiler determinations, and non-waste determinations a "changed circumstance" that would require the holder of such a Board order to submit that order to the Agency for review and recommendation?* The Illinois EPA does not believe that the advent of a 10-year fixed term is a changed circumstance in itself; however, we do believe that USEPA intends that these previously issued determinations be reviewed every 10 years. USEPA states, "Many of the variance and non-waste determination criteria specifically consider factors such as the manner in which the hazardous secondary material is recycled, the market factors of the recycling process, the value of the hazardous secondary material, and contractual arrangements. However, these factors do not remain static and, instead, tend to change and evolve over time. It is, therefore, prudent that regulatory authorities periodically review these case-by-case situations to ensure that the hazardous secondary material continues to meet the criteria of the variance or non-waste determination." USEPA requires notification for all facilities with a determination. They also talk about prioritizing these facilities, re-reviewing the variances and providing compliance assistance. They also indicate that they do not wish to rely on self-reporting by the facility. The Illinois EPA believes that those facilities with existing adjusted standards must comply with the notification requirements and re-apply within the 10 year timeframe. However, if they meet the terms of the adjusted standard and the regulations; no changed circumstances as described in the regulations have occurred; and the adjusted standard is less than 10 years old, they could continue up to 10 years on the previously issued adjusted standard.

17. *Are the revisions to the definition of "legitimate recycling" and/or the broadened applicability of the definition of a nature that they are "changed circumstances," where that requirement exists, and, if so, would the "changed circumstances" require the holder of such a Board order to submit that order to the Agency for review and recommendation?* USEPA states, "Many of the variance and non-waste determination criteria specifically consider factors such as the manner in which the hazardous secondary material is recycled, the market factors of the recycling process, the value of the

hazardous secondary material, and contractual arrangements. However, these factors do not remain static and, instead, tend to change and evolve over time. It is, therefore, prudent that regulatory authorities periodically review these case-by-case situations to ensure that the hazardous secondary material continues to meet the criteria of the variance or non-waste determination...EPA has changed the definition of legitimate recycling in Section 260.43 to make clear that all four factors identified in Section 260.43 must be met, but also to provide some flexibility in determining legitimacy for certain types of recycling. In particular, in cases where there is no analogous product made from raw materials, EPA has clarified that the product of recycling is still a legitimate product when it meets widely recognized commodity standards (e.g., commodity-grade scrap metal) or when the hazardous secondary material is recycled back into the production process from which it was generated (e.g., closed-loop recycling). In addition, for cases in which the product of the recycling process has levels of hazardous constituents that are not comparable to analogous products, the revised legitimacy standard includes a process that allows the facility to document and certify that the recycling is still legitimate.” Based on this information, it would be necessary to submit a new petition if the previous adjusted standard did not indicate that all four factors identified in Section 260.43 were met. In other instances where petitioner wished to take advantage of the flexibility that has been added, adding the flexibility to the adjusted standard would amount to a change in circumstances. In the event the holder of the adjusted standard believes that activity no longer continues to fulfill the criteria on which the adjusted standard was granted, it should not be necessary to get a determination from the Illinois EPA prior to applying to the Board. In instances where the holder of the adjusted standard is unsure whether the changed circumstances have occurred, it would be appropriate for them to submit that order to the Illinois EPA for review.

18. *Are the revisions to the definition of “legitimate recycling” and/or the broadened applicability of the definition of a nature that will require regulated entities operating under a codified exclusion to comply and assemble any required documentation?*

USEPA stated, “In developing the codified legitimacy language, we did not intend to raise questions about the status of general legitimacy determinations that underlie existing exclusions from the definition of solid waste (e.g., the solid waste exclusions in 40 CFR 261.4(a)), or about case-specific determinations that have already been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances that are based on the hazardous secondary material being legitimately recycled, including determinations made in letters of interpretation and inspection reports, remain in effect.” Illinois EPA believes the exclusions impacted by this regulatory change are limited to hazardous secondary materials and we are unaware of anyone operating under the exclusion in 35 Ill. Adm. Code 720.143. Codified exclusions found in other parts of the regulations would not be required to assemble any documentation.

19. *Are the revisions to the definition of “legitimate recycling” and/or the broadened applicability of the definition of a nature that will require application to exclusions from the definition of hazardous waste?* The Board asked, “This is not full explanation of the impact of the 2015 DSWR amendments on existing exclusions. USEPA’s discussion does not consider the effect of the newly revised procedural requirements. Specifically,

are the requirements for the changed circumstances, limited term, and required notice provisions imposed on these exclusions by 40 C.F.R. 260.33(c), (d), and (e) (corresponding with 35 Ill. Adm. Code 720.133(c), (d), and (e))?

If the changed circumstances and new term limit requirements apply to the existing exclusions granted by administrative determinations, this would include all of the solid waste determinations and boiler determinations that the Board has granted to date by adjusted standard. Must the persons to whom the Board granted these adjusted standards now submit an explanation of changed circumstances to the Illinois EPA? Must these persons apply to the Board for modification of the adjusted standard for review and addition of a fixed term limit? Will these adjusted standards expire by operation of law 10 years after the date they issued or after the effective date of the present amendments?"

The Illinois EPA believes the rule change would only impact those instances where the determination excluded a "hazardous secondary material" as previously defined, and we are unaware of anyone operating under the exclusion in 35 Ill. Adm. Code 720.143. 35 Ill. Adm. Code 720.133(c), (d), and (e) would not be impacted.

USEPA stated, "In developing the codified legitimacy language, we did not intend to raise questions about the status of general legitimacy determinations that underlie existing exclusions from the definition of solid waste (e.g., the solid waste exclusions in 40 CFR 261.4(a)), or about case-specific determinations that have already been made by EPA or the states. Current exclusions and other prior solid waste determinations or variances that are based on the hazardous secondary material being legitimately recycled, including determinations made in letters of interpretation and inspection reports, remain in effect." The Illinois EPA does not believe that the rule itself resulted in an across the board change in circumstances. The change in circumstances would be the result of factors of the recycling process, the value of the hazardous secondary material, and contractual arrangements that tend to change and evolve over time. USEPA has indicated that the regulatory authorities should periodically review the case-by-case situations to ensure that the hazardous secondary material continues to meet the criteria of the variance or non-waste determination. Illinois EPA believes that the intention is to use the notification process and 10 year expiration date to ensure case-by-case reviews of all existing determinations issued under 35 Ill. Adm. Code 720.143 only. Therefore, the 10 year expiration would cause determinations issued under 35 Ill. Adm. Code 143 to expire by operation of law and those petition holders would also be subject to the notification requirements. However, we do not believe this is the case for determinations issued under 35 Ill. Adm. Code 720.133(c), (d), and (e).

20. *After the 2013 amendment that directs attention to the Agency for financial assurance forms, is there any purpose for retaining Illustrations A and B in Appendix A to 35 Ill. Adm. Code 727?* The Illinois EPA sees no problem with removing the financial assurance forms for the financial test to demonstrate financial assurance for a facility with a standardized permit in Illustration A, Appendix A of Part 727 and the financial test to demonstrate third party liability for a facility with a standardized permit in Illustration B, Appendix A of Part 727. 35 Ill. Adm. Code 727.240(l) appears to address the forms

by allowing the Illinois EPA to designate and incorporate by reference in 35 Ill. Adm. Code 720.111(b) the same standardized forms from 40 CFR 267.151.

21. *Does adding systematic names and CAS numbers for the chemicals listed in Appendix C to 35 Ill. Adm. Code 728 enhance the clarity of the chemicals identified? Yes, the systematic names and CAS numbers added to the chemicals do enhance the clarity of the chemicals identified.*

22. *Is there any reason the Board should not parenthetically add systematic names and CAS numbers for the chemicals listed in Appendix C to 35 Ill. Adm. Code 728? There does not appear to be any reason that the Board should not parenthetically add systematic names and CAS numbers to the chemicals listed in 35 Ill. Adm. Code 728, App. C.*

This concludes the Illinois EPA's comments in this matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Kimberly A. Geving
Assistant Counsel
Division of Legal Counsel

Date: May 2, 2016

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STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **COMMENTS** upon the persons to whom they are directed, by placing a copy of each in an envelope addressed to:

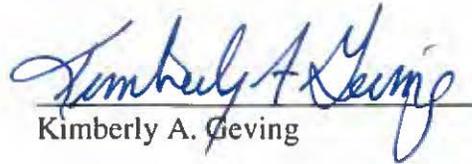
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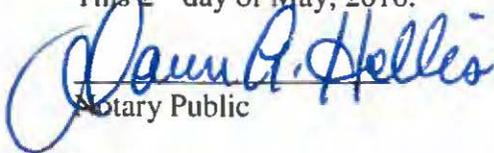
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and mailing them (First Class Mail) from Springfield, IL on May 2, 2016, with sufficient postage affixed as indicated above.


Kimberly A. Geving

SUBSCRIBED AND SWORN TO BEFORE ME
This 2nd day of May, 2016.


Notary Public



RECEIVED
MAY 2 2016
CLERK OF SUPERIOR COURT
STATE OF CALIFORNIA
SAN FRANCISCO