

ILLINOIS POLLUTION CONTROL BOARD

November 15, 2018

IN THE MATTER OF:	)	
RCRA SUBTITLE D UPDATE, USEPA REGULATIONS (July 1, 2016 through December 31, 2016)	)	R17-14 (Identical-in-Substance Rulemaking - Land)
RCRA SUBTITLE C UPDATE, USEPA AMENDMENTS (July 1, 2016 through December 31, 2016)	)	R17-15 (Identical-in-Substance Rulemaking - Land)
RCRA SUBTITLE C UPDATE, USEPA AMENDMENTS (July 1, 2017 through December 31, 2017)	)	R18-12 (Identical-in-Substance Rulemaking - Land)
UIC UPDATE: MISCELLANEOUS NON-SUBSTANTIVE REVISIONS AND CORRECTIONS TO 35 ILL. ADM. CODE 704, 705, 730, AND 738	)	R18-31 (Identical-in-Substance Rulemaking - Land) (Consolidated)

Adopted Rule. Supplemental Opinion and Order.

SUPPLEMENTAL OPINION AND ORDER OF THE BOARD (by C.K. Zalewski and B.K. Carter):

The Board adopted extensive amendments to the Illinois hazardous waste, Municipal Solid Waste Landfill (MSWLF), and underground injection control (UIC) rules on October 4, 2018. Significant revisions to the proposed version of two provisions prompted the Board to invite supplemental public comments on those two provisions. The Illinois Environmental Protection Agency (Agency) submitted comments on October 26, 2018.

By this supplemental opinion and order, the Board addresses the Agency's comments. The Board makes minor revisions to the text of the adopted rules based on the Agency comments.

**DISCUSSION**

**Additional Episodic Events**

The Board declines to revise the provision for additional episodic events in 35 Ill. Adm. Code 722.333 as requested by the Agency. Obstacles bar granting each request.

**Approval by Rule.** The Agency repeats its earlier request that the Board draft the Illinois rule to incorporate approval by rule. *See* PC 8 at 4; PC 11 at 3-4. The Board cannot adopt such a rule. Approval by rule would either make the Illinois rule less stringent than corresponding 40 C.F.R. § 262.223 or inconsistent with what the United States Environmental Protection Agency (USEPA) intends. USEPA cannot authorize such a rule. *See* 40 C.F.R. §§ 271.4 and 271.10(h)(3)(i) (2017).

The Agency must play a role in receiving petitions for additional episodic events and approving or disapproving them. USEPA requires administrative approval for additional episodic events: “[US]EPA has determined that it is most appropriate to allow only one event of each type per year and to require the generator to petition [US]EPA for the second event and be approved.” 81 Fed. Reg. 85732, 86786 (Nov. 28, 2016).

Consistent with the notification requirements, the generator must petition [US]EPA for the second event. For a planned event, the generator must submit a petition for a second event and indicate that this is a petition for a second event. For an unplanned event, the petition must be in the form of a notification to [US]EPA within 72 hours of the start of the event by phone, email, or fax and subsequent submittal of a complete petition with the relevant information for the event.

\* \* \*

In the case of a planned second episodic event, a generator may not manage the hazardous waste from the event under the episodic generation conditions in subpart L until it has approval from the implementing agency for that second event. \* \* \*

[US]EPA has determined that in the case of a petition for an unplanned second event, the generator may manage hazardous waste for the additional unplanned episodic event under the episodic event standards until written approval by [US]EPA has been received. \* \* \* *Id.*

USEPA stated that requiring administrative approval ensures the legitimacy of the additional episodic event and minimizes the potential for abuse. *Id.*

**Approval by Provisional Variance.** The Agency requests that the Board not use the mechanism of a provisional variance for its approval of additional episodic events. The Agency points out that the threshold for issuing a provisional variance is that compliance would pose a short-term arbitrary or unreasonable hardship on the petitioner. The Agency argues that a generator needing an additional episodic event would not be facing an arbitrary or unreasonable hardship; the generator needs only to comply with the higher-generator-category standards. PC 11 at 1-2.

The Board disagrees. The need to comply with higher-generator-category standards imposes a greater regulatory burden. The occurrence of an unplanned episodic event is a chance occurrence. USEPA provided for additional episodic events to avoid unnecessarily imposing that burden on generators where the need for an additional episodic event is legitimate. *See* 81 Fed. Reg. at 85786, 85788.

There is no argument that the provisional variance is inappropriate for extending the generator accumulation time “due to unforeseen, temporary, and uncontrollable circumstances.” 35 Ill. Adm. Code 722.116(d) and 722.117(b). The Board observes that this is similar to the language of the definition of “unplanned episodic event”: “‘Unplanned episodic event’ means an episodic event that the generator did not plan or reasonably did not expect to occur, including

production process upsets, product recalls, accidental spills, or ‘acts of nature’, such as tornado, hurricane, or flood.” 35 Ill. Adm. Code 722.331. Contrary to the Agency’s assertions, both need and arbitrary or unreasonable hardship are elements underlying a petition for an additional episodic event.

The Agency points out that the information required in a petition focuses on the generator’s compliance history, how the generator will manage its waste, and other factors relating to compliant management of waste during the episodic event. PC 11 at 3. These factors help ensure sound management of the waste. These information items also aid determining the legitimacy and need for an additional episodic event and that the generator is not using episodic events to avoid compliance with higher-generator-category standards. 81 Fed. Reg. at 85786. These information requirements do not undermine determinations of need or arbitrary or unreasonable hardship that would result from complying with higher-category-generator standards due to the occurrence of an unplanned episodic event in a calendar year.

The Agency argues that there is no “need to fit petitions for additional episodic events into an existing mechanism for administrative approval.” PC 11 at 3. The Board believes that the Agency, as a creature of statute, is limited to the authority conferred by statute or Board rule. The Environmental Protection Act (Act) (415 ILCS 5 (2016)) requires allocation of decision-making authority “based upon the general division of functions within this Act and other Illinois statutes.” 415 ILCS 5/7.2(a)(5) (2016). The provisional variance is the single statutory mechanism for Agency approval that is most consistent with what USEPA intends.

**Factors for Agency Consideration.** The Agency requests that the Board remove the criteria for Agency decision-making added as 35 Ill. Adm. Code 722.333(e). The Agency said that it requested criteria as part of a provision that granted approval by rule. PC 11 at 4. The Board observes, however, that the Joint Committee on Administrative Rules (JCAR) first requested that the Board add criteria for Agency decision-making. *See* PC 5.

After considering the JCAR request, the Board added criteria drawn from the definitions of “unplanned episodic event” and “planned episodic event” in 35 Ill. Adm. Code 722.331 (derived from 40 C.F.R. § 262.231), the requirements in 35 Ill. Adm. Code 722.333(a) (derived from 40 C.F.R. § 262.233(a)), and USEPA’s *Federal Register* discussion of the rule. The Board believes the criteria are needed.

### **Definition of “Municipal Solid Waste Landfill Unit”**

The Board Declines to revise the definition of “municipal solid waste landfill unit” in 35 Ill. Adm. Code 810.103 (now derived from 40 C.F.R. § 258.2) as requested by the Agency. The Board revised the definition to follow the federal definition at the request of JCAR. *See* PC 7. Using the federal language avoids confusion that some other meaning is intended.

**“Any Pile of Non-Containerized Accumulations.”** The Agency requests that the Board retain language from the statutory definition of “municipal solid waste landfill unit.” The Illinois statutory definition includes the phrase, “any pile of noncontainerized accumulations.” 415 ILCS 5/3.285 (2016). The Board replaced this with “waste pile,” as defined in 40 C.F.R. § 257.2. The federal definition of “waste pile” provides: “*Waste pile* or *pile* means any

noncontainerized accumulation of solid, nonflowing waste that is used for treatment or storage.” 40 C.F.R. § 257.2 (2018). Thus, the Agency-recommended language would omit “of solid, nonflowing wastes that is used for treatment or storage.” The Agency asserts that this change would “retain the exclusion meant for transfer stations, storage facilities, and treatment facilities.” PC 11 at 5.

The Agency-requested revision could shift the meaning to embrace flowing waste. The Board does not see how this changes the effect on transfer stations, storage facilities, and treatment facilities. The Board retains the federal language.

**“Publicly or Privately Owned or Operated.”** The Agency requests that the Board add “or operated” to the clause stating that a MSWLF “may be publicly or privately owned.” The Agency points out, “Landfills in Illinois can be publicly owned and operated, privately owned and operated, or even publicly owned and privately operated.” PC 11 at 5.

The Board believes that the phrase “publicly or privately owned” avoids confusion over use of the word “municipal” in the defined term. The Board does not believe that adding “or operated” adds anything to the definition. If an MSWLF unit may be publicly or privately owned, that it is publicly or privately operated is immaterial. In the absence of potential for confusion, the Board prefers to add nothing to the federal language.

**“Landfill.”** The Agency requests that the Board change “construction and demolition landfill” to “landfill.” The Agency concedes that the Board note explanation avoids confusion that a “construction and demolition landfill” is related to a “clean construction and demolition debris landfill,” which is regulated 35 Ill. Adm. Code 1100. PC 11 at 5.

The Board does not revise the federal language absent some indication that revision is necessary to avoid confusion.

### **Miscellaneous Minor Corrections**

The Agency pointed out 11 possible errors in provisions in 35 Ill. Adm. Code 722. The Board corrects 10 provisions as a result. There is no error in one of the provisions.

The Board corrects “262.722.117(a)” to “722.117(a)” in 35 Ill. Adm. Code 722.115(a)(6)(A), so the text appears as follows:

- A) Comply within three consecutive calendar days with the applicable central accumulation area regulations in Section 722.116(b) or 722.117(a), or

The Board corrects “subsection (b)(2)(i)” to “subsection (b)(2)(A)” in 35 Ill. Adm. Code 722.116(b)(2)(D), not to “35 Ill. Adm. Code 725.171,” as suggested by the Agency. The provision in 35 Ill. Adm. Code 725.171 requires compliance with treatment, storage, and disposal facility standards, not generator standards. Subsection (b)(2)(A) requires compliance with the requirements for small quantity generators. The text appears as follows:

- D) Inspections. At least weekly, the SQG must inspect central accumulation areas. The SQG must look for leaking containers and for deterioration of containers

caused by corrosion or other factors. See subsection (b)(2)(A) for remedial action required if deterioration or leaks are detected.

The Board corrects “the SQG pours, mixes, spreads, or otherwise handles hazardous waste is being poured, mixed, spread, or otherwise handled” to “the SQG pours, mixes, spreads, or otherwise handles hazardous waste”; reverted “either directly or through direct, unimpeded visual or voice contact with another employee” to the federal language “direct or unimpeded access” in 35 Ill. Adm. Code 722.116(b)(8)(D)(i), so the text appears as follows:

- i) Whenever the SQG pours, mixes, spreads, or otherwise handles hazardous waste, all personnel involved in the operation must have immediate access (i.e., direct or unimpeded access) to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required under subsection (a)(8)(B).

The Board removes the definite article from before “returned waste” and corrects “designated facility can accept and manage the waste and later received that shipment back” to “designated facility could accept and manage the waste but which the designated facility later returned” in 35 Ill. Adm. Code 722.116(e), so the text appears as follows:

- e) Rejected Load. An SQG may accumulate returned waste on site in accordance with subsections (a) and (b) if the SQG sent the shipment of hazardous waste to a designated facility believing that the designated facility could accept and manage the waste but which the generator later received that shipment back as a rejected load or residue in accordance with the manifest discrepancy provisions of 35 Ill. Adm. Code 724.172 or 725.172 may accumulate the returned waste on site in accordance with subsections (a) through (d). Upon receipt of the returned shipment, the SQG must do either of the following:

The Board corrects “LQG must be locate” to “LQG must locate” in 35 Ill. Adm. Code 722.117(a)(1)(F)(i), so the text appears as follows:

- i) The LQG must locate containers holding ignitable or reactive waste at least 15 meters (50 feet) from the facility’s property line, unless the LQG obtains a written approval from the authority having jurisdiction over the local fire code that allows hazardous waste accumulation to occur within this restricted area. The LQG must maintain a record of the written approval as long as the LQG accumulates ignitable or reactive hazardous waste in this area.

The Board restores the comma before and corrects “if the LQG manages the hazardous wastes are being managed in satellite accumulation areas” to “if the LQG manages the hazardous wastes in satellite accumulation areas” in 35 Ill. Adm. Code 722.117(a)(3)(B), so the text appears as follows:

- B) The LQG must remove all wastes from the drip pad at least once every 90 days. Any hazardous wastes that the LQG removes from the drip pad are subject to the 90-day accumulation limit in subsection (a) and Section 722.115, if the LQG

manages the hazardous wastes in satellite accumulation areas prior to moving them to a central accumulation area; and

The Board corrects “the unit is emptied the LQG empties the unit” to “the LQG empties the unit” in 35 Ill. Adm. Code 722.117(a)(4)(B)(ii), so the text appears as follows:

ii) Documentation that the LQG empties the unit at least once every 90 days.

The Board corrects “employees must not work . . . until he or she has completed” to “an employee must not work . . . until he or she has completed” in 35 Ill. Adm. Code 722.117(a)(7)(B), so the text appears as follows:

B) Facility personnel must successfully complete the program required in subsection (a)(7)(A) within six months after the date of their employment, assignment to the facility, or assignment to a new position at the facility, whichever is later. An employee must not work in unsupervised positions until he or she has completed the training standards of subsection (a)(7)(A).

The Board corrects “40 CFR 268” to “35 Ill. Adm. Code 728” in 35 Ill. Adm. Code 722.117(a)(9), so the text appears as follows:

9) Land Disposal Restrictions. The LQG must comply with all applicable requirements of 35 Ill. Adm. Code 728.

The Board removes the ending period and “The SQG must also maintain both of the following” in 35 Ill. Adm. Code 722.332(b)(4)(A)(ii), so the text appears as follows:

ii) An indication of the hazards of the contents. Examples include, but are not limited to, the applicable hazardous waste characteristics (i.e., ignitable, corrosive, reactive, or toxic); hazard communication consistent with the USDOT requirements at subpart E (labeling) and subpart F (placarding) of 49 CFR 172, incorporated by reference in 35 Ill. Adm. Code 720.111; a hazard statement or pictogram consistent with 29 CFR 1910.1200 (Hazard Communication), incorporated by reference in 35 Ill. Adm. Code 720.111; or a chemical hazard label consistent with NFPA 704, incorporated by reference in 35 Ill. Adm. Code 720.111; and

The Board corrects “must to the following” to “must do the following” in 35 Ill. Adm. Code 722.362 preamble, so the text appears as follows:

A copy of the contingency plan and all revisions to the plan must be maintained at the LQG facility, and the LQG must do the following:

### **ORDER**

The Board revises the text of the amendments adopted October 4, 2018 as described in this supplemental opinion and order. The Board directs the Clerk to provide notice in the *Illinois Register* of the appended adopted amendments to the hazardous waste, UIC, and MSWLF rules

at 35 Ill. Adm. Code 702 through 705, 720 through 728, 730, 733, 738, 738, and 810 through 812.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 15, 2018, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, circular initial "D".

Don A. Brown, Clerk  
Illinois Pollution Control Board