



## GENERAL DISCUSSION

On March 1, 1990, USEPA delegated authority to Illinois to administer several additional components of the RCRA program. (55 Fed. Reg. 7320) This included Board authority to delist hazardous waste, in lieu of USEPA, pursuant to 35 Ill. Adm. Code 720.122.

The USEPA rules define hazardous waste in two basic ways. A waste is hazardous either: because it exhibits a hazardous characteristic; or, because it is listed by name or by the name of the process which produces the waste. In the latter case the listings may be overinclusive. For example, USEPA might determine that Process A produces Waste M which generally has hazardous constituents X, Y and Z. USEPA would then "list" "wastes from Process A" or "Waste M". Wastes which met this description would be hazardous, regardless of whether constituents X, Y or Z were actually present. Delisting would be appropriate if the generator demonstrated that X, Y and Z were not actually present in its waste, and that there were no other hazardous constituents.

There are two basic problems with the Board's delisting Section, 35 Ill. Adm. Code 720.122.

First, Section 720.122 was premised on the assumption that USEPA would initially delist wastes, followed by essentially ministerial Board action in an "identical in substance" rulemaking. For this reason, the Board relied on incorporation by reference of USEPA rules, rather than following its usual practice of adopting the verbatim text. Worse, the USEPA Section (40 CFR 260.22) in turn references the USEPA standards for defining hazardous waste characteristics and listing hazardous wastes, which standards were also incorporated by reference in 35 Ill. Adm. Code 721.110 and 721.111. In the context of a system in which the Board is the direct recipient of delisting procedures, these provisions may be confusing to the public, contrary to the directive of Section 7.2(a)(4) of the Act.

Second, 35 Ill. Adm. Code 720.122 requires the Board to use rulemaking to delist hazardous waste. In Illinois, site-specific rulemaking can be a slow, resource-consuming process. The Board now has authority under Section 28.1 of the Act to handle this type of "exception" decision more efficiently by way of adjusted standards.

As is discussed in greater detail below, the Board has addressed these problems in two ways. First, the Board has replaced the incorporations by reference with the verbatim text, tailored to fit Illinois procedures. Second, the Board has proposed adjusted standards as an alternative procedure to be followed, a procedure we believe is compatible with USEPA's requirements.

The Board specifically **solicits comment** as to whether the Agency will need to request reauthorization to use the adjusted standard procedure, or whether USEPA can approve this alternative in a less formal way, such as by commenting in this rulemaking? The Board notes that the March 1, 1990, Federal Register specifies existing Section 720.122 as the approved procedure, and that Section specifies rulemaking under 35 Ill. Adm. Code 102.

SECTION-BY-SECTION DISCUSSION  
PART 720

Section 720.111

The Board has proposed to add an incorporation by reference for the guidance manual for delisting, which is used below. The Board **solicits comment** as to whether the April, 1985, edition is still current.

The base text for Section 720.111 is drawn from R89-9, and may be subject to change in other Dockets before this rule is finalized.

Section 720.120

This Section corresponds to 40 CFR 260.20, which sets forth USEPA's procedures for citizens to initiate rulemaking. In adopting the Section the Board referenced its procedures in 35 Ill. Adm. Code 102, which also allow any person to initiate rulemaking. In addition, the Board differentiated petitions to adopt "identical in substance" rules pursuant to Section 22.4(a) of the Act from other petitions to adopt additional regulations pursuant to normal rulemaking. The only change to this Section is that it has been amended to include a reference to 35 Ill. Adm. Code 726. This is equivalent to 40 CFR 266, which is omitted from the USEPA list of Sections which may be amended pursuant to citizen petition. The Board **solicits comment** as to whether there is some reason for this omission.

Section 720.122

This Section corresponds to 40 CFR 260.22, which sets forth the standards for delisting, and the contents of the delisting petition. The existing Section incorporates 40 CFR 260.22 by reference, and explains how delisting fits into the State program. The existing subsections (a) through (f) have been moved down to subsections (m) et seq., to maintain close correspondence with the subsection labels in the USEPA rule, the verbatim text of which is proposed.

40 CFR 260.22(a) specifies that a person must file a regulatory petition to obtain a delisting. The Board has replaced this with a cross reference to subsection (n), which will include adjusted standards as an alternative procedure, as is discussed below. The following text has been generally edited to be neutral as to the procedural context.

40 CFR 260.22(a) appears to be stating a general delisting standard, which is supplemented by more specific standards for various types of hazardous waste. The subsequent subsections appear to say pretty much the same thing, as applied to the specific types of waste. In that the subsequent subsections appear to be all-inclusive, is there really any necessity for subsections (a)(1) and (2)? The Board **solicits comment** as to whether they ought to be omitted.

The Board has proposed to add headings to subsections (b) through (e) indicating to what types of hazardous waste the subsections apply. The type is obvious except with respect to subsection (b). It appears to apply to "listed wastes and mixtures". However, this overlaps some of the following

categories which are also Subpart D listed wastes. It is possible that subsection (b) applies only to mixtures which include a Subpart D listed waste, and that the Subpart D listed wastes themselves are delisted pursuant to the subsequent subsections. The Board **solicits comment**.

The USEPA rules include a number of standards which are a real concern under the Illinois APA. An example is: "demonstrates to the satisfaction of the Administrator". The Board has changed many of these to clear, objective standards. However, those which appear to be central to the delisting determination the Board has proposed to retain. The recurring one is the standard for whether to consider other possible hazard characteristics besides the ones which caused the waste to be listed. This reads as follows:

[If the Board] has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste.

The Board **solicits comment** as to whether this standard could be made more specific.

40 CFR 260.22(d) applies to D-listed toxic wastes. It includes a reference to the factors USEPA considered in listing these wastes, which are in 40 CFR 261.11. As is discussed below, the Board has proposed to replace incorporations by reference with verbatim text for that Section also.

40 CFR 260.22(f) and (g) are "reserved" for radioactive and infectious waste. Code Division requirements prohibit reserving subsections. However, holes will be left to preserve the correspondence of subsection labels.

Following 40 CFR 260.22(1) is a note referencing the Federal Register publication of a notice of availability of the guidance document on delisting. The Board has replaced this with a reference to the document itself, which has been incorporated by reference in Section 720.111, above.

As noted above, the existing text of Section 720.122 mostly deals with fitting the federal delistings into the State program. The existing text now appears beginning with Section 720.122(m), which continues to authorize persons to propose "identical in substance" delistings following USEPA action. The Board proposes that this remains a useful provision even after delegation, because USEPA might retain authority to delist in a multistate situation. In such a case, the Board could continue to use "identical in substance" rulemaking to enter the result into the Illinois rules.

There are several possible examples of multistate delistings. In the first situation, suppose a generator produces the same waste in several states. Could the generator ask USEPA to delist the waste from all facilities, or would the generator have to go to the appropriate authority in each state? What if the different states reached inconsistent conclusions as to whether the waste ought to be delisted?

For the second example, suppose a generator ships waste out of state for treatment, storage or disposal. Could the generator request a USEPA

delisting, or would the waste have to be delisted in both states? Are there other examples of dual or overlapping jurisdiction? The Board **solicits comment.**

Section 720.122(n) is drawn from old subsection (b). As is discussed in general above, it allows procedures for original Board action on a delisting. Subsection (n)(1) retains the rulemaking procedures under 35 Ill. Adm. Code 102. Subsection (n)(2) would allow adjusted standards procedural rules under 35 Ill. Adm. Code 106.

Section 720.122(c) has been renumbered to Section 720.122(o). This Section distinguishes the Agency's authority to determine whether something is a hazardous waste from the Board's delisting authority. While the Agency's action must be based on the regulatory definition, the Board's action changes the regulatory definition. This Section was adopted in R81-22. (45 PCB 345)

Old Section 720.122(d) contained the incorporation by reference of 40 CFR 260.22. This has been replaced with the verbatim text discussed above. This subsection also contains the requirement that, before the Board adopts a delisting, someone demonstrate that the delisting needs to be adopted as a part of the Illinois RCRA program. This has been renumbered to Section 722.122(p). This was added in R86-1 (71 PCB 123). This limitation is now codified in Section 7.2(a)(1) of the Act. Most USEPA delistings concern wastes generated and managed outside Illinois. Delistings do not need to be added to the Illinois rules unless the waste is generated or somehow managed in Illinois.

Old Section 720.122(e) has been moved to Section 720.122(q). The Board will not approve delistings if they would make the Illinois program less than "substantially equivalent" to the USEPA program. In other words, the Board cannot add a delisting which would result in loss of program approval.

Old Section 720.122(f) has been moved to Section 720.122(r). Delistings apply only in Illinois. Generators must comply with Part 722 for waste which is hazardous in any state to which it is transported.

#### PART 721

As was discussed above, the USEPA standards for delisting reference the criteria for listing hazardous waste in 40 CFR 261.11, which in turn is closely related to 40 CFR 261.10. In adopting equivalents of these Sections in 35 Ill. Adm. Code 721.110 and 721.111, the Board used incorporation by reference, without setting forth the verbatim text. The Board incorporated these Sections by reference for two reasons.

First, even if the Board were to identify additional criteria or list additional wastes, these two Sections would not be controlling. Rather, the broad mandates of Sections 22.4(c) and 27 of the Act would control. There is nothing in federal or State law which would prevent the Board, acting pursuant to normal rulemaking procedures, from identifying wholly new criteria, or redefining USEPA's criteria in a more inclusive manner.

Second, if the Board adopted the verbatim text of these Sections, it would appear to govern future regulatory actions taken by USEPA. This basis for not adopting is now codified in Section 7.2(a)(1) of the Act.

Section 7.2(a)(4) now authorizes incorporation by reference only where it would not be confusing to the public. As is discussed above, the delisting rules will be incomplete without a portion of these listing rules. The Board has therefore proposed to adopt the verbatim text. However, the verbatim text has been reworded so that it governs neither future actions by the Board nor USEPA. Rather, the text is set forth as neutral statements of the criteria which were used by USEPA to identify hazardous characteristics and to list hazardous waste. In this way the needed standards are present, but the unintended effects are avoided.

#### Section 721.110

This Section is drawn from 40 CFR 261.10. This Section contains the criteria used by USEPA to "identify" the characteristics of hazardous waste. For example, ignitability and toxicity are "characteristics" of hazardous waste which USEPA has identified pursuant to this Section.

As discussed above, the Board has replaced the incorporation by reference with the verbatim text, edited to avoid stating this as a State rule with which USEPA and the Board must comply.

40 CFR 260.10 has a subsection (a), but no (b). This is prohibited by the Code Unit. The simplest way to codify this Section would be to promote the levels of subdivision. However, this would destroy the close correspondence between the Board and USEPA numbering. Instead, the Board has added a do nothing cross reference as subsection (b).

#### Section 721.111

This Section is drawn from 40 CFR 260.11. It sets forth the criteria which were used by USEPA to "list" wastes. For example, waste which has LD<sub>50</sub> (rat) of less than 50 mg/kg is listed as "acute hazardous waste".

As originally adopted, this Section is mainly an incorporation by reference of the USEPA rule. As is discussed in general above, the Board has proposed to replace the incorporation by reference with the verbatim text, edited to avoid stating it as a State rule with which the Board and USEPA must comply.

The standard which is referenced in 40 CFR 260.22, which is the main purpose of adopting this Section, is 40 CFR 261.11(a)(3). This is the standard for listing a toxic waste. USEPA lists any waste which contains an Appendix VIII (or H) contaminant, unless it determines that the waste "is not capable of posing a substantial present or potential hazard...", based on consideration of eleven criteria. 40 CFR 261.11(a)(3)(i) through (xi) list factors for consideration. There are a number of editorial problems with the USEPA text.

Following 40 CFR 261.11(a)(3)(xi) is a hanging paragraph. This is prohibited by the Code Division. It is impossible to cite to this paragraph in a simple manner, other than as "the hanging paragraph following Section 261.11(a)(3)(xi)". It is necessary to rewrite this into a format acceptable to the Code Division. The question is whether this paragraph is a portion of the introductory text to subsection (a)(3), a portion of subsection (a)(?) (xi), or

subsection (a)(4) with its label missing. This paragraph is the criterion for listing hazardous constituents in Appendix VIII (or H). As such it is a concept which should be placed into parallel with subsection (a)(3). The Board has therefore adopted the third alternative, and proposed this as 35 Ill. Adm. Code 721.111(a)(4), but **solicits comment**.

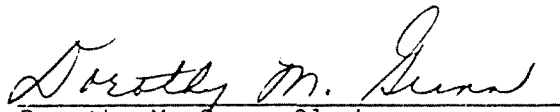
The main problem with the above interpretation is that the parenthetical following the hanging paragraph appears to apply to paragraph (a)(3), not to what the Board has labeled (a)(4). The Board has therefore reversed the order of these paragraphs.

40 CFR 261.11(b) allows USEPA to list wastes based on the definition of hazardous waste in Section 1004(5) of the RCRA Act. The Board generally avoids unnecessary references to federal statutes, especially ones which function as incorporations by reference. However, in this case the Board is merely reciting the standards used by USEPA in making a decision. The possibility that a person would have to actually find and apply this definition in a case before the Board is remote. The Board has therefore proposed to leave this reference, but **solicits comment**. The alternative would be to set forth the definition from the RCRA Act.

#### CONCLUSION

This Opinion supports the Board's Order of this same day. The text of the proposed rules is set forth in that Order. The Board will accept written public comment for 45 days after publication of the proposal for public comment in the Illinois Register.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 19<sup>th</sup> day of July, 1990, by a vote of 5-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board