ILLINOIS POLLUTION CONTROL BOARD
February 25, 1988

IN THE MATTER OF:	)	
	)	
RCRA UPDATE, USEPA REGULATIONS (7-1-87 THROUGH 12-31-87)	)	R87-39

PROPOSAL FOR PUBLIC COMMENT

OPINION OF THE BOARD (by J. Anderson):

By a separate Order, pursuant to Section 22.4(a) of the Environmental Protection Act (Act), the Board is proposing to amend the RCRA regulations.

On December 3, 1987 the Board opened this docket for the purpose of updating the RCRA rules to agree with recent USEPA amendments.

Section 22.4 of the Act governs adoption of regulations establishing the RCRA program in Illinois. Section 22.4(a) provides for quick adoption of regulations which are "identical in substance" to federal regulations; Section 22.4(a) provides that Title VII of the Act and Section 5 of the Administrative Procedure Act shall not apply. Because this rulemaking is not subject to Section 5 of the Administrative Procedure Act, it is not subject to first notice or to second notice review by the Joint Committee on Administrative Rules (JCAR). The federal RCRA regulations are found at 40 CFR 260 through 270, and 280. This rulemaking updates Illinois' RCRA rules to correspond with federal amendments during the period July 1 through December 31, 1987. The Federal Registers utilized are as follows:

52 Fed. Reg. 25760	July 8, 1987
52 Fed. Reg. 25942	July 9, 1987
52 Fed. Reg. 26012	July 10, 1987
52 Fed. Reg. 28697	August 3, 1987
52 Fed. Reg. 33936	September 9, 1987
52 Fed. Reg. 34779	September 15, 1987
52 Fed. Reg. 35893	September 23, 1987
52 Fed. Reg. 41295	October 27, 1987
52 Fed. Reg. 44313	November 18, 1987
52 Fed. Reg. 45787	December 1, 1987

In R86-46 the Board passed over revisions to the chemical listings which appeared at 51 Fed. Reg. 28298, August 6, 1986. The Board will propose these revisions as modified by USEPA.

During this period the Federal Register also included a large number of delistings. As provided by Section 720.122, the Board will not adopt site-specific delistings unless and until someone proposes that the Board adopt the delisting and demonstrates why the delisting is necessary in Illinois.

HISTORY OF RCRA and UIC ADOPTION

The Illinois RCRA and UIC (Underground Injection Control) regulations, together with more stringent state regulations particularly applicable to hazardous waste, include the following:

702	RCRA and UIC Permit Programs
703	RCRA Permit Program
704	UIC Permit Program
705	Procedures for Permit Issuance
709	Wastestream Authorizations
720	General
721	Identification and Listing
722	Generator Standards
723	Transporter Standards
724	Final TSD Standards
725	Interim Status TSD Standards
726	Specific Wastes and Management Facilities
728	USEPA Land Disposal Restrictions
729	Landfills: Prohibited Wastes
730	UIC Operating Requirements
731	Underground Storage Tanks

Special procedures for RCRA cases are included in Parts 102, 103, 104 and 106.

Adoption of these regulations has proceeded in several stages. The Phase I RCRA regulations were adopted and amended as follows:

R81-22 45 PCB 317, February 4, 1982, 6 Ill. Reg. 4828, April 23, 1982.

R82-18 51 PCB 31, January 13, 1983, 7 Ill. Reg. 2518, March 4, 1983.

Illinois received Phase I interim authorization on May 17, 1982 (47 Fed. Reg. 21043).

The UIC regulations were adopted as follows:

R81-32 47 PCB 93, May 13, 1982; October 15, 1982, 6 Ill. Reg. 12479.

The UIC regulations were amended in R82-18, which is referenced above. The UIC regulations were also amended in R83-39:

R83-39 55 PCB 319, December 15, 1983; 7 Ill. Reg. 17338, December 20, 1983.

Illinois received UIC authorization February 1, 1984. The Board has updated the UIC regulations:

R85-23 June 19, 1986; 10 Ill. Reg. 13274, August 8, 1986.

R86-27 Dismissed April 16, 1987 (No USEPA amendments through 12/31/86).

R87-29 January 21, 1987; 12 Ill. Reg. 2450, January 29, 1988; (1/1/87 through 6/30/87)

R88-2 Next Docket (7/1/87 through 12/31/87)

The Phase II RCRA regulations included adoption of Parts 703 and 724, which established the permit program and final TSD standards. The Phase II regulations were adopted and amended as follows:

R82-19 53 PCB 131, July 26, 1983, 7 Ill. Reg. 13999, October 28, 1983.

R83-24 55 PCB 31, December 15, 1983, 8 Ill. Reg. 200, January 6, 1984.

On September 6, 1984, the Third District Appellate Court upheld the Board's actions in adopting R82-19 and R83-24. (Commonwealth Edison et al. v. IPCB, 127 Ill. App. 3d 446; 468 NE 2d 1339 (Third Dist. 1984).)

The Board updated the RCRA regulations to correspond with USEPA amendments in several dockets. The period of the USEPA regulations covered by the update is indicated in parentheses:

R84-9 64 PCB 427, June 13, 1985; 9 Ill. Reg. 11964, effective July 24, 1985. (through 4/24/84)

R85-22 67 PCB 175, 479, December 20, 1985 and January 9, 1986; 10 Ill. Reg. 968, effective January 2, 1986. (4/25/84 -- 6/30/85)

R86-1 July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986. (7/1/85 -- 1/31/86)

R86-19 October 23, 1986; 10 Ill. Reg. 20630, December 12, 1986. (2/1/86 -- 3/31/86)

R86-28 February 5 and March 5, 1987; 11 Ill. Reg. 6017, April 3, 1987. Correction April 16, 1987; 11 Ill. Reg. 8684, May 1, 1987. (4/1/86 -- 6/30/86)

R86-46 July 16, 1987; August 14, 1987; 11 Ill. Reg. 13435. (7/1/86 -- 9/30/86)

R87-5 October 15, 1987; 11 Ill. Reg. 19280, November 30, 1987. (10/1/86 -- 12/31/86)

R87-26 December 3, 1987; 12 Ill. Reg. 2450, January 29, 1988. (1/1/87 -- 6/30/87)

R87-32 Correction to R86-1; September 4, 1987; 11 Ill. Reg. 16698, October 16, 1987.

R87-39 Opened December 3, 1987. (7/1/87 -- 12/31/87)

Illinois received final authorization for the RCRA program effective January 31, 1986.

The Board added to the federal listings of hazardous waste by listing dioxins pursuant to Section 22.4(d) of the Act:

R84-34 61 PCB 247, November 21, 1984; 8 Ill. Reg. 24562, effective December 11, 1984.

This was effectively repealed by R85-22, which included adoption of USEPA's dioxin listings. The Board has adopted a USEPA delisting at the request of Amoco:

R85-2 April 24, 1986; 10 Ill. Reg. 8112, effective May 2, 1986.

The Board has procedures to be followed in cases before it involving the RCRA regulations:

R84-10 62 PCB 87, 349, December 20, 1984 and January 10, 1985; 9 Ill. Reg. 1383, effective January 16, 1985.

The Board also adopted in Part 106 special procedures to be followed in certain determinations. Part 106 was adopted in R85-22 and amended in R86-46, listed above.

The Board has also adopted requirements limiting and restricting the landfilling of liquid hazardous waste, hazardous wastes containing halogenated compounds and hazardous wastes generally:

R81-25 60 PCB 381, October 25, 1984; 8 Ill. Reg. 24124, December 4, 1984;

R83-28 February 26, 1986; 10 Ill. Reg. 4875, effective March 7, 1986.

R86-9 Emergency regulations adopted October 23, 1986; 10 Ill. Reg. 19787, effective November 5, 1986.

The Board's action in adopting emergency regulations in R86-9 was reversed (CBE and IEPA v. IPCB et al., First District, January 26, 1987). Hearings on permanent rules are pending.

GENERAL DISCUSSION

The proposed amendments are discussed in detail below. The following is a general description of the USEPA actions encompassed by this rulemaking. The complete Federal Register citations are given above. All dates are 1987.

July 8	Restriction of "California List" wastes
July 9	List of constituents for groundwater monitoring
July 10	Technical correction to chemical listings
August 3	Readoption of change to spent pickle liquor listing (again)
September 9	Technical correction to permit application rules

September 15	Extension of date for submission of Part A applications by certain cement kilns
September 23	Exception reporting by small quantity generators
October 27	Incorporation by reference of "Test Methods"
November 18	Corporate guarantees for liability coverage
December 1	Codification of HSWA requirements

Several of these actions result in no change to the Illinois rules. The August 3 correction to the spent pickle liquor listing in Section 721.132 contains no change from the listing adopted in R86-46. The Federal Register publication is a protective action by USEPA to ward off a possible challenge based on defective procedures during the previous action.

The September 15 extension of application dates results in no amendment, since the application dates are not included in the rules. The Board solicits comment as to whether the rules need to include these dates.

In addition, the Board will address the August 6, 1986 revisions to the chemical listings, which the Board passed over in R86-46 pending correction by USEPA.

DETAILED DISCUSSION

Section 702.181

This Section is drawn from 40 CFR 270.4, which was amended at 52 Fed. Reg. 45787, December 1, 1987. The USEPA rule formerly provided that compliance with a RCRA permit constituted compliance with the RCRA Act. This has been amended to provide that direct statutory requirements, and 40 CFR 268 land disposal bans, override any requirements in permits.

When the Board adopted this Section, in R81-32, it rejected the concept of the permit as a shield against enforcement. As a matter of State law, the RCRA permit protects only against enforcement for failure to have a permit. Therefore the USEPA amendment is irrelevant to the State program. However, the Board has proposed to update the reference to the USEPA rules, and to make other technical corrections to this rule.

Section 702.184

This Section is drawn from 40 CFR 270.41, which was amended at 52 Fed. Reg. 45787, December 1, 1987. USEPA has amended this Section to allow it to modify permits to reflect new statutory requirements.

Parts 702 through 704 were originally adopted based on USEPA's consolidated permit rules then contained in 40 CFR 122. Part 702 contains material in common to the RCRA and UIC program, while Parts 703 and 704 contain material specific to the respective programs. It is becoming increasingly difficult to maintain this structure now that USEPA's deconsolidated rules are drifting farther apart with respect to the programs. This is especially complicated in this rulemaking, since the December 1 amendments include UIC amendments which will be addressed in R88-2.

The amendments allow the Agency to modify permits to reflect statutory changes. This is so basic that it probably doesn't even need to be in the rules. However, USEPA has made the change to the RCRA Section 270.41, but not to the corresponding UIC Section 144.39. Does this mean that USEPA positively cannot modify a UIC permit to reflect statutory changes? Since this seems unlikely, the Board has proposed these as common UIC/RCRA changes. Since the language is too intertwined, the alternative is to repeal Section 702.184, and adopt separate RCRA and UIC provisions in Parts 703 and 704. The Board solicits comment on this.

Section 702.187

This Section is drawn from 40 CFR 270.42, which was amended at 52 Fed. Reg. 25760, July 8, 1987. Sections 702.187(e)(9) and (10) have been amended to allow persons with RCRA permits to use the minor modification procedures to modify their operations to treat or store hazardous wastes subject to a Part 728 restriction.

40 CFR 270.42(p)(3) includes a reference to "termination" of a permit under Section 270.43. In Section 702.187(e)(10)(C) the Board has cited the equivalent Section 702.186, which provides for permit revocation by the Board.

This Section includes the first of many references to Section 3004(d) of the RCRA Act, which contains waste disposal prohibitions contained in the federal statute, but not (yet) reflected in the regulations. This could be construed as an incorporation by reference of a federal standard, which would raise the spector of the Administrative Procedure Act incorporation by reference requirements and procedures. To comply with these, it is much easier to add a single Section referencing the federal statute, and to reference that Section at all other points. The Board solicits comment as to this approach, which is reflected in Section 728.139, discussed below.

Section 703.121

This Section is drawn from 40 CFR 270.1, which was amended at 52 Fed. Reg. 45787, December 1, 1987. This contains the RCRA permit requirement. It has been amended to specifically require post-closure RCRA permits for certain units which received waste after January 26, 1982, or which certified closure after January 26, 1983.

Section 703.121 reads differently from 40 CFR 270.1(c) since it is really the RCRA permit requirement of Section 21(f) of the Act which the Board is implementing, rather than the federal statute. The cross references to definitions in the federal language are in Section 703.100(c).

Section 703.141

This Section is drawn from 40 CFR 270.60, which was amended at 52 Fed. Reg. 45787, December 1, 1987. This modifies the permit by rule requirement for UIC wells.

Section 703.141(a) grants permits by rule to persons conducting ocean disposal of hazardous waste. It was adopted in R82-19. Illinois will not

attempt to get authority to administer this portion of the RCRA program. (53 PCB 159) The Board therefore referenced the USEPA rules rather than the equivalent Board rules. However, this now causes APA incorporations by reference problems. In order to simplify compliance, the Board has moved the references to 40 CFR 220 and 264 to the incorporations by reference Section. The reference to the Marine Protection, Research and Sanctuaries Act is mere surplussage, and has been deleted.

Section 703.155

This Section is drawn from 40 CFR 270.72, which was amended at 52 Fed. Reg. 25760, July 8, 1987. This Section specifies what modifications the operator of an interim status facility can make without filing a Part B permit application. A sentence has been added to Section 703.155(e) to allow interim status facilities to make changes to treat or store restricted hazardous wastes in containers. The Board proposed, but withdrew, a similar State rule in R86-9.

At 51 Fed. Reg. 25422, July 14, 1986, USEPA added a sentence to 40 CFR 270.72(e) to allow interim status facilities to modify tank systems to meet new requirements without filing a Part B. The Board adopted this in R86-46. The July 8, 1987 amendment appears to repeal this sentence. The Board suggests this may be an error by USEPA, and has proposed to leave the sentence in pending clarification.

Section 703.159

This new Section is drawn from 40 CFR 270.1(c)(5), which was amended at 52 Fed. Reg. 45787, December 1, 1987. This allows an interim status owner or operator to attempt to demonstrate closure by removal or decontamination before filing a Part B application for a post-closure RCRA permit.

This provision is difficult to place in the rules as organized by the Board. USEPA has placed it next to the RCRA permit requirement, in the introductory Section to Part 270. This seems to be unusual placement for a detailed, temporary requirement. The Board has therefore located this in the Subpart devoted to interim status requirements.

40 CFR 270.1(c)(5) sets up a mini-procedure similar to the 40 CFR 124 or 35 Ill. Adm. Code 705 permit issuance procedures. The USEPA rule provides for public notice if the Regional Administrator "believes" that the Part 264 standards are met. The Board has proposed to replace this subjective, personal standard with a requirement of public notice "if the Agency makes a tentative determination." This more closely follows the language of 40 CFR 124 and Part 705.

40 CFR 270.1(c)(5)(ii)(A) allows operators to demonstrate closure under more stringent state requirements, rather than 40 CFR 264. The Board has not proposed to adopt this requirement, since Part 807 does not include removal or decontamination standards.

Section 703.160

This new Section is drawn from 40 CFR 270.1(c)(6), which was amended at 52 Fed. Reg. 45787, December 1, 1987. This includes the procedural details for the determination made under Section 703.159.

This Section starts with a conditional: "If a facility owner/operator seeks an equivalency demonstration ..." The Board has changed this to "seeks an equivalency determination." This is may be a typographical error by USEPA.

The Board has proposed to add Section 703.160(d), referencing the generic appeal provisions of Section 702.107. The alternative would be to provide that an equivalency determination can be appealed only with the Part B application which is required if the determination is negative. The Board solicits comment on this.

Section 703.185

This Section is drawn from 40 CFR 270.14(c), which was amended at 52 Fed. Reg. 25942, July 9, 1987, and corrected at 52 Fed. Reg. 33936, September 9, 1987. The Section was amended again at 52 Fed. Reg. 45787, December 1, 1987. The amendments: reference the new list of groundwater contaminants in Part 264, Appendix I; correct language in Section 785.185(h)(5); and, change the reference to Section 724.190 in the introduction.

Section 703.187

This new Section is drawn from 40 CFR 270.14(d), which was amended at 52 Fed. Reg. 45787, December 1, 1987. It adds a specific information packet required in a Part B application if there are solid (non-hazardous) waste units present at the facility.

Section 703.188

This new Section is drawn from 40 CFR 270.10(k), which was amended at 52 Fed. Reg. 45787, December 1, 1987. This allows USEPA to solicit additional information to establish conditions under 40 CFR 270.32(b)(2) and 270.50(d). The Board has proposed to reference Sections 703.241(a)(2) and 702.161, which appear to be the equivalents. These concern duration of permits and conditions necessary to protect human health and the environment. The Board solicits comment as to whether this is what USEPA intended.

Section 720.111

This Section is drawn from 40 CFR 260.11, which was amended at 52 Fed. Reg. 41295, October 27, 1987. This is a technical correction to add 40 CFR 268 to the list of Parts covered by the incorporations by reference Section.

The USEPA scheme of forward-referencing from the incorporations by reference Section does not work in Illinois for two reasons. First, under the codification rules each Part has to be self-contained. Second, the APA requires a specific identification of incorporated items. Therefore, the Board always has to back-reference to Section 720.111 when it uses any incorporated material. Since the attempted forward-reference serves no purpose, the Board has proposed to delete it.

The Board has added a reference to section 3004 of the Resource Conservation and Recovery Act, which is used in Section 728.139.

The Board has added a number of references to the Code of Federal Regulations as paragraph (b). 40 CFR 220 and 264 are used in Section 703.141. 40 CFR 761 is USEPA's PCB burning rules, which are referenced in Part 268, discussed below.

Note that the CFR references placed in Section 720.111 are "odd" references, those which are used in a Section which is not the equivalent of the federal Section being referenced. This is in contrast with "normal" references, for example 40 CFR 261, Appendix II, which is incorporated by reference in Section 721.Appendix B. The reason for the different treatment is the APA limitation on incorporation of future amendments. When USEPA references 40 CFR 761 in 40 CFR 268, it means to include future amendments to Part 761. The Board must reference a certain edition. Updating the odd incorporations would be an impossible task if they were scattered about the rules. However, a USEPA amendment to a normal incorporation would be picked up in the normal course of events.

Section 721.132 Not amended

This Section is drawn from 40 CFR 261.32, which was amended at 52 Fed. Reg. 28697, August 3, 1987. This concerns spent pickle liquor, which has been visited in many previous dockets. The USEPA action readopts the existing language without change. No Board action is necessary.

Section 721.133

This Section is drawn from 40 CFR 261.33, which was amended at 52 Fed. Reg. 26012, July 10, 1987. This Section was also amended at 51 Fed. Reg. 28298, August 6, 1986. The July 10 amendment restores the empty container language which USEPA inadvertently replaced with older language in a recent rulemaking.

The main change to this Section is from the August 6, 1986 Federal Register. This was a supposedly non-substantive recodification of the chemical listings. However, it appeared to contain many errors. The Board withdrew this from consideration in R86-46 at USEPA's suggestion. USEPA has now indicated a correction will be forthcoming, and that the Board can proceed. (PC 1).

Appendix H

The listing of hazardous constituents was also revised in the August 6, 1986 Federal Register. This is drawn from 40 CFR 261, Appendix VIII. Note that the 1987 edition of the CFR has two Appendix VII's, the second of which should be Appendix VIII.

Section 722.142

The corresponding federal Section was amended at 52 Fed. Reg. 35893, September 23, 1987.

This Section concerns "exception reports," which the generator makes to the Agency if the generator does not receive a copy of the manifest back from the treatment, storage or disposal facility within a specified number of days after shipping waste. The subsections have been renumbered. The existing language is now in subsection (a), which applies only to generators of over 1000 kilograms per month. New subsection (b) requires generators of 100 to 1000 kilograms per month to send the manifest with an explanatory note to the Agency, rather than fill out the exception report form.

The existing and amended form of this Section appear to require the generator to report exceptions to IEPA even if the waste was shipped out of State. The Board solicits comment as to whether this meets USEPA's requirements.

Section 722.144

The corresponding federal Section was amended at 52 Fed. Reg. 35893, September 23, 1987.

The amendment adds exception reports to the list of regulations with which generators of 100 to 1000 kg/month have to comply.

The Board has followed USEPA's wording in this amendment, which reads: "A generator ... is subject only to the following requirements in this Subpart: ..." Does this mean that the generator is subject to only the following requirements, which, by the way, are in this Subpart. Or, does this mean that, of the requirements in this Subpart, the generator is subject to only the following? The Board solicits comment on this.

Section 722.170

The corresponding federal Section was amended at 52 Fed. Reg. 25760, July 8, 1987.

This Section has been amended to exempt farmers from the land disposal restrictions in addition to the rest of the hazardous waste disposal rules with respect to disposal of waste pesticides on the farm.

The USEPA amendment purports to amend 40 CFR 262.51. However, USEPA renumbered this to Section 262.70 at 51 Fed. Reg. 28682, August 8, 1986. The Board renumbered Section 722.151 to 722.170 in R86-46. Section 262.51 now deals with exports of hazardous waste.

Section 724.113

The corresponding federal Section was amended at 52 Fed. Reg. 25760, July 8, 1987. The amendment is to Section 724.113(b)(7)(C). It concerns waste analysis plans for certain surface impoundments which treat wastes restricted under Part 728.

Section 724.198

The corresponding federal Section was amended at 52 Fed. Reg. 25942, July 9, 1987.

As is discussed below, Appendix I (big letter "i") has been added to list groundwater contaminants for which monitoring is required. Section 724.198(h)(2) - (4) have been added to reference this list instead of the Part 721, Appendix H list of hazardous constituents.

Section 724.199

The corresponding federal Section was amended at 52 Fed. Reg. 25942, July 9, 1987. This Section has also been amended to reference Appendix I.

Section 724.200

The corresponding federal Section was amended at 52 Fed. Reg. 45787, December 1, 1987. Section 724.200(e) has been amended. Pursuant to the 1984 amendments to the RCRA Act, operators are required to conduct corrective action to address groundwater contamination beyond the facility boundary, unless the operator is unable to obtain the necessary permission.

This Section is ambiguous in the format presented in the Federal Register. The introductory paragraph to the existing Section ends with a sentence stating that: "The permit will specify measures to be taken", followed by two items. This sentence which introduces the list has been dropped from the federal introductory text, but the items of the list are renumbered to subsections (3) and (4). New subsections (1) and (2) are separated by a semi-colon and end in a period, as though they were a list of two. There is a question as to whether the resulting list of four really is what USEPA intended. An alternative rendering would create two lists of two, retaining the introduction to the old list. The Board solicits comment on this.

The federal Section provides that "the owner/operator is not relieved" of all responsibility by failure to get permission to clean up adjacent property. It is doubtful whether this meets codification requirements. The Board has rendered this as "the owner and operator are not relieved ..."

Section 724.201

The corresponding federal Section was amended at 52 Fed. Reg. 45787, December 1, 1987. Similar corrective action beyond the facility boundary is required for solid waste management units present at hazardous waste facilities.

Section 724.247

The corresponding federal Section was amended at 52 Fed. Reg. 44313, November 18, 1987. The amendments are to 40 CFR 147(g)(2), which concerns corporate guarantees in lieu of liability insurance. This is a minor correction to interim final rules adopted by USEPA at 51 Fed. Reg. 25354, July 11, 1986. The Board addressed these in R86-46.

As was discussed in R86-46, there are a number of problems with the USEPA rule as adopted in 1986. These center on the parent corporation guarantee in lieu of liability insurance. This is a lot like writing an insurance contract or bond, which is a regulated activity in most states. Also, it could be an ultra vires act under the law of the state of incorporation or articles of incorporation. Furthermore, there is a question as to whether the gurantee is governed by the law of the state of incorporation, the place of execution of the gurantee or the location of the facility covered by the guarantee. Some states have strict consumer protection laws on guarantees, which could apply to corporations. In the RCRA context, this is compounded by the ambiguity as to whether, in a multi-state situation, the federal RCRA rules govern, or the derivative rules in the states involved. In addition, there are practical problems which Illinois or its citizens would face if they had to collect on guarantees in the courts of other states.

USEPA has not addressed many of these concerns in the final rules. Rather, it has tightened the rules to require corporations which are incorporated outside the U.S. to maintain a registered agent for service of process in each state in which a facility covered by the guarantee is located. From the State's perspective this addresses only a tiny portion of the enforceability problem.

As was discussed in R86-46, 40 CFR 264.147(g)(2) is a directive to the states to adopt a type of regulation, rather than a rule which the states are supposed to adopt. The Board implemented the directive by requiring that guarantees be signed in Illinois, and that the guarantor agree that Illinois law applies and submit to Illinois court jurisdiction. This assures that the guarantee is enforceable in Illinois. USEPA has indicated in the November 18 Federal Register that the Illinois Attorney General has so certified. The Board construes this as a ratification of its action in R86-46.

The USEPA rule now requires foreign (non-U.S.) corporations to maintain a registered agent in each state in which there is a facility covered by a parent corporation guarantee. It is appropriate for the Board to add this requirement to its rule. The Board has referenced Section 5.05 of the Business Corporations Act (Ill. Rev. Stat. 1985, ch. 32, par. 5.05) which requires certain corporations to maintain a registered agent in the State.

The general requirement to maintain a registered agent applies only to foreign corporations "transacting business" in Illinois. Mere ownership of a subsidiary or guaranteeing the subsidiary's debts may not constitute "transacting business" in Illinois. The Board will request comment from the Corporation Division as to whether it would allow foreign corporations to register under these circumstances.

There is an additional question as to how to shrink the registered agent requirement from federal to State law. USEPA requires corporations organized outside its jurisdiction (the U.S.) to maintain a registered agent within its jurisdiction (in any state). Should Illinois require a registered agent for corporations organized outside its own jurisdiction, or outside of USEPA's jurisdiction?

There are three classes of corporations concerned: Illinois corporations, U.S. corporations organized in another state and non-U.S. corporations. The Corporations Act treats the latter two classes the same with respect to the registered agent requirement. The question is whether the Board should draw a distinction between foreign (U.S.) and foreign (non-U.S.) corporations.

The purpose of the registered agent requirement is to assure that the agency which administers the rules can easily sue to collect on a guarantee. USEPA maintains offices all over the U.S., and can easily sue in any state. However, Illinois does not generally maintain a presence in all states, and would face the same problems suing in other states as USEPA would face suing in foreign countries. Therefore, drawing a distinction between foreign (U.S.) and foreign (non-U.S.) corporations serves no purpose in State law. It would therefore violate equal protection requirements to require registration of foreign (non-U.S.), but not foreign (U.S.) corporations. The Board has therefore proposed to require all corporations except Illinois corporations to maintain a registered agent in Illinois as a condition precedent to using the corporate guarantee.

Section 724.251

The corresponding federal Section was amended at 52 Fed. Reg. 44313, November 18, 1987. The amendment prescribes the forms for the corporate guarantee. The Board has incorporated this Section by reference without setting it out in full. The Board has updated the incorporation. The Agency will promulgate forms based on the federal forms.

Section 724.Appendix I

The corresponding federal Section was amended at 52 Fed. Reg. 25942, July 9, 1987. This is the list of groundwater contaminants for which monitoring is now required. The list replaces the complete list of hazardous constituents in Part 721 for purposes of specifying groundwater monitoring parameters.

Section 725.101

The corresponding federal Section was amended at 52 Fed. Reg. 45787, December 1, 1987. Section 725.101(c)(2) has been deleted, so that a person who operates an injection well only may now be subject to the RCRA interim status requirements.

Section 725.113

The corresponding federal Section was amended at 52 Fed. Reg. 25760, July 8, 1987. Section 725.113(b)(7) has been amended to make waste analysis plans consistent with Part 728.

Section 725.247

The corresponding federal Section was amended at 52 Fed. Reg. 44313, November 18, 1987. The corporate guarantee for liability insurance for interim status facilities has been modified along the lines discussed above under Section 724.247.

Section 728.101

Part 728 is drawn from 40 CFR 268, which was amended at 52 Fed. Reg. 25760, July 8, 1987. This is USEPA's land disposal restrictions which the Board adopted in R87-5. The amendments mainly implement the HSWA requirement that USEPA ban "Calfornia List" wastes. These should have little impact in Illinois, since most of these wastes are already restricted in Part 729, which the Board adopted pursuant to State authority in R81-25 and R83-28.

Section 728.101(c)(5) has been added to exempt farmers from Part 728. This correlates with Section 722.170. As is discussed above, USEPA has referenced the wrong Section number.

Section 728.102

Definitions have been added for "halogenated organic compound" ("HOCs") and "polychlorinated biphenyls" ("PCBs"). The definition of HOC references the list in new Appendix C, discussed below. PCB references 40 CFR 761.3, the USEPA regulations for disposal of PCBs. The Board has added 40 CFR 761 to the incorporations by reference in Section 720.111, discussed above.

USEPA has also made a subtle change to the definition of "land disposal" inserting "or placement in" before "concrete vault or bunker intended for storage purposes." This serves to separate the question of intent from the rest of the methods, which are clearly disposal.

The Board has also added a definition of "ppm", which is used in the rules.

Section 728.103

The prohibition on dilution has been expanded to include dilution to avoid an effective date, or to avoid a ban under Subpart C or section 3004 of the Resource Conservation and Recovery Act.

Section 728.104

When originally adopted, 40 CFR 728.4 had a subsection (a), but no (b). This is prohibited under Illinois codification rules. USEPA has now added a subsection (b), forcing a complete relabeling of the Illinois subsections.

This Section allows the use of lagoons for treatment of wastes which are subject to a land disposal ban. New subsection (b) excludes evaporation of hazardous constituents from the types of treatment which can be conducted in such lagoons. Therefore, evaporation lagoons are considered land disposal lagoons.

Note that this is different from the distinction drawn in Section 729.100(b) in the Illinois bans, which prohibits placement in such lagoons if hazardous constituents are expected to remain after closure. Under Section 728.101(d), Parts 728 and 729 are cumulative, so that the Part 728 ban would now apply to any evaporation lagoons which would qualify as treatment lagoons

under Part 729. An example might be a lined aeration lagoon in which a volatile chlorinated chlorinated solvent is stripped from waste water by evaporation. This would qualify as a treatment lagoon under Part 729, assuming it would be possible to remove the liner and accomplish a clean closure. However, this would be land disposal under Part 728 regardless of whether a clean closure is possible.

Section 728.105

The Board has updated the incorporation by reference of the USEPA procedures for case-by-case extensions of the effective date.

Section 728.106

Section 728.106(k) has been added. Liquid hazardous wastes containing greater than 500 ppm PCBs cannot be the subject of a petition for an adjusted standard under this Section.

Section 728.107

The waste analysis requirements have been amended, mainly to reference Section 728.132 and section 3004(d) of the Resource Conservation and Recovery Act.

40 CFR 268.7(a)(1) is ambiguous. It reads as follows:

> If a generator determines that he is managing a restricted waste under this part and the waste does not meet the applicable treatment standards, or where the waste does not comply with the applicable prohibitions set forth in {268.32 of the part or RCRA section 3004(d), with each shipment the generator must notify the treatment facility ...

The Board has rendered this as:

> If a generator determines that he is managing a restricted waste, ... or that the waste does not comply with ... the generator must notify ...

An alternative reading would interpret the "where" clause as a second "if" clause. However, this seems to suggest that someone other than the generator makes the determination as to whether the waste complies with Section 728.132 and RCRA. This would be contrary to the general framework of the rules which places this obligation on the generator. The Board solicits comment on which interpretation is correct.

Section 728.132

This Section is drawn from 40 CFR 268.32. In addition to the July 8, 1987 amendments noted above, this Section was amended at 52 Fed. Reg. 41295, October 27, 1987. This is the USEPA ban on "California List wastes," which are listed in Appendix C. These are halogenated organic compounds and PCBs.

These should have little impact in Illinois, since most of these wastes are banned in Part 729 pursuant to State restrictions adopted in R81-25 and R83-28. Section 728.100 makes these Parts cumulative.

Some of these restrictions became effective as federal law on July 8, 1987. The Board has not proposed to make these effective as State law retroactively. Rather, they will become effective when these rules are filed.

The effective date is delayed until November 8, 1988 for CERCLA response wastes and RCRA corrective action wastes. The Board has referenced the term "RCRA corrective action", which was defined in R86-46. RCRA corrective action wastes include wastes produced under RCRA programs in other states, as well as Illinois.

Section 728.139

The Board has added this Section to require compliance with land disposal bans imposed directly by Congress in section 3004(d) of the Resource Conservation and Recovery Act. This format simplifies compliance with the APA incorporations by reference requirements, and assures that there is a State regulation which could be cited in an enforcement action against someone violating a Congressional ban which has not yet been implemented in the regulations. The Board solicits comment on this format.

Section 728.140 and 728.142

Section 728.142(a) has been modified to specify certain treatment technologies for California List wastes. This is generally incineration. Section 728.140(b) has been added to allow land disposal of residuals either from the specified treatment technology or from an equivalent technology approved by the Agency under Section 728.142.

USEPA references its PCB incineration standards found at 40 CFR 761. The Board has added these to the incorporations by reference Section discussed above.

The existing language adopted in R87-5 and the proposed amendments substitute "Agency" for "Regional Administrator" in the USEPA rules. There is a question of who decides whether a waste can be land disposed in a multistate situation. For example, consider an original generator in State A, who ships a waste to a commercial treatment facility in State B, which ships a residual to a land disposal facility in State C. Who has authority to decide whether the residual can be land disposed, USEPA, or States A, B or C?

For purposes of soliciting comment, the Board proposes that 40 CFR 268 imposes the obligation on the "generator" of the waste which is land disposed to make the initial decision as to whether the waste can be land disposed. In the example, the waste which is to be land disposed is the treatment residual produced in State B, and the "generator" is the treatment facility. If State B has RCRA authorization, State B's law would apply, and any demonstrations would be made to the appropriate agency in State B. If State B does not have authorization, USEPA's rules would apply, and the Regional Administrator would

receive any petitions. State C would have to accept the decision of State B or the Regional Administrator as to whether the residual can be land disposed under the RCRA rules, even though the disposal takes place in State C. However, State C could reject the waste based on local, non-RCRA law. Also, State C's RCRA rules would require manifesting and proper documentation before receipt at the disposal facility; and State A's RCRA rules would require manifesting and documentation by the original generator.

This appears to be the result is each State adopted the USEPA rules, substituting its agency for "Regional Administrator." If the above example is wrong, the Board should adopt specific rules to cover multistate situations. Even if it's correct, the State rules perhaps need to be made more clear on this. The Board solicits comment on this.

Section 728.150

This Section prohibits the storage of restricted wastes except under specified conditions. This has been amended to reference new Section 728.132 and section 3004 of the Resource Conservation and Recovery Act. Paragraph (f) references the storage standards of 40 CFR 761.65 for PCBs, and requires treatment within one year.

Section 728.Appendix C

This is the list of halogenated organic compounds prohibited under Section 728.132.

There are two obvious errors in this list. "1,2-Dibromomethane" should probably be "1,2-Dibromoethane". "Hexachloroprohene" should probably be "hexachlorophene." The ethers should be separated into two words.

This list includes several undefined abbreviations. Most of these are obvious.

This Proposed Opinion supports the Board's Proposed Order for public comment of this same day. The Board will allow 45 days for public comment following publication in the Illinois Register. Because of its length, this Opinion will not be published in the Environmental Register, or appear in the Board's Opinion volumes.

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 25th day of February, 1988, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board