

ILLINOIS POLLUTION CONTROL BOARD
November 8, 1984

IN THE MATTER OF:)
) R84-10
RCRA AND UIC PROCEDURAL RULES)

PROPOSED RULE. SECOND NOTICE
PROPOSED OPINION OF THE BOARD (by J. Anderson):

This Opinion supports the Board's Second Notice Order of November 8, 1984.

On March 21, 1984, in anticipation of final "Phase II" RCRA authorization, the Board opened this docket for the purpose of adopting procedural public notice and participation rules¹ to be followed in cases arising pursuant to the RCRA and UIC rules. Since the Board discerns no necessity for specialized UIC procedures, this aspect of the proposal has been dropped.

On June 4, 1984 the Board adopted a Proposed Opinion and Order for first notice. The proposal appeared at 8 Ill. Reg. 9888, June 29, 1984. The Board received the following public comments:

1. United States Environmental Protection Agency (USEPA), August 7, 1984
2. Illinois Environmental Protection Agency (IEPA or Agency), August 13, 1984
3. Commonwealth Edison et al., August 13, 1984
4. Chemical Waste Management, August 14, 1984
5. USEPA, August 24, 1984

On July 6, 1984 the Board requested preliminary review from the Joint Committee on Administrative Rules (JCAR). Preliminary review questions on 35 Ill. Adm. Code 103 and 1042 were received July 20, 1984. On July 13, 1984 the Board received codification comments from the Administrative Code Unit.

Statutory Provisions

The RCRA rules arise from the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. §6901 et seq.) (RCRA Act). USEPA adopted regulations pursuant to the RCRA Act starting on May 26, 1980. These are now found in 40 CFR 260, 261, 262, 263, 264, 265 and 270. The RCRA Act contemplates that

¹As used in this Opinion, the term "rules" is intended to be interchangeable with "regulations".

²Unless otherwise indicated, all references to "Sections" or "Parts" are to Illinois Administrative Code, Title 35.

states should be delegated primacy. Requirements for primacy are found in 40 CFR 123 and 271.

The General Assembly authorized Illinois to apply for RCRA "primacy" in P.A. 82-380. Important provisions include the following provisions of the Act:¹

- \$4(1) Designating IEPA as "solid waste agency"
- \$20(a)(8) Finding that a separate state program should be avoided
- \$21(f) Requiring RCRA permits for hazardous waste treatment, storage and disposal (TSD) operations
- \$22.4(a) Authorizing adoption of "identical in substance" regulations by abbreviated procedures
- \$39(d) Authorizing IEPA to issue RCRA permits
- \$40(b) Authorizing third party appeals to the Board of issuance of RCRA permits for hazardous waste disposal sites

In P.A. 84-431 the General Assembly amended Sections 38(c) and 40(a)(3) to extend the Board's decision period in RCRA variances and permit appeals to 120 days, and to provide for mandamus-type action by the Appellate Court if the Board fails to act.

This rulemaking is pursuant to authority contained in Section 22.4(a) of the Act as well as Section 26, which provides for adoption of Board procedural rules. Section 22.4(a) exempts this rulemaking from the normal notice and comment procedures of the Illinois Administrative Procedure Act (APA), including second notice review by JCAR. However, the Board has followed normal APA rulemaking procedures in order that it may have the benefit of comment from the public and JCAR.

Prior Regulatory Actions

The Board has completed several rulemakings to implement the RCRA program in Illinois. The Phase I rules included Parts 720 through 723 and 725. These defined "hazardous waste" and established standards and reporting requirements for generators and transporters of hazardous waste. The Phase I rules also established notification requirements and interim status operating standards for hazardous waste

¹Environmental Protection Act, Ill. Rev. Stat. 1983, ch. 111 1/2, pars. 1001 et seq.

treatment, storage and disposal (TSD) facilities. The Phase I rules 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 from USEPA on May 17, 1982 (47 Fed. Reg. 21043).

The Phase II rules included adoption and amendment of Parts 702, 703, 705 and 724. These established a RCRA permit program, provided procedures for review of permits by the Agency and provided final permitting standards for TSD units. The Phase II rules have been adopted and amended, but authorization has not been received. The rulemakings were as follows:

R82-19, 53 PCB 31, 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).

Finally, the Board notes that it has opened R84-9 for the purpose of updating the RCRA rules to conform with amendments to the federal RCRA rules. The Board is awaiting a proposal to be filed by IEPA.

Comments

A detailed discussion of the First Notice comments appears below. Some of the comments, particularly those of IEPA and USEPA, raise broad issues.

IEPA's comment suggested that the procedures could be greatly simplified, especially those involving enforcement actions. In its final comment USEPA objected to some aspects of IEPA's comments, expressing a preference for the Board's proposal. After considering IEPA's comment and USEPA's final comment, the Board has determined to adopt the proposal in essentially the same form as proposed. The following is a discussion of the fundamental questions raised by these comments.

Procedural Context

A RCRA issue can come before the Board in four ways:

1. Regulatory proposal
2. Enforcement action
3. Variance petition
4. Permit appeal

Regulatory proposals are governed by Title VII of the Act and Part 102. In addition, there are specific procedural requirements in Section 22.4 of the Act, depending on whether the proposal is "identical in substance" with amendments to federal regulations.

Regulatory proposals may be either amendments to the general rules or proposals more site-specific in nature. The TSD standards include provisions which specify site-specific rulemaking as a mechanism for obtaining relief which would be referred to as "variance" under the federal rules. For example, see §724.401(b).

Enforcement actions may be brought pursuant to Title VIII of the Act and Part 103. The complainant may be the Attorney General, representing the IEPA or acting in his own name. The complainant could also be a State's Attorney or a private citizen.

Types of enforcement actions which might involve the RCRA rules would include allegations of operation without a required RCRA permit, operation in violation of the Act or RCRA rules, or operation in violation of RCRA permit conditions. A complainant could request that a respondent be ordered to apply for a permit, to cease and desist from violating the rules, to cease conducting regulated activities, or that a RCRA permit be revoked.

Variance petitions are governed by Title IX of the Act and Part 104. Board variances are temporary, are granted on a showing of arbitrary or unreasonable hardship and require a compliance plan. These are to be distinguished from "variances" provided in USEPA's RCRA rules which sometimes are permanent on a specific showing other than arbitrary or unreasonable hardship. In adopting the RCRA rules the Board has identified potential problem areas and indicated whether relief requires the filing of a variance petition. In other cases, either a site-specific rule is required, or a permit modification application addressed to the Agency.

Permit appeals are governed by Title X of the Act and Part 105. The Agency will have followed the Part 705 procedures in issuing or denying the permit. The Board therefore sees no need to adopt special procedures for RCRA permit appeals.

Regarding appeals of the issuance or denial of RCRA permits, the question before the Board is whether the IEPA correctly issued or denied the permit based on the facts which were before it at the time it acted. Sections 21(f) and 39(d) of the Act require RCRA permit issuance upon a showing of compliance with the Act and Board rules. These same limitations apply to the Board when it reviews the Agency's actions.

Although a variance or site-specific rule could be granted by the Board subsequent to an appeal if the applicable procedures were followed, the Board's subsequent granting of a variance or site-specific rule would not affect the question of whether the Agency was correct as of the date of issuance or denial, based on the information before it. The variance or site-specific rule could be incorporated into a permit only pursuant to a subsequent application to the Agency to modify the permit.

MOA

As a part of the RCRA authorization process, USEPA and IEPA will sign a memorandum of agreement (MOA). This is authorized by §4(l) of the Act. There is no comparable specific provision authorizing the Board to sign such an agreement. Title VII and §22.4 of the Act specify the procedures which the Board is to follow in adopting or amending regulations which will bind future Boards, unless and until such regulations are subsequently amended pursuant to the applicable procedures.

Enforcement Within the Permit System

The TSD facility standards of Part 724 provide a detailed set of operating standards. Among other things, TSD owners or operators are required to provide groundwater protection and financial assurance of closure and post-closure care (§§724.190 et seq. and §§724.240 et seq.) Enforcement against a facility in violation of the RCRA rules could proceed by two different routes: a RCRA permit could be issued or modified reflecting the result of the enforcement action; or, the RCRA permit could be revoked, with any necessary remedial action to be dealt with in a Board Order.

Section 33 of the Act authorizes the Board, among other things, to revoke a permit and issue a cease and desist order. It also provides for the posting of a performance bond if a reasonable delay is included in which to correct a violation. It is thus clear that the Board could, by its order, bring about facility closure or compliance even in the absence of a RCRA permit. The Board should retain the option of revoking a permit and proceeding with direct Board supervision of a site under appropriate circumstances.

However, in those circumstances in which, for example, specifics of the closure and post-closure care plans and financial assurance are contained in the permit, enforcement may result in issuance or modification of the RCRA permit spelling out a compliance or closure plan based on the general RCRA operating rules as specifically modified, with the RCRA financial assurance mechanisms available to secure closure and post-closure care, and with federal oversight and all possible sanctions in place.

RCRA Permit Procedures

Part 705 specifies the procedures which IEPA must follow in issuing or denying a RCRA permit. The procedures include the following:

1. Public notice of the application
2. A tentative decision by the Agency
3. Public comment and the opportunity for a hearing subsequent to the tentative decision.

These procedures differ from the contested case provisions of the Illinois Administrative Procedure Act (APA) in that the Agency reaches a tentative decision prior to the hearing. This would not be possible under the contested case provisions since there would be no record on which the Agency could base its decision prior to the hearing. The hearing mandated by federal regulations is a public participation hearing in which the Agency presents its tentative decision to the public for comment. §3006 of the Federal RCRA Act and USEPA regulations require Illinois to utilize this type of hearing. USEPA has indicated in its comments that this is an essential feature of the federal system which the State must employ to obtain final authorization.

The Illinois Supreme Court held, in reviewing a non-RCRA permit, that the public was entitled to a contested case hearing before the Agency issued a permit for a hazardous waste disposal site, Pioneer Processing v. IEPA, 464 N.E. 2d 238 (1984). However, the statute [see 1979 Ill. Rev. Stat. ch. 111½, former Sec. 1039(c)] which allowed third party participation in hazardous waste permit issuance has been repealed; §39.3 of the Act is inapplicable to RCRA permits [see Sec. 39.3(h) of the current Act]. The right to public participation before the Agency in issuance of a RCRA permit is that required by federal regulations, and those very regulations specify a public participation-type hearing. The Board notes that Section 705.212 allows appeal to the Board of any Agency action by persons who have filed comments or participated before the Agency; Section 40(b) of the Act allows third party appeal of Agency issuance of a

hazardous waste disposal permit, regardless of prior participation before the Agency. Sections 20(a)(5) et seq. and 22.4(a) of the Act require the Board to adopt regulations to obtain authorization in the RCRA program which are identical in substance to the federal RCRA regulations. The Board holds that, to the extent the APA may require a contested case hearing, the legislature intended to except the RCRA permit issuance procedures before the Agency from contested case provisions of the APA. However, to the extent possible, the Board has attempted to accommodate the APA and prior procedures.

IEPA has the exclusive authority to issue RCRA permits. It must follow these procedures under federal and state law. Moreover, if the Board's decision in an enforcement action or variance petition controls the substance of a permit, it will follow the same procedures so that the public would have a right to participation in the Board's decision in a manner consistent with that allowed under federal law.

The NPDES permit system (Section 12(f) of the Act and Part 309) is an imperfect model for the RCRA permit system: The Board has never adopted "identical in substance" regulations based on federal effluent standards found in 40 CFR Part 400 et seq. Rather, the IEPA considers the Board's rules along with USEPA's rules in issuing the NPDES permit, basing each condition on the more stringent regulation (Peabody Coal v. IEPA, PCB 78-296, 38 PCB 131, May 1, 1980). The discharger has to apply to IEPA or USEPA for relief from the USEPA standard. Having never adopted the USEPA effluent standards, the Board lacks subject matter jurisdiction to amend them or grant a variance from them.

On the other hand, §22.4(a) of the Act required the Board to actually adopt RCRA regulations which are "identical in substance" to USEPA regulations. The Board has subject matter jurisdiction to amend these rules, or to grant variances from them.

The proposal requires joinder of the Agency in all cases with potential RCRA involvement so as to assure that the Board will have the benefit of the Agency's expertise and experience with the general rules before the Board reaches a decision. This process avoids any unintended inconsistencies under RCRA.

Relationship to Agency Permit Issuance

Following a Board decision, if necessary IEPA is to issue or modify a RCRA permit incorporating the Board's decision.

For interim status facilities the RCRA permit issuance

process is initiated with a request by IEPA that the facility file a Part B application [§703.180(a)]. The Agency's review of a Part B application is expected to take a significant amount of manpower. The Board does not intend that the variance procedure should be utilized to force a premature review of a Part B application. Unless the Board were to specifically hold otherwise, an interim status facility with a variance would join the queue for permit action.

IEPA is expected to evaluate any case with RCRA implications to ascertain whether an enforcement settlement or variance petition is consistent with the overall program and acceptable to USEPA. It must make any problems known to the Board in advance of any decision. The Board then will have the benefit of IEPA's evaluation before the decision. The Board will follow notice and comment procedures comparable to those used by USEPA.

The alternative enforcement procedure suggested by IEPA would allow for the possibility that a private citizen could settle an enforcement action against a RCRA permittee in a manner inconsistent with the requirements of the general rules. The proposal has been carefully drawn to assure IEPA input prior to the actual decision which governs the permit.

How to Get on the RCRA Track

The regulations establish special procedures which must be followed in cases with RCRA involvement. A case has to be flagged to assure that the special procedures are followed. This should be easy in most cases. However, the RCRA involvement might not become apparent until the case is ready for decision. For example, a water or air case might reach a settlement which could involve disposal of a hazardous wastewater treatment plant sludge, or incineration of a hazardous waste.

The proposal attempted to provide for a Board determination early in a proceeding as to whether a case belonged on the RCRA track. The JCAR preliminary review questions focused on the need for standards for the Board to apply. It would be difficult to write such standards when the problem would only arise prior to the time the Board has dealt with the merits of the case and where the resolution can occur only after being addressed at hearing. Chemical Waste Management suggested moving the decision to the back of the process as a part of the Board's final determination. This approach will be followed.

The modified rules, which are discussed below, state the petitioner's or complainant's duty to label the case and keep it on the right procedural track. If in the final

evaluation the Board decides that the case came to it with the wrong procedures, the Board will send the case back with instructions to remedy the deficiencies. A variance petition will be deemed deficient for failure to properly label it and invoke the correct procedures. This will require an amended petition which will restart the decision clock.

Section 102.123 Proposal of RCRA Amendments

This Part applies both to general amendments and to site-specific amendments to the RCRA rules. Sections 720.120-720.122 lead into these provisions. The TSD standards also specify site-specific rulemaking as one mechanism for adjusting general standards [for example, Section 724.401(b)].

Paragraph (b)(1) requires the proponent to specify the procedural provision of Section 22.4 of the Act under which he wishes to proceed. The proponent must also provide a listing of all amendments to the corresponding federal regulations since the last Board updating. This will assure that the Board has the current federal provisions for comparison.

The proponent is required to mail a copy of the proposal to USEPA.

Section 102.124 Notice of Site-specific RCRA Proposals

This section establishes specialized public notice procedures to be followed in site-specific proposals. General program amendments will not have to follow these requirements.

The public comment period will usually be set by the Hearing Officer following the completion of the hearings (Section 102.163) and by the Board following publication in the Illinois Register.

Section 102.202 Adoption of RCRA Amendments

The Board will proceed at a minimum with notice and written comment prior to adopting amendments to the RCRA rules. This will be the case even if the proposal is "identical in substance" with federal provisions pursuant to Section 22.4(a) of the Act.

40 CFR 271.19 provides for USEPA comments on permit applications and draft permits. The Board construes this to include regulatory proposals, enforcement orders and variance petitions which may result in issuance or modification of a RCRA permit. The Board will issue an Opinion in all such cases as required by the Act [Sections 27(b), 33(a), 35(a)]. The Board's Opinion will meet or refute USEPA's concerns as required by 40 CFR 271.19(d).

Section 103.260 Purpose, Scope and Applicability

The enforcement procedures center on enforcement against a facility with a RCRA permit for violation of the RCRA rules or permit conditions. If the Board found it necessary it would order a compliance schedule leading either to closure of the facility or to compliance by the facility. The rules contemplate Agency and public participation in establishment of the compliance schedule, and modification of the RCRA permit to reflect the compliance schedule.

Whether an enforcement action involves the issuance or modification of a RCRA permit should be fairly obvious. Section 103.261(a) allows any party to ask the Board to invoke the special procedures. If the case comes before the Board for decision and the Board determines that the case may involve the issuance or modification of a RCRA permit, the Board will enter an interim order invoking the special procedures. If it later appears that the case can be decided without ordering the issuance or modification of a RCRA permit, the Board will terminate the special procedures and decide the case (§103.263(d)).

Enforcement actions which involve issuance or modification of a RCRA permit include those in which, to grant complete relief, it appears that the Board will have to: revoke the permit; order a permit issued or modified; order actions different from those required by the general regulations; or, order closure or modification of a facility operating without a required RCRA permit. The special procedures apply when there is a potential for RCRA involvement: following the notice and comment procedures the Board may determine that there is in fact no need to involve a RCRA permit.

Section 103.261 Interim Order

The special procedures are invoked by entry of an interim order on motion of a party, or on the Board's own motion. It is expected that the parties will usually advise the Board through a motion when it is time to start the special procedures. If not, Sections 103.180 and 103.268 require the Board to invoke the procedures before deciding the case.

Section 103.261(b)(1) requires a finding or proposed finding of violation and a penalty or proposed penalty in the interim order. The special procedures center on development of a compliance schedule after the question has been settled as to whether a violation exists and what penalty is appropriate. In a fully contested case this finding would be based on full public hearings pursuant to Section 103.203. The respondent could also admit or stipulate to the violation and penalty.

The interim order will provide for joinder of the Agency if it is not a party, and for a time schedule for preparation of a partial draft permit.

Section 103.263 Draft Permit or Statement

In the time provided in the interim order, the Agency must file a partial draft permit or a statement that no permit need be issued or modified. If no time is specified, the Agency must file the draft permit within 60 days. This is avoided if the parties, including the Agency, enter into a stipulated remedy within the specified time frame.

The Agency is to prepare a partial draft permit including such conditions as it finds are necessary to correct the violations found in the interim order. The partial draft permit should in effect be a detailed plan which the Agency believes will correct the violations. This would ordinarily be a part of the Agency's case if it were the complainant in an enforcement action. The requirement of a finding of violation in the interim order will make more definite the compliance plan which the Agency must prepare, and protect the Agency from having to prepare a compliance plan in what may be an unfounded citizen suit.

The Agency has asked that the respondent be required to file an application. This would be unworkable in a fully contested case. If any party wants to initiate the application process, it is not precluded from requesting that the interim order be so worded.

If the Agency issues a statement that no RCRA permit needs to be issued or modified, the Board will decide the case without following the special notice, comment and hearing procedures. The Board will assume that any order it enters can be implemented consistent with RCRA program.

Section 103.264 Stipulated Draft Remedy

A stipulated draft remedy must be signed by all of the parties, including the Agency. If one is filed, the Agency need not prepare a separate draft permit or statement under Section 103.263, although one or the other would be included with the stipulated remedy.

The rules are drafted on the assumption that the Agency is not a party in the early stages of the enforcement action and that the RCRA involvement is speculative. If the Agency is a party, and the parties are ready to stipulate to a settlement which clearly involves a RCRA permit, all of the intermediate steps can be rolled into one. The parties can

stipulate to a violation, a penalty and a remedy in one document, file it with the Board and request an interim order leading immediately to the public comment period and a public hearing.

The draft remedy itself must include the mandatory orders the Board is to enter, plus the draft permit or statement by the Agency. The Agency can stipulate to a certain form of order to be entered at the same time that it makes its statement that no permit modification is necessary.

A listing of types of mandatory orders has been included as a guide to persons preparing these stipulations. Some of these are interrelated. For example, if a permit is to be revoked, the stipulation should be specific as to the steps to be taken to close the facility in the absence of a permit, and as to whether any financial assurance pursuant to the permit is released, continued or to be applied to the closure.

The stipulation must be signed and available to the public before notice is given pursuant to Section 103.265.

Section 103.265 Contents of Public Notice

The Agency must give public notice of any draft permit, whether it is part of a stipulated remedy or not. No special notice is required if the Agency determines that no permit modification is required. Instead, the regular notice and hearing procedures of Section 103.180 are to be followed.

Section 103.265(b) specifies various persons who are to get notice. This is drawn from 40 CFR 124.10(c), with the appropriate State agencies inserted instead of the descriptions found in the federal rules.

Section 103.266 Public Comment

Forty-five days will be allowed for written public comment after the partial draft permit has been filed. The Board will consider this written public comment, including that of USEPA, in entering its final Order and Opinion.

Section 103.267 Hearing

There will be at least 30 days notice of the hearing. The partial draft permit or stipulated remedy will have to be available to the public for at least 30 days before the hearing also.

Section 103.268 Contents of Board Order

The Board will not enter an order which would require the issuance or modification of a RCRA permit unless the

special procedures have been followed. If necessary, the Board will enter an interim order invoking, or reinvoking, the special procedures.

If the Board determines that it must order the issuance or modification of a RCRA permit, it will so direct, either in specific terms or through general guidelines. If the order specifies a compliance schedule leading either to upgrading or closing the facility, the Board will require compliance as soon as possible (40 CFR 270.33).

Section 104.104 RCRA Variances

Paragraph (a) contains the definition which fixes the scope of the RCRA variance procedures: a "petition for a RCRA variance" is one which requests a variance from the RCRA rules or which requests that the Board otherwise order temporary issuance or modification of a RCRA permit.

The procedures of this Part are centered on variances which would result in issuance of a RCRA permit with conditions which would be different than those required by the general rules. The petitioner would request a variance from the underlying Board rule, and ask that the Agency be directed to issue or modify the permit based on the variance.

The specialized RCRA procedures also apply if the petitioner requests a variance from the RCRA rules not involving a permit. This includes requests for variances from the interim status requirements of Part 725, and requests for variances by generators and transporters. The federal rules allow general variances through the compliance schedule procedures of 40 CFR 270.33. These are available only to persons with RCRA permits. In considering variances for persons without permits, the Board will utilize procedures which are analogous to the federal compliance schedule procedures.

Paragraph (b) contains several cross-references intended to aid persons unfamiliar with the Board rules. There are several federal procedures which are called federal "variances" which, unlike the variances allowed under the Act, involve permanent adjustment of the general rules on a showing other than arbitrary or unreasonable hardship. (For example, compare 40 CFR 264.147(c) with 35 Ill. Adm. Code 724.247(c).) There are also federal procedures which, although not denominated as such, could be described as "variances" as the term is used outside Illinois. (For example, compare 40 CFR 264.94(b) and 35 Ill. Adm. Code 724.194(b).) In adopting the RCRA rules the Board has attempted to identify the federal provisions which could cause confusion. An Appellate

Court has upheld the Board's decision on several of these provisions (Commonwealth Edison v. IPCB, Third District, September, 1984). These substantive rules indicate which procedures are to be followed to obtain adjustment of the permit condition.

The Board anticipates that there will be many multi-state firms which will use the federal regulations as their primary source instead of the comparable Board regulations. Section 104.104(b) is a cross reference intended to alert persons before they invest the effort involved in preparing an unnecessary variance petition. This Section is not intended as a comprehensive statement as to when a variance is required.

Section 104.122 Consistency with Federal Law

Paragraph (e) is derived from Section 35 of the Act. It requires a person seeking a RCRA variance to prepare an analysis of federal law, and to plead sufficient facts to show that the petitioner is entitled to the requested relief pursuant to federal law.

Section 104.126 RCRA Variances: Additional Material

Paragraph (a) requires the petitioner to label a RCRA variance as such. This will allow the Board to place the petition on the correct procedural track. If it appears that a petition has not been properly labeled, the Board may dismiss it or require an amended petition. This will restart the decision clock, affording time for the Board to follow the correct procedures.

Paragraphs (b) and (c) require the petitioner for a permit-related variance to file an application to modify the permit in advance of the petition. The relevant portion of the application must be attached.

Paragraph (d) requires proof of service on USEPA as a condition for the sufficiency of the petition. The filing date will be delayed if the proof is filed after the date the main body of the petition is filed (Section 104.142(a)). USEPA requires that it be notified of variance petitions. The Board has placed this burden on the variance petitioner who has invoked its jurisdiction to obtain relief from a general rule.

Section 104.141 Objections to Petition

Section 37(a) of the Act requires a hearing on a variance petition if any person files a written "objection"

within 21 days. This procedure is unnecessary because the Board has required hearings on all RCRA variance petitions.

Section 104.142 RCRA Variances: Notice of Filing of Petition

40 CFR 124.10 requires notice to be given to various types of agencies and persons. The Board has designated certain State agencies which appear to have responsibility in the areas indicated in the federal rules. USEPA will designate federal agencies entitled to notice through the MOA or other arrangement with the Agency.

If the facility is located near the Illinois border, the Agency is to give notice to the Governor of the adjacent state, to elected officials in any adjacent counties, and to elected officials in any municipality if it is the closest population center.

Section 104.182 RCRA Variances: Additional Information in Recommendation

The Agency must file the recommendation within 30 days after the petition is filed. The recommendation will serve the purpose of the partial draft permit and tentative decision in the federal scheme. The Agency will include a fact sheet, statement of basis, draft permit conditions and/or a notice of intent to deny, insofar as is relevant to the variance request.

Section 104.183 RCRA Variances: Public Comment

There will be a 45 day period for written comment after the recommendation is filed. Persons may comment on the petition and on the Agency's recommendation. The public hearing will usually be held during the last 15 days of the written comment period.

Section 104.200 Notice of Hearing

The hearing officer is to give notice of a hearing to be held not less than 30 days after the filing, or anticipated filing, of the recommendation. Notice is to be given to the people who received notice of filing of the petition, plus any other persons who comment or request notice. The hearing is to be held in the County in which the facility is located, in the population center closest to the facility.

Section 104.221 RCRA Variances: Board Decision

The Board will not grant a RCRA variance unless the RCRA procedures have been followed. The procedures are

invoked when the petitioner labels the petition pursuant to Section 104.126. The decision period will be restarted if the petitioner failed to properly label the petition.


Paragraph (c) provides that variances will be granted only to the extent consistent with the RCRA Act and its rules. Where the federal provisions provide a variance mechanism, it will be necessary to identify the mechanism and allege sufficient facts to show that the relief is available (§104.122(e)). The general federal mechanism analogous to the Illinois variance is the compliance schedule (40 CFR 270.33). Variances analogous to compliance schedules must require compliance with the general regulations in the shortest possible time.

The Board's Order may direct the Agency to issue or modify a RCRA permit. The Board may set forth a specific set of conditions to be incorporated into the permit, or it may provide general guidelines.

This Opinion supports the Board's Second Notice Order of this same date. Because of its length, this Second Notice Opinion will not appear in the Opinion volumes, but will be distributed to participants.

Board Member J. Theodore Meyer dissented.
Board Members J. Marlin and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 8th day of November, 1984 by a vote of 5-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board