ILLINOIS POLLUTION CONTROL BOARD
January 25, 1990

IN THE MATTER OF:	)	
	)	R89-2
UIC UPDATE, USEPA REGULATIONS	)	(Identical in Substance Rulemaking)
(7-1-88 THROUGH 12-31-88)	)	

FINAL ORDER. ADOPTED RULE.

OPINION OF THE BOARD (By J. Anderson):

By a separate Order, pursuant to Sections 22.4(a) and 13.(c) of the Environmental Protection Act (Act), the Board is amending the Underground Injection Control (UIC) regulations.

Section 22.4 of the Act governs adoption of regulations establishing the RCRA program in Illinois. Both Sections 22.4(a) and 13(c) provide for quick adoption of regulations which are "identical in substance" to federal regulations. 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 UIC regulations are found at 40 CFR 144 and 146 (and a new part, 148) This rulemaking updates UIC rules to correspond with federal amendments during the period August 1 through December 31, 1988. The Federal Registers utilized are as follows:

52 Fed. Reg. 46963	December 10, 1987
53 Fed. Reg. 28147	July 26, 1988
53 Fed. Reg. 30918	August 16, 1988
53 Fed. Reg. 34086	September 2, 1988
53 Fed. Reg. 37294	September 26, 1988
53 Fed. Reg. 37410	September 26, 1988
53 Fed. Reg. 37934	September 26, 1988
53 Fed. Reg. 41601	October 24, 1988

Usually, State UIC and RCRA program updates are divided into their traditional parts, UIC in 35 Ill. Adm. Code 704, 730, and now 738, and RCRA in 35 Ill. Adm. Code 703, 705, and 720 through 729, with minimal overlap. However, the present UIC and RCRA program updates, involved in R89-1 and this docket, have more overlap than usual. The result is that along with the usual UIC Illinois sections being addressed in this update, this update also addresses the amendments to 35 Ill. Adm. Code 702, 705 and 720. The RCRA update, R89-1, adopted the July through December 1988 amendments to 35 Ill. Adm. Code 703, 721, 724 through 726, and 728, on September 28, 1989.

Various sections of the federal UIC program were amended to allow Indian Tribes to be treated as states for purposes of administering an Underground Injection Control Program. There does not appear to be a need to adopt these amendments because there do not appear to be any Indian tribes in Illinois. This conclusion is based on the fact that no Illinois tribes are listed on the Federal recognition list kept by the Secretary of the Interior. Listing on this recognition list is the first of four eligibility criteria under Section 1451 of the SDWA for treatment of Indian Tribes as states. Thus, the Board

does not adopt these rules pursuant to Section 7.2(a)(1) of the Act, the inapplicability exemption from the identical in substance rulemaking mandate.

35 Ill. Adm. Code 704 has been amended to include a new Subpart H: ISSUED PERMITS. This Subpart is composed of Sections from 35 Ill. Adm. Code 702.183 through 702.187 (except 702.186), with language applicable only to RCRA permits removed, so that only UIC permits are addressed.

HISTORY OF RCRA, UST and UIC ADOPTION

NOTE: For greater clarity, the Board is employing an alternative format to that previously used for the following historical summary of RCRA, UST, and UIC adoption. This alternative format includes updated information not part of the summaries in prior RCRA, UST, and UIC opinions.

The Illinois UIC 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
738	Hazardous Waste Injection Restrictions

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

The Board has adopted and amended the Resource Conservation and Recovery Act (RCRA) hazardous waste rules in several dockets. Dockets R81-22 and R82-18 dockets dealt with the Phase I RCRA regulations. USEPA granted Illinois Phase I authorization on May 17, 1982, at 47 Fed. Reg. 21043. The Board adopted RCRA Phase II regulations in Parts 703 and 724 in dockets R82-19 and R83-24. USEPA granted final approval of the Illinois RCRA program on January 31, 1986, at 51 Fed. Reg. 3778 (January 30, 1986). USEPA granted approval to revisions to the Illinois program and partial Hazardous and Solid Waste Amendments (HSWA) approval effective March 5, 1988, at 53 Fed. Reg. 126 (January 5, 1988). The entire listing of all RCRA identical in substance rulemakings follows (with the period of corresponding federal revisions indicated in parentheses):

R81-22 45 PCB 317, September 16, 1981 & February 4, 1982; 6 Ill. Reg. 4828, April 23, 1982, effective May 17, 1982. (5/19/80 through 10/1/81)

R82-18 51 PCB 31, January 13, 1983; 7 Ill. Reg. 2518, March 4, 1983, effective May 17, 1982. (11/11/81 through 6/24/82)

R82-19 53 PCB 131, July 26, 1983, 7 Ill. Reg. 13999, October 28, 1983, effective October 2, 1983. (11/23/81 through 10/29/82)

R83-24 55 PCB 31, December 15, 1983, 8 Ill. Reg. 200, January 6, 1984, effective December 27, 1983. (Corrections to R82-19)

R84-9 64 PCB 427 & 521, June 13 & 27, 1985; 9 Ill. Reg. 11964, August 2, 1985, effective July 8 & 24, 1985. (1/19/83 through 4/24/84)

R85-22 67 PCB 175, 479, December 20, 1985 and January 9, 1986; 10 Ill. Reg. 968, January 17, 1986, effective January 2, 1986. (4/25/84 through 6/30/85)

R86-1 71 PCB 110, July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986, effective August 12, 1986. (7/1/85 through 1/31/86)

R86-19 73 PCB 467, October 23, 1986; 10 Ill. Reg. 20630, December 12, 1986, effective December 2, 1986. (2/1/86 through 3/31/86)

R86-28 75 PCB 306, February 5, 1987; and 76 PCB 195, March 5, 1987; 11 Ill. Reg. 6017, April 3, 1987, effective March 23, 1987. Correction at 77 PCB 235, April 16, 1987; 11 Ill. Reg. 8684, May 1, 1987, effective April 21, 1987. (4/1/86 through 6/30/86)

R86-46 79 PCB 676, July 16, 1987; 11 Ill. Reg. 13435, August 14, 1987, effective August 4, 1987. (7/1/86 through 9/30/86)

R87-5 82 PCB 391, October 15, 1987; 11 Ill. Reg. 19280, November 30, 1987, effective November 10 & 12, 1987. (10/1/86 through 12/31/86)

R87-26 84 PCB 491, December 3, 1987; 12 Ill. Reg. 2450, January 29, 1988, effective January 15, 1988. (1/1/87 through 6/30/87)

R87-32 Correction to R86-1; 81 PCB 163, September 4, 1987; 11 Ill. Reg. 16698, October 16, 1987, effective September 30, 1987.

R87-39 90 PCB 267, June 16, 1988; 12 Ill. Reg. 12999, August 12, 1988, effective July 29, 1988. (7/1/87 through 12/31/87)

R88-16 November 17, 1988; 13 Ill. Reg. 447, January 13, 1989,

effective December 28, 1988. (1/1/88 through 7/31/88)

R89-1 September 13, 1989; 13 Ill. Reg. 18278, November 27, 1989, effective November 13, 1989. (8/1/88 through 12/31/88)

R89-9 Proposal for Public Comment December 6, 1989; 14 Ill. Reg. 72, January 5, 1990. (1/1/89 through 6/30/89)

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

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, December 21, 1984, effective December 11, 1984.

This was repealed by R85-22, which included adoption of USEPA's dioxin listings. Section 22.4(d) was repealed by P.A. 85-1048, effective January 1, 1989.

The Board has adopted USEPA delistings at the request of Amoco and Envirite (the date of the corresponding federal action is included in parentheses):

R85-2 69 PCB 314, April 24, 1986; 10 Ill. Reg. 8112, May 16, 1986, effective May 2, 1986. (9/13/85)

R87-30 90 PCB 665, June 30, 1988; 12 Ill. Reg. 12070, July 22, 1988, effective July 12, 1988. (11/14/86)

The Board has adopted special procedures in Parts 101, 102, and 104 for cases involving the RCRA regulations:

R84-10 62 PCB 87 & 349, December 20, 1984 & January 10, 1985; 9 Ill. Reg. 1383, February 1, 1985, effective January 16, 1985.

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

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

R81-25 60 PCB 381, October 25, 1984; 8 Ill. Reg. 24124, December 14, 1984, effective December 4, 1984.

R83-28 68 PCB 295, February 26, 1986; 10 Ill. Reg. 4875, March 21, 1986, effective March 7, 1986.

R86-9 Emergency regulations adopted at 73 PCB 427, October 23, 1986; 10 Ill. Reg. 19787, November 21, 1986, effective November 5, 1986.

The Board's action in adopting emergency regulations in R86-9 was reversed by the First District Court of Appeals. (Citizens for a Better Environment v. PCB, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987).) Hearings on permanent rules are pending.

The Board has adopted and amended Underground Injection Control (UIC) regulations in several dockets to correspond with the federal regulations. One such docket, R82-18, was a RCRA docket. USEPA authorized the Illinois UIC program on February 1, 1984, at 49 Fed. Reg. 3991. The entire listing of all UIC rulemakings follows (with the period of corresponding federal revisions indicated in parentheses):

R81-32 47 PCB 93, May 13, 1982; 6 Ill. Reg. 12479, October 15, 1982, effective February 1, 1984. (7/7/81 through 11/23/81)

R82-18 51 PCB 31, January 13, 1983; 7 Ill. Reg. 2518, March 4, 1983, effective May 17, 1982. (11/11/81 through 6/24/82)

R83-39 55 PCB 319, December 15, 1983; 7 Ill. Reg. 17338, December 20, 1983, effective December 19, 1983. (4/1/83)

R85-23 70 PCB 311 & 71 PCB 108, June 20 & July 11, 1986; 10 Ill. Reg. 13274, August 8, 1986, effective July 28 & 29, 1986. (5/11/84 through 11/15/84)

R86-27 Dismissed at 77 PCB 234, April 16, 1987. (No USEPA amendments through 12/31/86).

R87-29 85 PCB 307, January 21, 1988; 12 Ill. Reg. 6673, April 8, 1988, effective March 28, 1988. (1/1/87 through 6/30/87)

R88-2 90 PCB 679, June 30, 1988; 12 Ill. Reg. 13700, August 26, 1988, effective August 16, 1988. (7/1/87 through 12/31/87)

R88-17 December 15, 1988; 13 Ill. Reg. 478, January 13, 1989, effective December 30, 1988. (1/1/88 through 6/30/88)

R89-2 This Docket. (7/1/88 through 12/31/88)

The Board adopted Underground Storage Tank (UST) rules in R86-1 and R86-28, which were also RCRA update Dockets. The Board updated the UST regulations to correspond with USEPA amendments in several dockets. USEPA has not yet authorized the Illinois UST program. The entire listing of all UST rulemakings follows (with the period of corresponding federal revisions indicated in parentheses):

R86-1	71 PCB 110, July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986, effective August 12, 1986. (7/1/85 through 1/31/86)
R86-28	75 PCB 306, February 5, 1987; and 76 PCB 195, March 5, 1987; 11 Ill. Reg. 6017, April 3, 1987, effective March 23, 1987. Correction at 77 PCB 235, April 16, 1987; 11 Ill. Reg. 8684, May 1, 1987, effective April 21, 1987. (4/1/86 through 6/30/86)
R88-27	April 27, 1989; 13 Ill. Reg. 9519, June 23, 1989, effective June 12, 1989. (9/23/88)
R89-4	July 27, 1989; 13 Ill. Reg. 15010, September 22, 1989, effective September 12, 1989. (10/26/88)
R89-10	Proposal for Public Comment November 15, 1989; 14 Ill. Reg. 153, January 5, 1990. (10/27/88 through 6/30/89)

GENERAL DISCUSSION

The amendments are discussed in detail below. The following generally describes the USEPA actions encompassed by this rulemaking. The complete Federal Register citations are given above. All dates are 1988 unless otherwise stated.

December 10, 1987	RCRA permits may become UIC permits under certain circumstances.
July 26	Prohibitions of Underground Injection of Hazardous Waste.
August 16	Amends effective dates of mandated prohibitions on the underground injection of wastes from the "California list" wastes and certain wastes from the "First Third" wastes.
September 26	Oxygen Activation (OA) tool to test fluid migration
October 24	Corrects error concerning effective dates prohibiting the injection of certain wastes.

PUBLIC COMMENTS

The Board received four public comments on the proposed amendments. The Office of the Secretary of State Administrative Code Division (Code Unit) submitted two public comments: public comment number one (PC# 1), received December 11, 1989, and public comment number two (PC# 2), received December 21, 1989. The Joint Committee on Administrative Rules (JCAR) submitted public comment number three (PC# 3), which the Board received December 19, 1989. The Board received public comment number four (PC# 4) from the United States Environmental Protection Agency Region V (USEPA) on January 19, 1990.

Most of the comments and resulting revisions concern minor editorial corrections to the text of the proposed rules. Some of the comments and revisions, however, relate to more substantive aspects of the Board's proposal. The public comments and resulting revisions of both types are discussed below under the appropriate section headings as part of the detailed discussion. One set of comments, all part of PC# 3 from JCAR, relate to the timeliness of Board adoption of the USEPA amendments involved in this update. The Board responded directly to JCAR and will not discuss this public comment in this opinion because it does not relate to the substance of the proposed amendments.

The detailed discussion that follows indicates each topic on which the Board invited public comment. The Board construes silence as affirmation on the Board's approach to each topic.

DETAILED DISCUSSION

The amendments have been edited to establish a uniform usage with respect to "shall," "must," "will," and "may." "Shall" is used when the subject of a sentence has to do something. "Must" is used when someone has to do something, but that someone is not the subject to the sentence. "Will" is used when the Board obligates itself to do something. "May" is used when a provision is optional. Some of the USEPA rules have sentence construction problems, or appear to say something other than what was intended. Others do not read correctly when the Board or IEPA is substituted into the federal rule. The Board does not intend to make any substantive change in the rules by way of these edits.

PART 702

SUBPART C: PERMIT CONDITIONS

Section 702.152

This Section is drawn from 40 CFR 144.51 and 270.30, which was amended at 53 Fed. Reg. 37934. The RCRA only provision has been placed in Section 703.247, discussed in R89-1.

Section 702.160

This Section is drawn from 40 CFR 144.52(a) and 270.32(a). 40 CFR 270.40 was amended at 53 Fed. Reg. 28147. The amendment requires the Agency to establish UIC permit conditions based on new requirements, included elsewhere in this rulemaking.

PC# 4 asserts that the appropriate citation in the Board Note to existing subsection (c) should appear as 40 CFR 144.52(c), rather than 40 CFR 144.51. The Board observes that this Board Note did not undergo amendment during this update. The Board further observes that virtually identical language appears in the preamble to 40 CFR 144.51 as appears at 40 CFR 144.52(c). Nevertheless, the Board will amend the Board Note to indicate that

40 CFR 144.52(c) is the federal counterpart to 35 Ill. Adm. Code 702.160(c). The thrust of 40 CFR 144.52 is more specific to establishing permit conditions.

SUBPART D: ISSUED PERMITS

Section 702.181

This Section is drawn from 40 CFR 144.35 and 270.40. 40 CFR 270.40 was amended at 53 Fed. Reg. 28147. The federal amendment references the new procedures for permit modifications discussed below. The existing federal and State text differ in a substantive way, in that, while a RCRA or UIC permit provides a partial shield against federal enforcement, it provides none under State law. The text has also been modified to reference "reissuance" of permits, which is discussed below in connection with Section 703.270 et seq.

PC# 4 observes that the Board has added to the text of Section 702.181(c) the clause, "except as noted in subsection (a)," which does not appear at 40 CFR 144.35 (c). First, the Board observes that this clause is not part of the present update; it is existing regulatory text adopted in R81-31 on August 18, 1982. The Board believes that this clause avoids potential conflict in interpretation of subsections (a) and (c) and constitutes a clear statement of Illinois law. Further, it does not render this section inconsistent with the federal provision. The Board will not revise this subsection to delete the clause.

The Board notes one item in the existing text of subsection (a), although no correction is necessary to this section. As noted in the Board's Order of September 13, 1989 in R89-1, the Board has systematically deleted the word "revoked" wherever it appears throughout the UIC and RCRA rules. USEPA systematically uses "revocation and reissuance" in a non-punitive sense throughout its permitting rules. Permit revocation has punitive enforcement implications, see Section 702.186, so the Board has substituted "reissue" in its rules where "revoke and reissue" appears in the federal rules. This is important to this docket in light of the fact that PC# 4 raises this issue with regard to 35 Ill. Adm. Code 704.260 through 704.262, as discussed below. However, the appearance of "revoke" in the text of Section 702.181 is proper because the use is intended pursuant to an enforcement action and is consistent with Section 702.186.

Sections 702.182 through 702.185 and 702.187

These Sections are drawn from 40 CFR 144.38 and 270.40, which were amended at 53 Fed. Reg. 37934. The general and RCRA only provisions in this and the following Sections have been moved to new Sections 703.260 et seq., adopted in R89-1, and the general and UIC only provisions have been moved to Section 704.260 et seq. This format change is necessitated by the extensive amendments to the RCRA permit modification procedures, discussed in R89-1.

PART 704

SUBPART D: APPLICATION FOR PERMIT

Section 704.161

This Section, drawn from 40 CFR 144.31(a), is amended at 52 Fed. Reg. 46965, December 10, 1987. This amendment was inadvertently omitted from the previous UIC or RCRA update. The amendment to subsection (a) adds that a RCRA permit may constitute a UIC permit for hazardous waste injection wells if the requirements of 35 Ill. Adm. Code 724.Subpart X are met. The Board adopted Subpart X September 28, 1989 in R89-1.

In response to PC# 2, the Board has revised the proposed text of the Source Note to this section to omit past amendments and its docket numbers, which all appear in the main source note to Part 704.

SUBPART E: PERMIT CONDITIONS

Section 704.181

This Section was drawn from 40 CFR 144.51, and amended at 53 Fed. Reg. 28147, July 26, 1988. The amendment to subsection (b) requires permittees to keep records in accord with the new Subpart G, if appropriate. Also, subsections (c)(2) and (d) have been given headings.

SUBPART H: ISSUED PERMITS

This Subpart is composed of recodified Sections from certain Sections of Part 702.Subpart D, absent RCRA only language. Sections 702.182, 702.183, 702.184, 702.185 and 702.187 are repealed. The Sections correspond as follows:

702.181 (Effect of Permit)	remains 702.181
702.182 (Transfer)	is now 704.260
702.183 (Modification)	is now 704.261
702.184 (Causes for Modification)	is now 704.262
702.185 (Facility Siting)	is now 704.263 (Well Siting)
702.186 (Revocation)	remains 702.185
702.187 (Minor Modifications)	is now 704.264

One section in this new Subpart, Section 704.262, has also been amended.

PC# 4 observes that the Board omitted language from Sections 704.260 through 704.262 that would apply to revocation and reissuance of permits. For the reasons discussed above for Section 702.181, the Board's intent was to delete the reference to revocation and substitute "reissue" for "revoke and reissue." The Board erred by deleting "or reissue" from the text as it appeared at Sections 702.182 through 702.184. Therefore, the Board restores the phrase "or reissue" to the text of Sections 704.260 through 704.262, where

appropriate. However, the Board refrains from adding any reference to revocation to these sections.

PC# 4 also questions why the Board did not adopt a counterpart to 40 CFR 144.40, which relates to termination of permits. As discussed in the Board Orders of May 13, 1982, in R89-32, and July 26, 1983, in R82-19, termination is a punitive measure appropriate in enforcement proceedings. Such a provision conferring such authority on the Agency is inappropriate in Part 704. Rather, 35 Ill. Adm. Code 702.186, which states the circumstances under which the Board may revoke a permit are essentially identical to the bases for termination stated at 40 CFR 144.40(a).

Section 704.260

This section derives from 40 CFR 144.38 (1988) and is recodified from 35 Ill. Adm. Code 702.182. USEPA did not modify the corresponding federal provision during this update cycle.

PC# 2 notes an error in the Source Note, which the Board corrects for the reasons discussed above re Section 704.161. PC# 3 observes a typographic error in the Board Note relating to the corresponding federal rule number. The Board corrects "40 CFR 144.39" to 40 CFR 144.38."

Examination of the text of Section 704.260(a) reveals another typographic error. Former Section 702.182, from which Section 704.260 derives, refers to "Sections 702.183 through 702.185" and "Section 702.187(d)" with regard to modification and reissuance of permits. These are now codified as Sections 704.261 through 704.264. However, the text of the proposed rule erroneously referred to "Sections 704.161 through 704.164." The Board has made this correction in the adopted rule.

Section 704.261

This provision derives from 40 CFR 144.39 (1988) and is recodified from 35 Ill. Adm. Code 702.183. USEPA did not modify the corresponding federal provision during this update cycle.

PC# 2 points out an error in the Source Note, and the Board makes the appropriate correction. PC# 3 asserts that the Board may have erred by citing 40 CFR 122.15 as the corresponding federal provision. The Board corrects the Board Note to cite 40 CFR 144.39 as the federal source of this section.

Section 704.262

This Section, entitled Causes for Modification, derives from $0 CFR 144.39, as amended at 54 Fed. Reg. 28147 on July 26, 1988. USEPA amended subsection (a) by deletion of the words, "but not reissuance" in the first sentence. Also, the second sentence now provides that for Classes I and III hazardous waste injection wells, the following may be causes for reissuance as well as modification. For all other wells, the following may be cause for reissuance and modification upon request or agreement of the permittee. In

subsection (a)(3), not only may just Class III wells be modified during their terms for cause, but now so may Class I hazardous waste injection wells.

Due to the addition of a new paragraph, subsection (b) was divided into a subsections (1) and (2). The new subsection (2) provides that a permittee may request modification of a permit when a determination that the waste being injected is a hazardous waste as defined in 35 Ill. Adm. Code 721.103 either because the definition has been revised, or because a previous determination has been changed.

Board examination of the text of subsection (a) reveals that the proposed text substituted "and" where "as well as" appears in 40 CFR 144.39(a), as amended at 54 Fed. Reg. 28147. The Board changes the adopted rule to use the federal language.

PART 705

SUBPART B: PERMIT APPLICATIONS

PC# 1 notes that the Board neglected to strike "or Revocation" from the heading of Section 705.128 in the table of contents as it struck this from the heading in the text of the rules. The adopted amendments correct this oversight. PC# 1 also observes necessary revisions to the Authority Note, which the Board also adopts.

Section 705.128

This Section was drawn from 40 CFR 124.5, amended at 53 Fed. Reg. 37934, September 26, 1988. Subsection (c) has been entitled "Agency Modification Procedures." The substantive amendment to subsection (c)(1) provides that for reissued permits, the Agency shall require the submission of a new application. Also, subsection (c)(3) was amended to exempt Class I and II wells as defined in 35 Ill. Adm. Code 702.110 from the requirements of the Section.

In response to PC# 1, the Board deletes "Illinois" from subsection (e) because the official name is "Environmental Protection Act."

SUBPART D: PUBLIC NOTICE

Section 705.163

This Section was drawn from 40 CFR 124.10(c), amended at 53 Fed. Reg. 28147, July 26, 1988, and 53 Fed. Reg. 37410, September 26, 1988. The first amendment to this Section, made in July, applies to all Class I wells, including injection wastes not yet subject to prohibition, those injecting wastes which meet the treatment standards, and those whose wastes have been banned and which have received an exemption under Part 738. The amendment adds a new subsection (a)(6) which requires that for Class I UIC permits only, public notice must be given to the Illinois Department of Mines and Minerals. The current subsection (a)(6) is redesignated (a)(7).

The September amendment relates to Indian tribes, thus it is not adopted.

PART 720

SUBPART B: DEFINITIONS

Section 720.110

This Section is drawn from 40 CFR 260.10 which was amended at 52 Fed. Reg. 46963 and 53 Fed. Reg. 34086. These are the definitions applicable to Parts 720 et seq.

In addition to the changes derived from the federal amendments, the Board has made a few editorial revisions to these definitions. Several of these concern references to federal rules or statutes. As has been discussed in previous opinions, these are of concern because they may be subject to the APA limitations on incorporations by reference. The Board has attempted either to clearly make each incorporation by reference in compliance with the APA, or to clearly make it not an incorporation by reference. In the latter case, among the options are for the Board to eliminate unnecessary references, to replace federal references with derivative State rules, or to reword provisions so that the rule references federal actions rather than rules.

The Board has amended the definition of "designated facility" to remove unnecessary federal references. This term refers to the facility listed by the generator on the manifest to receive the hazardous waste shipment. Section 722.120 requires that the generator designate a facility with a RCRA permit or interim status. It is complicated to state this, since the receiving facility could be located out-of-State, and hence have a RCRA permit from USEPA or another authorized state. It is not necessary to repeat the limitation on designated facilities in both the definition and the operative Section.

The definition of "elementary neutralization unit" was amended at 53 Fed. Reg. 34086. The main change appears to be the addition of "tank systems" to the list of units which could be an elementary neutralization unit. See Section 702.110 discussion.

The definition of "landfill" was amended at 52 Fed. Reg. 46963, adding to the list of specific units which are not "landfills".

The definition of "miscellaneous unit" has also added at 52 Fed. Reg. 46963, which added the regulations applicable to miscellaneous units. The Board has added "tank system" to the list of units which are not "miscellaneous units." This change is parallel to the changes made at 53 Fed. Reg. 34086, and probably represents an error made by USEPA because different offices were working with out-of-date copies of the rules.

The definition of "POTW" has been modified to replace federal references with a derivative State definition, adopted with the pretreatment rules in R86-44 in 35 Ill. Adm. Code 310.

The definition of "wastewater treatment unit" was amended at 53 Fed. Reg. 34086. The main change is again to add "tank systems" to the list of units. The Board has also replaced the references to the federal Clean Water Act with references to the derivative State rules in Parts 309 and 310. To be exempt from the hazardous waste rules, a wastewater treatment unit either has to have an NPDES permit under Part 309, or a pretreatment permit or authorization to discharge, issued by the Agency or authorized by POTW, under Part 310.

The USEPA language exempts units "subject to regulation" under the Clean Water Act. This is subject to the interpretation that a facility which is required to, but does not have an NPDES permit would thereby be exempt from the hazardous waste rules. This is probably not what USEPA intends. As amended by the Board, the exemption would extend only to those units which have required the permits.

The Board corrects the main Source Note in response to PC# 1 by deleting "as" from the last reference.

Section 720.111

The sole amendment to the incorporations by reference Section is the addition of a single reference. This reference, "Technical Assistance Document: Corrosion, Its Detection and Control in Injection Wells," is referred to in the amendment to Section 730.162. It is a guidance document for use by the regulated community published by the USEPA Office of Drinking Water State Programs Division. Other amendments, made in R89-1 and primarily limited to updating incorporations by reference, are discussed in that opinion.

PC# 3 points out that the Proposed Order of October 5, 1989 discussed several other revisions to this section. As noted in the direct response to JCAR, there was a strong link between R89-1, the parallel RCRA update, and this docket. Several amendments went back and forth between the two dockets. The additional amendments discussed in the Proposed Opinion in this docket actually occurred in The Board's Order of September 13, 1989 in R89-1. The inclusion of the additional discussion in the Proposed Opinion was erroneous, and the Board has deleted it from this Opinion.

PC# 3 also requested identification of the Board or federal rule that requires reference to the added USEPA Technical Assistance Document. The Board replied directly to JCAR that new Section 730.165(b) refers to this document, although corresponding 40 CFR 146.65(b) refers to other, unspecified documents. This is further discussed below with Section 730.165.

PART 730

This Part was drawn from 40 CFR 146, amended by 53 Fed. Reg. 28148 on July 26, 1988. It applies to owners or operators of wells injecting hazardous wastes, including those injecting wastes not yet prohibited, those which meet treatment standards or which have been banned under 35 Ill. Adm. Code 728 or 738. Part 730 differs from the new Part 738 in that Part 730 requirements are

necessary to effectively regulate hazardous waste injection which has not been banned and is therefore not subject to Part 738 requirements. Part 730 also assures that USDW's are not endangered from formation fluids.

September 26th Federal Interim Approval amendment, at 53 Fed. Reg. 37294, applying to all injection wells, provides for granting interim approval until October 26, 1990 for use of the Oxygen Activation (OA) tool for test fluid migration adjacent to the injection well bore as an alternative to the tests for mechanical integrity specified in 40 CFR 146.8(c) (Part 730.108(c)). USEPA is still requesting comments and further data on the viability of this alternative. At the end of the two year interim approval, the USEPA will issue a final determination on its use as an alternative to existing tests for demonstrating the absence of fluid movement behind the casing.

It is the Board's opinion that since the USEPA has not yet adopted a final rule, the mandate requiring Illinois to adopt this rule does not apply. Also, Section 730.108(d) currently allows for the possibility of the Oxygen Activation Test if the owner or operator can demonstrate the mechanical integrity of wells for which its use is proposed. For these reasons, the Board is not amending 35 Ill. Adm. Code 730.108(a) at this time. The Board invited comment.

Two revisions are made to the table of contents. The Board corrects the heading to Subpart B, by underlining "NON-HAZARDOUS" to correlate with how this appears in the body of the text. The Board also corrects the Authority Note. This is in response to PC# 2. In response to PC# 4, the Board changes the heading for Section 730.168 to agree with its appearance in the body of the rules.

SUBPART A: GENERAL

Section 730.101

This Section, drawn from 40 CFR 146 generally, is affected by a Federal Extension of Interim Approval a 53 Fed. Reg. 37296, September 26, 1988. The federal extension adds six months, from September 26, 1988 to March 27, 1989, for using alternatives to test the mechanical integrity of an injection wells' tubular goods. Since the six month extension deadlines have passed, this amendment is not adopted. Another minor amendment was made to replace the language of "On or after the date of approval by the United States Environmental Protection Agency (USEPA) of the Illinois UIC program" to the actual date of approval as published in the Federal Register, February 1, 1984. (See discussion under Section 730.103.)

In response to PC# 2, the Board corrects subsection (a) by capitalizing "Part" where it appears.

Section 730.103

Minor changes have been made throughout this definition Section. One notable change is in the definition of "Date of approval by USEPA of the Illinois UIC program." Previously, it has been defined as "the date on which

USEPA delegates primacy for the UIC program for Class I, III, IV and V wells to the State of Illinois pursuant to Section 1422 of the SDWA and 40 CFR 123." It has been revised to be defined as February 1, 1984, the date of the Federal Register notice of approval of the Illinois Program. (49 Fed. Reg. 3991). Note, however, that the effective date of the program is listed as March 3, 1984 at 40 CFR 147.700. Subpart O. A similar change was made in the definition of "Effective date of the UIC program". Public comment was solicited on whether the Board should use the February 1 or March 3, 1984 date, and why.

The Board also makes several editorial revisions. The Board adds the Federal Public Law numbers to the definition of "Act" and removes the parallel definition title "or RCRA." The Board then deletes the present definition of "RCRA" in favor of defining it as "Act". The Board removes "his" from the definition of "Director" in favor of gender-neutral language. The Board further adds to the definitions of "Radioactive Waste" and "Total Dissolved Solids" two incorporations by reference that refer to 35 Ill. Adm. Code 720.111.

The Board corrects the definitions of "Act" and "SDWA" by changing "Pub. L." to "P.L." in response to PC# 2. In response to PC# 3, the Board adds a space before "as" in the definition of "Act." Also in response to PC# 2, the Board revises the order in which the definitions of"Conventional mine" and "Well monitoring" appear, so that all the definitions appear in alphabetical order in the adopted amendments. PC# 2 further highlights an error in the definition of "Environmental Protection Act. This is corrected by updating the definition to the 1987 version of the Illinois Revised Statutes and the 1988 Supplement, because there is no 1988 version, and by referencing all the Act by referring to Sections 1001 through 1052, rather than only referring to Section 1001.

PC# 3 questions why the Board did not earlier update the definition of "Effective date of the UIC program" or, alternatively, use a full-blown APA Section 5 rulemaking proceeding to do so at this late date. The Board responded directly to JCAR that this update did not occur earlier due to oversight and that Section 7.2 of the Act, rather than Section 5 of the APA, is the appropriate route to make this minor corrective update to render the Board's rules identical in substance to the federal rules. PC#4 states that the February 1, 1984 date is correct, and that the March 3, 1984 date which appears at 40 CFR 147.700 is wrong, but USEPA asserts, without reasons, that the Board should not revise the definition to use the actual date of federal approval. The Board will use the actual date for the convenience of the regulated community.

SUBPART B: CRITERIA AND STANDARDS APPLICABLE TO CLASS I WELLS

Section 730.111

This Section is drawn from 40 CFR 146.11, amended by 53 Fed. Reg. 28148, July 26, 1988. The amendment states that Subpart B now applies only to Class I non-hazardous wells. The Subpart previously applied to all Class I wells. The Board also amends the Subpart heading to include the word non-hazardous.

Section 730.113

Derived from 40 CFR 146.13, this Section is amended by 53 Fed. Reg. 28248, July 26, 1988. This amendment adds a subsection (d) providing for additional monitoring requirements. Specifically, the Agency will require annual pressure decay monitoring of the injection zone. Also, the rules make ambient monitoring requirements site-specific, thus giving the Agency discretion to determine an acceptable ambient monitoring program. These amendments are applicable to all owners and operators of Class I wells, whether hazardous waste injection wells or not. The Board uses the phrase "permit condition" in lieu of "Agency." The Board believes that this more accurately reflects how the Agency grants such approval. The Board similarly amends existing references to Agency approval at 35 Ill. Adm. Code 730.113(a)(3) and (c)(2).

SUBPART G: CRITERIA AND STANDARDS APPLICABLE TO CLASS I HAZARDOUS WELLS

This Subpart has been adopted in the USEPA format, thus conversion is relatively simple.

Section 730.161

This Section begins the new Subpart G. It is drawn from 53 Fed. Reg. 28148, July 26, 1988. It states the Subpart applies to Class I hazardous waste wells, supplementing the requirements of Subpart A, and applies instead of Subpart B unless otherwise noted. It also states definitions applicable to the Subpart.
The Board substitutes for the 40 CFR 146.61(b) language "was authorized" in the definition of "existing well" with the more specific language "had a UIC permit or UIC permit by rule." Which are the only two modes of authorization.

Section 730.162

Derived from 40 CFR 146.62, added at 53 Fed. Reg. 28148, July 26, 1988, this Section requires the Agency to site Class I hazardous waste injection wells only in geologically suitable areas and the basis upon which the Agency shall make its decision. Also, 40 CFR 146.62(d)(4) provides for USEPA to grant approvals for sites not shown to meet the general criteria. The Board believes that the Board may more appropriately approve a site which does not meet the stated requirements if the owner makes the required demonstration pursuant to adjusted standard procedures in 35 Ill. Adm. Code 106.

This procedure exists at the federal level, but the procedural context in unacceptable under Section 7.2(a)(5) of the Illinois Environmental Protection Act. The action would derogate Board rules, rather than implement them. This action involves "determining, defining or implementing environmental control standards" under Section 5(b) of the Act, and there is language in the federal rule which would form the basis a "justification" for an adjusted standard.

Petitioners for an adjusted standard must meet in their petitions for well siting the narrative standard of no endangerment of USDWs. According to USEPA, the most appropriate substantive guidance for making this demonstration is given in the Preamble to Part 730 in the July 26, 1988, Federal Register.

PC# 3 correctly points out that subsection (d)(4) adds language at (A) and (B) not found in the corresponding text of 40 CFR 146.62(d)(4), as added at 54 Fed. Reg. 28148, July 26, 1988. The Board feels that this added language is necessary under the Illinois scheme, whereas it is not necessary on the federal level. USEPA already possesses information of the type indicated in these added provisions. Under Illinois law, only the petitioner and the Agency posses this information. The Board can only review this essential information if it is submitted by the parties to the adjusted standard proceeding. These two provisions place the burden of submitting this information on the petitioner to the extent necessary for Board review.

Section 730.163

Derived from 40 CFR 146.63, added at 53 Fed. Reg. 28148, July 26, 1988, this Section states that for Class I hazardous waste wells, the minimum area of review (AOR) is a two (2) mile radius around the well bore, with certain exceptions. For Class I hazardous wells, this local definition of AOR applies instead of the AOR definition stated in Section 730.106. The AOR pertains to the area within which the owner or operator must identify all wells penetrating the confining zone and the injection zone and determine whether they have been properly completed or plugged and abandoned.

In some circumstances, the Agency has the discretion to require a larger area of review. As stated at 53 Fed. Reg. 28135, no guidance for determining the larger area of review is given because no single calculation, or set of calculations, describes the universe of acceptable methods for determining area of review. Also, USEPA believes that prescribing by regulation the appropriate method could preclude permittees from using more sophisticated methods which might become available at some future point.

The Board amends the 40 CFR 146.63 language to reflect that authorization of a larger area of review occurs "by permit condition." See discussion of Section 730.113. The Board also adds "injection" to make the language appear uniformly throughout as "Class I hazardous waste injection wells" and convey the singular meaning and applicability of these provisions.

Section 730.164

Derived from 40 CFR 146.64, added at 53 Fed. Reg. 28149, July 26, 1988, this Section states that it applies instead of 35 Ill. Adm. Code 704.193 and Section 730.107 for Class I hazardous waste injection wells. This Section is intended to work in connection with 730.170, which outlines the information required to demonstrate compliance during the permit process.

This section sets forth requirements for corrective action, by requiring owners and operators to submit a plan outlining the protocol used for various listed activities as part of the application to the Agency. The Agency must

review the plan, determine whether it is adequate and approve it, modify it, or deny the application. It also states possible consequences if the Agency finds the permittee's plan inadequate. This section also provides that for a Class I hazardous well requiring corrective action other than pressure limitations, permits issued must include a compliance schedule requiring any corrective action accepted or prescribed under another Section.

The section states the criteria and factors the Agency must consider in determining the adequacy of corrective action proposed by the applicant to prevent fluid movement into and between USDW's.

The Board substitutes the federal "shall apply to the exclusion of" for the simpler and more direct "applies instead of" in the preamble. The Board adds "injection" to the preamble. See discussion of Section 730.163. The Board adds a citation to 35 Ill. Adm. Code 702.162, the provision for compliance schedules, to subsections (d)(1) and (d)(3). The Board has also put the language of the preamble of subsection (e) in the active voice, in order to avoid the convoluted federal language.

The Board adds a closing period to subsection (c)(3) in response to PC# 3.

Section 730.165

Derived from 40 CFR 146.65, added at 53 Fed. Reg. 28149, July 26, 1988, this Section states construction and completion requirements for all existing and new Class I hazardous waste wells. It attempts to achieve an appropriate balance between specific design standards and more general performance standards. Specifically, the changes in construction requirements include additional criteria in overall performance standards, more explicit compatibility requirements, and certain requirements for owners and operators injecting through a well equipped with fluid seals.

Also, in subsection (c)(1), the amendments more specifically articulate the performance standards outlined in subsection (a).

Guidance to manufacturers as to what are acceptable compatible construction materials is provided in the federal language by reference to American Petroleum Institute standards and from an annual book of standards from the American Society of Testing Materials. The Board is unaware of any such existing standards relating to underground injection. Rather, the Board adds a reference to an existing USEPA Technical Assistance Document. The Board specifically invited comment on this, as well as to whether any API or ASTM standards applicable to underground injection wells presently exist.

The Board puts the language of subsection (c)(1) into the active voice for clarity. The Board also substitutes "annular" for the federal "annual" in subsection (c)(2). The Board uses the language "specified by permit condition" at subsection (d)(1). See discussion of Section 730.113.

PC# 4 criticizes the Board's substitution at subsection (b) of the only reference it could find relating to well materials compatibility for the non-

specific API and ASTM standards named at 40 CFR 146.65(b). The thrust of the criticism is that the USEPA technical guideline is dated, whereas the USEPA rule references to non-specific technical documents assures continued use of the latest science in an evolving area. First, the Board observes that the language of subsection (b) does not require the use of the named USEPA document. Rather, the rule requires a demonstration of compatibility by "any compatibility method specified by permit condition." This would allow the Agency to specify the method used--whether it is the USEPA guideline, an ASTM or API method, or some other test. The Board named the USEPA guideline in a non-restrictive way to provide guidance. Second, Section 6.02 of the APA requires the Board to use only readily defined, existing documents and not subsequent editions; the Board must maintain a copy of the document for public inspection; and the organization publishing the document must make copies readily available to the public. In contacting the ASTM, the API, and USEPA, the Board could not locate any specific document other than the one it references here. If USEPA or some other person could provide a definite reference to an existing and available ASTM or API compatibility testing method, the Board can consider amending subsection (b) to include that reference in a subsequent update. The Board will not revise new Section 730.165 at this time.

Section 730.166

This Section is derived from 40 CFR 146.66, added at 53 Fed. Reg. 28150, July 26, 1988. These requirements pertaining to logging, testing and sampling have been consolidated into this Section from existing Sections 730.112(d) and 730.114(b). The amendments also change these requirements in several ways.

1) The establishment of baseline data prior to injection, against which future logging and testing can be reassessed, is an important new use of data. The future utility of many logs is dependent on having base logs against which to compare the data. Thus, the operator's ability to demonstrate compliance at a future date may depend on the logs it ran when the well was first bored.

2) Another change is more clearly stating all the listed tests that the owner or operator must conduct, which was less clearly worded in Section 730.112(d).

3) By revising language to allow the Agency to approve an equivalent alternative, the use of improved tests may be considered.

4) The mechanical integrity requirements in 740.166(d) are revised, so now an initial demonstration of mechanical integrity for new wells must be made as indicated in current 730.166(a)(3).

5) There is now a burden on the Agency to require more coring and for the operator to conduct it.

6) The Agency may require coring of other formation types.

7) Owners and operators must also conduct pump or injectivity tests, in order to identify hydrogeologic properties of the injection zone through the empirical method.

The Board revised the text from 40 CFR 146.66. It puts the first sentence of the preamble to subsection (a) into the active voice for clarity. The Board also changes the verb, "are" to "is" in subsection (a)(1). The subject of this first sentence of (a)(1) appears to be "a pilot hole," rather than "deviation checks." The Board also repunctuates subsections (a)(2)(A)(ii) and (a)(2)(B)(ii) because subsections (a)(2)(A) and (a)(2)(B) are elements of a series within a larger series, subsection (a)(2), which in turn is an element in the series of subsection (a). The Board believes that this, combined with the overall subsection structure would add clarity. The Board stipulates "by permit condition" in subsections (a)(3)(D) and (a)(3)(E). See discussion of Section 130.113. The Board also adds "not less than" to the federal language corresponding to subsection (f). This would clarify that this is a minimum time requirement. The Board invited comment.

PC# 4 points out that the Board uses "The Agency shall allow" at subsection (a)(2)(C), whereas USEPA uses "The Director may allow" at 40 CFR 146.66(a)(2)(iii). In light of the discussion on usage on pages seven and eight of this Opinion, the Board makes one further observation: Illinois law requires the Agency to grant a permit where the permittee has demonstrated that the permit, if granted, would not cause a violation of the Act or Board rules. If the threshold criterion for USEPA allowing use of an alternative to the required logs is that the alternative or better information, the Agency must allow use of the alternative in the Illinois scheme. Therefore, use of "shall" is more appropriate in the Illinois scheme.

The significance of USEPA's comment reaches beyond this provision. It raises a fundamental question with regard to the entire Illinois UIC regulatory scheme. Despite PC# 4's criticism that use of "shall" throughout the rules in place of the federal "may" might render the Board's rules less stringent than the federal rules, the Board cannot agree. Once a threshold standard for administrative decisionmaking is enunciated in the body of a rule and the regulated entity has demonstrated the requisite proof stated by the rule, any further exercise of discretion by the administrative decisionmaker might result in an improperly grounded decision not following the Board rule. Such a potentially arbitrary outcome would not likely withstand appeal. This could ultimately result in a regulatory scheme that is significantly less stringent than would have existed had the administrative agency made a proper decision on clear bases in the first instance. If USEPA has regulatory or decisionmaking standards that do not appear in the Board's rules, the Board will promptly adopt them as USEPA promulgates them or consider them as soon as some person submits a regulatory proposal.

Section 730.167

This Section, derived from 40 CFR 146.67, added at 53 Fed. Reg. 28150, July 26, 1988, restates existing requirements more explicitly, changes some substantively and adds new requirements. This Section also adds a requirement for a waste analysis plan, establishes more precise standards for

hydrogeological compatibility determinations, specifies the requirements for the compatibility of well materials and monitoring, revises and strengthens mechanical integrity testing, and establishes more specific ambient monitoring requirements.

Subsection (c) insures that a leak in the tubing would result in annulus fluid moving into the tubing, not in waste moving into the annulus. The language "unless such a requirement might harm the integrity of the well" provides the Agency with discretion and flexibility to permit otherwise when a positive hydrostatic balance across the injection tubing could lead to loss of mechanical integrity.

Specifically, the written waste analysis plan requires a description of how the waste will be analyzed and sampled and how the analysis will assure that the samples will be representative. To assure hydrogeologic compatibility, the operator must submit a plan which identifies anticipated reaction products and demonstrates that neither the waste nor the reaction products would adversely affect the injection or confining zone (satisfy requirements under Section 738.162). This amendment clarifies and adds some specificity to existing regulations in Sections 738.112 and 738.114, but does not substantially alter them.

Current mechanical integrity tests (MITs) require the operator to check for fluid movement behind the casing and for leaks in the tubing, casing, or packer. The amendments require more frequent annulus pressure tests and require the operator to conduct an annulus radioactive tracer survey for wells injecting hazardous wastes. Also, the use of a tool to evaluate the casing is required before operating the well.

The Board adds "injection" to subsection (e). See discussion of Section 730.163. The Board adds "by permit condition" to subsections (g)(1), (i)(1)(C), and (i)(1)(D). See discussion of Section 730.113. The Board also substitutes "without undue delay" for the corresponding federal "as expeditiously as possible" in the preamble to subsection (g). The Board adds specific reference at subsection (h)(5) to Section 730.108, for the mechanical integrity demonstration requirements. Finally, the Board refers to how Agency approval is gained by adding "permit modification" to subsection (j). See discussion of "permit condition" at Section 730.113. The Board invited comment on these revisions.

PC# 4 notes that 40 CFR 146.67(g)(1) requires well shutdown "unless authorized by the Director" and suggests that the Board use "unless authorized by the Agency," instead of "unless authorized by permit condition." The Board points out that the Agency is free to authorize continued operation, but it must do so by granting a supplemental permit. PC# 4 apparently focuses on the impracticality of requiring such a permit condition as part of the initial operating permit because it asserts the need for case-by-case determinations whether a well should continue to operate after an automatic alarm or shutdown. The Board believes that requiring a supplemental permit condition for continued operation merely stipulates the manner in which the Agency allows continued operation on a case-by-case basis, and that the Board's rule is identical in substance to the federal rule.

PC# 4 similarly notes asserts that use of "permit modification" at subsection (j), rather than "Agency approval," creates an undue administrative burden in the case of simple and routine well workovers. USEPA notes the need for case-by-case determinations on permit modifications. The Board replies that well workovers also need a case-by-case determination, as is recognized by the 40 CFR 146.67(j) requirement for prior approval. In the case of extensive well workovers, a permit modification may be essential. Where permit modification is not so essential (e.g., as for simple, routine workovers), the Agency could construe the modification as a "minor modification under 35 Ill. Adm. Code 704.264(e) for the purposes of 35 Ill. Adm. Code 704.261 and bypass the otherwise applicable procedural requirements necessary for permit modification. If anything, use of "permit modification" clarifies that the Agency can require permit modification where the well workover goes beyond simple and routine. The Board will adopt this provision as proposed.

PC# 2, PC# 3, and PC# 4 all highlight a typographic error in subsection (i)(1). This error appears in the text of 40 CFR 146.67(i)(1), as adopted at 54 Fed. Reg. 28151, July 26, 1988, and the Board replicated it. USEPA, in PC# 4 states that "immediately case" should appear as "immediately cause." This would run entirely counter to the apparent intent of this provision. Rather than requiring an operator to "immediately cause" the injection of wastes upon detection of a release into an unauthorized zone (which further exacerbates any possible environmental harm), the Board believes that the operator should "immediately cease" waste injection, as is suggested by PC# 3. This is consistent with the language of subsections (g) and (h), which use "stop" and "cease," respectively, under related circumstances.

Section 730.168

This Section is derived from 40 CFR 146.68, added at 53 Fed. Reg. 28151, July 26, 1988. Ambient monitoring requirements are specified in 35 Ill. Adm. Code 730.113, and apply to all owners and operators of all Class I wells, not just hazardous waste injection wells. Subsection (e) restates these requirements which are applicable to only Class I hazardous waste injection wells, for easy reference.

For seismic monitoring, it is believed that the potential for Class I hazardous waste injection inducing tectonic activity is minimized by a number of amendments, e.g. Section 730.162(b) and 730.162(c)(2)(i). However, since circumstances exist under which local seismic monitoring may be necessary, Subsection (f) provides the Agency with authority to require seismic monitoring on a case-by-case basis.

The Board uses "permit condition" in subsections (a)(3), (c)(2)(C), (d)(5), (e)(2)(A) and (e)(2)(B). See discussion of Section 730.113. Similarly, the Board uses "permit" in subsection (d)(4) to show how the Agency "specifies otherwise." The Board also deletes of the "to the satisfaction of..." phrase from subsection (b). The Agency must grant or deny permits within the bounds o Illinois law, and the required informational demonstration

will either satisfy or fail to satisfy the Agency in its review. The Board invited comment.

Section 730.169

This Section was derived from 40 CFR 146.69, added at 53 Fed. Reg. 28152, July 26, 1988. It states the minimum reporting requirements for owners and operators of Class I hazardous waste injection wells. It requires the owners or operators to report changes in the ratio between the injection pressure and the flow rate to evaluate the long term performance of the injection formation. It also adds a new requirement under subsection (a)(3), the new alarm shutdown and resulting response requirements, but its applicability is limited to notification only if a loss of mechanical integrity is expected. Other routine occurrences would be reported with quarterly reports. Also, subsection (a)(5) requires reporting of both annular fluid lost and fluid gained in order to indicate leaks in the well tubing and indicate where injection pressure exceeds annular pressure.

The Board revises the federal language in two regards. The Board believes repunctuation of subsection (a)(7) more clearly indicates that subsections (a) and (b) are dual requirements. The Board uses "permit condition" in subsection (b)(2). See discussion of Section 730.113.

Section 730.170

This Section was derived from 40 CFR 146.70, added at 53 Fed. Reg. 28152, July 26, 1988. It sets forth the information which must be evaluated by the Agency in authorizing Class I hazardous waste injection wells. It essentially restates the information of existing Section 730.114.

The Board revises the preambles to subsection (a) and (b) to more direct phrasing. The Board also offsets the proviso at the end of the subsection (a) preamble with a comma, concluding subsection (a)(8) with a colon (rather than a semicolon) and offsetting the "where necessary" phrase of subsection (b)(7) with commas and removing the comma before "and." The Board retains the 40 CFR 146.70(d) language, "economically practicable" and "practicable," at subsections (d)(1) and (d)(2) because these appear vital thresholds to a key federal requirement. The Board invited comment.

The Board will capitalize "Section" where it appears in the preamble, in response to PC# 2 and PC# 3.

Section 730.171

This Section was derived from 40 CFR 146.71, added at 53 Fed. Reg. 28153, July 26, 1988. It reorganizes and consolidates existing requirements for closure. Three new requirements for closure include:

1) Requiring the owner or operator to observe and record pressure decay for a time specified by permit condition,

2) Requiring the demonstration of mechanical integrity prior to plugging, and

3) Clarifying that both the owner or operator, as well as a third party, if different, must certify that the facility was closed according to a complaint closure plan.

The Board makes several revisions to the federal text. It uses "permit condition" in the subsection (a) preamble. THe Board also observes that 40 CFR 146.71(a)(4) reiterates a requirement with identical language at paragraphs (a)(4)(v) and (a)(4)(x). The Board retains only the first occurrence at subsection (a)(4)(E) and dropping what would have otherwise appeared as (a)(4)(J). The Board also substitutes "stop" at subsection (a)(6) and rephrasing this subsection more directly and without gender-based language. The Board adds "otherwise" to subsection (a)(G)(B), and specifying "permit condition" in this subsection and in subsections (d)(1), (d)(2)(D), (d)(5)(D), and (d)(7). See discussion of Section 730.113. To clarify that the informational submissions required under subsections (a)(6) are made as part of the permitting process, the Board addresses an additional subsection (A)(6)(C). The Board uses language for subsection (a)(7) that would clarify that 30 days is a minimum time for the required notice. The Board also drops language from subsection (b) that would explicitly allow a shorter time for notice of closure. The Board believes that the Agency has inherent authority to accept shorter notice, and it would serve no purpose for the Board to constrain the Agency or encourage shorter notice. The Board retains the language and capitalization for the methods names in subsections (d)(5)(A) through (d)(5)(C). Are these industry-wide standard procedures? Are they published in some form? The Board invited comment.

PC# 4 would have the Board add "of this Section" to the end of subsection (a)(2) for clarity. Under the Illinois codification rules, such use is not allowed. Further, under those rules, where "subsection (x)" is used, only subsection (x) of the present section is allowed. PC# 4 points out that the Board omitted 40 CFR 146.71(a)(4)(x) from subsection (a)(4). As noted above, 40 CFR 146.71(a)(4)(x) is a reiteration of the language of 40 CFR(a)(4)(v), which the Board proposed and adopts as subsection (a)(4)(E). Reiteration is not necessary to render the Board's rules identical in substance to the federal rules. PC# 4 also highlights the fact that the proposed text of subsection (b) simply requires notice to the Agency 60 days prior to well closure, rather than adding the proviso from 40 CFR 146.71(b) to the effect that the Agency can approve a shorter notice. The Board agrees with USEPA that a more rapid closure is sometimes desireable, and possibly necessary to avoid unsafe operation of a well. However, the Board points out that the rule, as proposed, in no way circumscribes the Agency's discretion to permit closure on shorter terms, if that is what the permittee has requested. The Board felt that restating the obvious (i.e. that the Agency has such discretion) could potentially encourage later filings. As it stands, subsection (b) simply requires prompt notice of closure to the Agency. The Board will adopt it as proposed.

Section 730.172

This Section was derived from 40 CFR 146.72, added at 53 Fed. Reg. 28154, July 26, 1988. This and the following Section mandate post-closure care requirements and associated financial responsibility requirements for hazardous waste injection wells. Although a properly chosen site should contain the waste indefinitely under natural conditions, other man-made conditions may affect containment. Owners or operators must submit a plan outlining the closure and post-closure care requirements. This would become a condition of the permit. These requirements survive permit termination. The requirement to maintain an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit. Any modifications of the permit are which might be required could be made using procedures at 35 Ill. Adm. Code 705.128.

Although Section 730.172(c) requires the owner of a Class I hazardous waste injection well to provide certain information on the deed to the facility property or another instrument which is normally examined during title search, the adopted rule clarifies that this does not exempt the owner from complying with the Illinois Responsible Property Transfer Act of 1988 (RPTA), Ill. Rev. Stat. 1987 ch. 30, par. 901 (P.A. 85-1228, effective 1-1-89). This Section also requires that the owner or operator notify the Ill. Dept. of Mines and Minerals as to the depth and location of the confining zone.

The language of 40 CFR 146.72(b)(5) makes it appear that USEPA intends ultimate disposition of waste records at some central repository. At subsection (b)(5), the Board requires delivery to the Agency at the conclusion of the retention period.

In response to PC# 2, the Board revises the citation to the Responsible Property Transfer Act in subsection (d). PC# 4 points out that the Board deleted a reference to "any local authority" from subsection (b)(4) that appears in the notification requirement of 40 CFR 146.72(b)(4). PC# 4 states that the intent of this provision is to prevent subsequent penetration of the well's confining layer. The Board shares this concern, but neither the record nor the Agency has informed the Board of the existence of any other state or local agency that would regulate activities which could penetrate the confining layer. The Illinois Department of Mines and Minerals is one choice obvious to the Board because it regulates mining activities. Therefore, the Board included the Department.

Further research reveals that the State Department of Public Health has the authority and responsibility under the Water Well Construction Code, Ill. Rev. Stat. 1987 and 1988 Supp. ch. 111½, par. 116.111 et seq., to permit and regulate installation of private and semi-private wells. The Department also regulates and permits private sewage disposal systems under the Private Sewage Disposal Licensing Act, Ill. Rev. Stat. 1987 and 1988 Supp. ch. 111½, par. 116.111 et seq., Under separate legislation, the Department also regulates various other activities, including aspects of public water supplies. This research also reveals that the Department can authorize units of local government to administer aspects of the Water Well Construction Code and the

Private Sewage Disposal Licensing Act, see Ill. Rev. Stat. 1987 and 1988 Supp. ch. 111½, par. 116.115b, 116.309 & 116.310, although the Board cannot specifically identify those units of local government.

The Board adds the State Department of Public Health to those that an owner or operator must notify under subsection (b)(4). As to other local authorities, the only activity besides mining that the Board can conceive as potentially penetrating a well's confining zone is well drilling. Because any such drilling must have a permit from the Department of Mines and Minerals, the State Department of Public Health, or a unit of local government (duly authorized by the State Department under the Water Well Construction Code), the Board will add "the State Department of Public Health and any unit of local government authorized to grant permits under the Water Well Construction Code (Ill. Rev. Stat. ch. 111½, par. 116.111 et seq.) in the area where the well is located."

The Board does not discuss the drilling of injection wells permitted by the Agency because the Agency already has record of the closing well. Also, the Board observes that subsection (d) already requires notice under RPTA to subsequent owners and occupants of the property.

The Board cannot adopt a rule as nebulous as that promulgated by USEPA as 40 CFR 146.72(b)(4). The Board must clearly delineate a standard by which the owner and operator can determine whom to notify of the closure. Alternative standards are possible, but without the benefit of public input, the Board cannot determine their viability. The Board believes that the rule as adopted is identical in substance with the federal requirement. If further public comment reveals a more viable alternative exists, the Board can correct subsection (b)(4) in a subsequent update.

Section 730.173

This Section was derived from 40 CFR 146.73, added at 53 Fed. Reg. 28154, July 26, 1988. The owner or operator must demonstrate and maintain financial responsibility for post-closure care. The rule is structured to mirror the requirements of 35 Ill. Adm. Code 725.Subparts G and H. The minimum funds necessary are listed, and the obligation to maintain financial responsibility for post-closure care survives the termination of a permit or the cessation of injection. The requirement to maintain financial responsibility is enforceable regardless of whether the requirement is a condition of the permit.

PART 738

A new Part, 738, derived entirely from 40 CFR 148, was added to identify hazardous wastes that are restricted from disposal into Class I hazardous waste injection wells. The Part also defines the circumstances under which wastes otherwise prohibited from injection may be injected. The use of models now forms the basis for "no migration" petitions, versus the previous "4x/10x", because the "4x/10x" concept may not always afford the level of protection that is sought.

All the Sections are numbered from the source USEPA rule according to a simple correspondence:

Source USEPA Section number	148.1
Insert zeros to right of decimal point so there are three digits after the decimal	148.001
Add the constant 590.100	590.100
Resulting Board Section number in 35 Ill. Adm. Code	738.101

USEPA has declined to comment on the substance of Part 738 until after the Agency has fulfilled its mandate under Section 4 of the Act and sought primacy for the "Land Ban" rules embodied in 35 Ill. Adm Code 728 and 738 under the federal Hazardous and Solid Waste Amendments of 1986 (HSWA). PC# 4 points out that the Agency "is not currently seeking primacy for the land ban program." However, PC# 4 further asserts that Section 1422 of the Safe Drinking Water Act (42 USC § 300h-1) preempts state law regulating underground injection until USEPA approves the state program. Therefore, PC# 4 expresses a desire that "a disclaimer be appended to the adoption of Part 738." Presumably, this disclaimer would delay the effective date of Part 738 until USEPA grants primacy.

As is apparent by today's amendment to the definition of "Effective date of the UIC program" at 35 Ill. Adm. Code 730.103, one alternative is for the Board to adopt a proviso at Section 738.101, as follows (added language highlighted):

> b) The requirements of this Part apply to owners or operators of Class I hazardous waste injection wells used to inject hazardous waste after the date on which USEPA delegates primacy for the land ban program to the State of Illinois pursuant to Section 1422 of the SDWA and 40 CFR 123.

Another alternative is for the Board to adopt a definition of "Effective date of the land ban program" at Section 738.102, that would read essentially as did the former definition of "Effective date of the UIC program" at 35 Ill. Adm. Code 730.103.

None of these alternatives is entirely desireable, and the alternatives relating to partial delay effective dates are not much better. One problem with a delayed effective date for Part 738 as a whole is that the federal rules would be more stringent than the Board's rules. A waste prohibited from injection at the federal level would not be prohibited under Illinois law. Further, this would mean the Board had not as fully complied with the mandate of Section 13(c) of the Act as it could have.

In adopting the initial phases of the RCRA and UIC programs, the Board employed delayed effective dates where the state had absolutely no authority to administer the programs until USEPA conferred primacy. This is not the case with regard to the HSWA-related amendments. Rather than adopt rules that

will have no effect until granted federal approval, the Board prefers to adopt rules that are effective as state law upon filing with the Secretary of State. To the extent these rules are preempted by federal law because they conflict with that law, they will probably have no effect as state law. However, to the extent they are not preempted by federal law, they are effective as state law--notwithstanding their lack of federal approval. When approved by USEPA, these rules will become effective as both federal and state law in Illinois.

For the foregoing reasons, the Board will not revise Part 738 to include a disclaimer or a delayed effective date as suggested by USEPA. Their adoption as immediately effective rules will not demonstrably interfere with the administration of any federal program, and it will aid in maintaining prompt consistency between the Illinois and federal UIC programs.

ADJUSTED STANDARDS FROM GENERAL PROHIBITIONS

The Federal 40 CFR 148 Rules contemplate that the Administrator of USEPA can grant exemptions to the general prohibitions upon petition and adequate showing of the owner or operator. The Administrator can also modify or terminate the exception under certain circumstances. As drafted by USEPA, this does not directly comport with Illinois law and administrative structure, so the Board adapts of the substance of the federal scheme to the Illinois system. The Board uses its existing adjusted standard procedure of 35 Ill. Adm. Code 106 as the framework for the state to grant the equivalent of a federal "exemption."

The structure of the federal rule presents two problems that the Board seeks to overcome. First, USEPA can require rejustification of the exemption during the course of permit review or on the basis of new information, whereas the Agency cannot review a Board-granted adjusted standard. Further, it is not clear that the Agency can petition for modification of an adjusted standard under the existing Board rules relating to reconsideration of Board orders and adjusted standards. The second, similar problem is that it is not clear that the Agency can petition the Board to terminate an adjusted standard using the existing procedures, absent an enforcement action, as is contemplated by 40 CFR 148.24.

The Board's adopted rule endeavors to solve both problems by opening existing procedures for use under this Part. Under the alternative adopted there is a reverse procedure that the Agency could use to petition for Board reconsideration of an adjusted standard--as sort of a "reverse adjusted standard" procedure. The alternative waives the existing limitation periods for reconsideration of Board orders, in order to allow a more summary procedure. This procedure requires the Agency to initially request that the owner or operator petition the Board for modification of the adjusted standard. If the owner or operator fails to do so, the Agency can file for reconsideration. The Board may conduct a plenary review of the adjusted standard and/or require that the full procedural requirements for a new petition and of 35 Ill. Adm. Code 106. Subpart G apply to the proceeding, with the Agency as petitioner. This method would contemplate a simultaneous waiver of the permit decision due date by the permittee if that permittee wishes to avoid issuance of "default" permits under subsection 738.123(a)(4).

Further, the adopted rule attempts to clarify that the existence of an adjusted standard does not insulate an owner or operator from enforcement of the Act, Board rules, and other laws. Initially, it requires this as a condition to all adjusted standards granted under this Part. Second, it expressly states that "any person" may file an enforcement action before the Board under Section 33 of the Act. The rule specifically states that the Board may terminate an adjusted standard (as part of any sanction) for the same reasons that USEPA states its Administrator may terminate any exemption.

Some aspects of these revisions are highlighted below in the section-by-section discussion. The Board invited comment on its adaptation of the federal procedures.

PC# 2 observes that the headings of Sections 738.111, 738.112, 738.113, 738.120, and 738.123 in the table of contents do not match those in the text of the rules. The Board notes that Section 738.113 does not exist, but there is such a discrepancy in the heading of Section 738.114. The board corrects the headings to Sections 738.111, 738.114, and 738.123 in the table of contents. The Board corrects the headings of Sections 738.112 and 738.120 in the text of the rules.

SUBPART A: GENERAL

Section 738.101

This Section was drawn from 40 CFR 148.1, added at 53 Fed. Reg. 28155, July 26, 1988. It generally describes the Part's purpose, scope and applicability. Subsection (c)(3), however, includes a substantive provision that allows continued injection of prohibited wastes under certain circumstances.

The Board, in subsections (c)(2), uses the adjusted standard as the means to gaining an exemption. The Board also omits the 40 CFR 148.1(c)(1) language "with respect to such wastes" and the 148.1(c)(2) language "to allow injection of restricted wastes..." as surplusage. Subsection 738.122(c) explicitly states the limitations of adjusted standards granted for underground injection. The Board omits 40 CFR 148.1(c)(4) in its entirety because the applicable date is past.

In response to PC# 2 and PC# 3, the Board capitalizes "Part" in subsection (b).

Section 738.104

This Section was drawn from 40 CFR 148.4, added at 53 Fed. Reg. 28155, July 26, 1988. It provides for the possibility for owners or operators of Class I hazardous waste injection wells to apply for an extension of the effective date of any applicable prohibitions under Subpart B by application to USEPA. Granting such extensions is a federal prerogative under Section 3004(h)(3) of RCRA, so the Board did not adopt a parallel provision retaining such authority. Rather, 35 Ill. Adm. Code 728.105(b), parenthetically

referenced in this provision, provides that USEPA-granted extensions are deemed extensions for the purposes of the parallel Board rule. The Board invited comment.

PC# 2 requests that the Board define "USEPA," stating that the Illinois Code codification rules will not allow use of an acronym without definition. The Board notes that "EPA" is defined at 35 Ill. Adm. Code 730.103, and this definition applies "to the underground injection control program." The Board uses "EPA" in the adopted rule.

Section 738.105

This Section was drawn from 40 CFR 148.5, added at 53 Fed. Reg. 28155, July 26, 1988. It requires generators of hazardous wastes that are disposed of into Class I injection wells to comply with applicable requirements of Part 728.107(a) and (b). Also, owners and operators of Class I hazardous waste injection wells must comply with certain requirements of Section 728.107(c).

As discussed below under Section 738.110, the Board adds a definition of "EPA Hazardous Waste number" to this section.

SUBPART B: PROHIBITIONS ON INJECTION

Section 738.110

This Section was drawn from 40 CFR 148.10, added at 53 Fed. Reg. 28155, July 26, 1988. This Section bans certain spent solvent wastes specified in 35 Ill. Adm. Code 721.131 from underground injection, unless the solvent waste is a solvent-water mixture or solvent containing sludge containing less than one percent total F001 through F005 solvent constituents listed in an included table. A total ban on injecting these wastes takes effect on August 8, 1990 under subsection (b). Subsection (c) states when exemptions from these bans are possible.

The Board has incorporated the table into the body of the adopted section because Illinois' codification scheme does not allow an appendix to an individual section. The Board also named "1,1,2-Trichloro-1,2,2-trifluoroethane" what appears at Table A to 40 CFR 148.10 as "1,2,2-Trichloro-1,2,2-trifluoroethane." The federally-named compound does not exist, and the Board-adopted name follows standard IUPAC nomenclature for what appears as USEPA's intent.

Subsections (c)(2) and (c)(4) in the adopted language refer to adjusted standards. The Board notes that two types of adjusted standards are contemplated under subsection (c): a 35 Ill. Adm. Code 738.Subpart C Adjusted Standard, discussed above, or a 35 Adm. Code 728.144 adjusted treatment standard.

PC# 2 requests that the Board define "EPA" used in subsection (a). As discussed above, the term is defined at 35 Ill. Adm. Code 730.103 for the purposes of the UIC program. Actually, the term that needs definition at this location, if any, is "EPA Hazardous Waste number." Such a definition exists

at 35 Ill. Adm. Code 720.110, but is limited in its applicability to 35 Ill. Adm. Code 721 through 725 and 728, the RCRA program. The Board will incorporate the substance of that definition in Section 738.102 for the purposes of this Part. "Hazardous waste" is defined at Section 730.103 for the purposes of the UIC program.

The Board initiates a final correction to this section at subsection (b). Proposed subsection (b) erroneously cited "subsection (c)(4) as the listing of F001 through F005 solvent waste constituents. As discussed above, the Board incorporated those constituents into the text of subsection (a).

Section 738.111

This Section was drawn from 40 CFR 148.11, added at 53 Fed. Reg. 28155, July 26, 1988. This Section bans injection of certain dioxin-containing wastes, then states the circumstances under which the ban does not apply.

The adopted language of subsection (a) omits a past effective date from 40 CFR 148.11(a). Subsection (b)(2) refers to a 35 Ill. Adm. Code 738.Subpart C adjusted standard, whereas subsection (b)(4) refers to a 35 Ill. Adm. Code 728.144 adjusted treatment standard.

Section 738.112

This Section was derived from 40 CFR 148.12, added by 53 Fed. Reg. 30918, August 16, 1988. It bans hazardous wastes listed at 35 Ill. Adm. Code 728.132 from underground injection that contain PCBs at concentrations greater than or equal to 55 ppm, or halogenated organic compounds at concentrations greater than or equal to 10,000 mg/kg.

Subsection (b) was further amended by 53 Fed. Reg. 41602, October 24. The amendment corrects an error in the final August 16 rule establishing effective dates prohibiting the injection of "California wastes," and certain "First third" wastes. Specifically, the October amendment clarifies that a two-year capacity variance (to August 8, 1990) has been granted to all injected wastes covered under Section 3004(d) of RCRA, except liquid hazardous wastes containing PCBs equal to or exceeding 50 ppm and hazardous wastes containing HOCs at concentrations equal to or greater than 10,000 mg/kg. These latter wastes were prohibited from disposal in injection wells on August 8, 1988, while the remaining California list wastes will be prohibited on August 8, 1990.

Subsection (c) of Section 738.112 was added at 53 Fed. Reg. 30918, August 16. It states when the bans in the other subsections are not applicable.

The adopted text of subsection (a) omits a past effective date. Subsection (c)(2) refers to a 35 Ill. Adm. Code 738.Subpart C adjusted standard.

Section 738.114

This Section was derived from 40 CFR 148.14, added by 53 Fed. Reg. 30918, August 16, 1988. Effective August 8, 1990, it bans certain of the wastes listed in 35 Ill. Adm. Code 721.132 from underground injection and states when the bans are not applicable.

Subsection (b)(2) refers to 35 Ill. Adm. Code 738.Subpart C adjusted standard.

SUBPART C: PETITION STANDARDS AND PROCEDURES

This entire Subpart is derived from 40 CFR 148.120 through 148.124, added at 53 Fed. Reg. 28155-28167, July 26, 1988. This Subpart defines the circumstances under which a waste otherwise prohibited from injection may be injected: when an applicant has demonstrated to the satisfaction of the Board that there will be no migration of hazardous constituents from the injection zone for as long as the wastes remain hazardous.

Also, Section 738.104 provides that the owner or operator may, on a case-by-case basis, petition USEPA for an extension to the effective date according to procedures outlined at 35 Ill. Adm. Code 728.105

Section 738.120

This Section states what a petitioner must prove to the Board, pursuant to adjusted standard procedures, to obtain an exemption from Subpart B. Basically, the applicant may make a demonstration of "no migration" based on either:

1) An absence of fluid movement out of the injection zone; or

2) An active process of waste reduction, transformation, or immobilization within the injection zone.

Whereas subsection (a)(1) states the object of the demonstration, subsection (a)(2) imposes informational requirements, as do subsections (b) through (d). Subsection (e) provides for reissuance of adjusted standards to add wastes or modify conditions upon petition and compliance with the subsections (a) through (c) requirements for original issuance. Under subsection (f), the Board may modify the adjusted standard if the owner or operator shows that the new wastes would behave "hydraulically and chemically similar" to the allowed wastes.

The Board rewords 40 CFR 148.20(d)(1) for directness and clarity in subsection (d)(1). The Board observes that subsection 738.120(a)(2)(B), includes the phrase "protocol acceptable to the Board." The Board invited comment as to whether any published resources presently exist for public guidance.

The Board deletes the underscoring from "exemption" in response to PC# 3. The Board corrects the Board Note to subsection (a)(2)(D), the word

"subsection" as subsections (b) and (c), and the word "Section" at subsection (f) in response to PC# 2.

Section 738.121

This section derives from 40 CFR 148.21, as added at 53 Fed. Reg. 28156, July 26, 1988. It outlines the information and quality of information that a petitioner must submit under Section 738.120 for an adjusted standard. Subsection (a) basically outlines the information quality, and subsections (b) and (c) largely outline the informational items required.

The Board-adopted text for subsection (a) deviates slightly from the text of 40 CFR 148.21(a) and is partly fashioned after 35 Ill. Adm. Code 728.106(c)(5). This is largely done for clarity, but with an intent of not increasing the petitioner's burden. It is also to overcome a flaw in the federal language if literally adopted by the Board. Paragraph 40 CFR 148.21(a)(2) requires use of EPA-certified test protocols. The Board is unaware of any such protocols, but, further, it cannot presently impose a requirement not yet in existence. For this reason, the Board chose, by subsection (a)(2)(B), to require the petitioner to identify any EPA-certified test protocols in existence when the petitioner performed its estimation and monitoring. Although compliance with those protocols is not required by this subsection, knowledge of their existence can help guide the Board in its deliberations. The Board invited comment as to the existence of any EPA-certified test protocols or technical guidelines.

The revision of subsection (a)(2) avoids using the federal "appropriate" at subsection (a)(2)(A), but the Board does not believe that it can similarly avoid using this word in subsection (a)(3). The Board invited comment. The Board corrects the federal "reliant" to "reliable" at subsection (c). This is the apparent intent of USEPA. The Board invited comment.

PC# 2 requests that the Board add a heading to subsection (a)(2) to add clarity and aid the reader. This the Board has done in the text of the adopted rule. The Board does not intend that this heading modify the meanings of subsections (a)(2)(A) and (a)(2)(B) in any way.

Section 738.122

This section derives from 40 CFR 148.22, as added at 53 Fed. Reg. 28156, July 26, 1988. Subsection (a) basically imposes additional informational requirements for Section 732.120 petitions for adjusted standards. Subsection (b) sets forth notice requirements. Subsection (c) states that adjusted standards apply only to the wastes and wells stated in the Section 738.120 petition. Finally, subsection (d) requires the Agency to expedite the issuance or reissuance of a permit after an adjusted standard issues. The maximum term of such a permit is ten years.

The adopted rule revised 40 CFR 148.22(a)(3) to more direct language in the active voice in subsection (a)(3). More important are the revisions embodied in subsection (b). 40 CFR 148.22(b) provides that USEPA will publish advanced Federal Register notice of its intent to approve or deny each

petition for exemption. The Board's existing adjusted standards rules provide for no similar advanced notice of intent. They provide that the petitioner must publish newspaper notice of having filed a petition for an adjusted standard, 35 Ill. Adm. Code 106.711, that the Board will file a newspaper notice of any hearing on such a petition, 35 Ill. Adm. Code 106.802, and that the Board will annually publish in the Illinois Register and the Environmental Register listings of all adjusted standards granted during the year. 35 Ill. Adm. Code 106.096.

The Board presumes that the federal notice requirement is to allow public comment on the proposed USEPA action. The Board believes that its existing adjusted standards public notice provisions more than adequately address this end. The existing adjusted standards procedures actually give greater opportunity for public participation in the adjusted standard deliberative process than does the corresponding federal rule because that participation would occur prior to any tentative decision on a petition.

The Board has considered and rejected more cumbersome public notice requirements that are not presently a part of existing adjusted standard procedures. One alternative is for the Board to publish notice of its decision on a petition, then hold the time for reconsideration open for a certain time after the date of publication. Another alternative is for the Board to issue public notice of tentative decisions, similar to those use in rulemaking proceedings. The Board does not believe that either alternative is necessary. Rather, the Board will employ its existing 35 Ill. Adm. Code 106. Subpart G procedures without elaboration or change. The text of adopted subsection (b) reflects this. The Board invited comment.

A final revision over the text of 40 CFR 148.22 is the addition of adopted subsection (e). This clarifies that as a condition to each adjusted standard, the owner or operator is not insulated from an enforcement action for violations of any provisions except those expressly recited in the adjusted standard itself.

Section 738.123

This section derives from 40 CFR 148.23, as added at 53 Fed. Reg. 28157, July 26, 1988. It provides for review of existing adjusted standards for a facility during the course of permit review. It provides that the Board may require a new Section 738.120 demonstration if it determines that the basis for original approval is no longer valid.

The Board has revised the federal rule in adapting its substance to the Illinois Regulatory scheme. The above general discussion of adjusted standards relates to these revisions. Initially, it is the Agency that reviews permits and the Board that approves petitions for adjusted standards. The Agency cannot revise an adjusted standard granted by the Board, and the Board does not conduct permit reviews, except on permit appeal, and does not have direct access to the Agency's permit files. Further complicating this is the fact that no direct "reverse adjusted standard" procedure presently exists by which the Agency may petition for Board review of adjusted standards. Rather, after the Board has issued an adjusted standard, and the time for

rehearing and appeal have passed, the Agency can only gain modification of an adjusted standard if a violation is found in the course of an enforcement action to obtain modification. This is problematic for a number of reasons that this opinion will not discuss.

The language of the adopted rule endeavors to correct this. The adopted rule requires the Agency to review any adjusted standards held by the permittee during the course of permit review. If the Agency determines that the basis for the adjusted standard may no longer be valid, it can request in writing that the permittee submit a petition to the Board for modification of the adjusted standard pursuant to Section 738.120(f). If the permittee fails to file such a petition, the Agency may petition the Board for reconsideration of the adjusted standard. This will invoke the Board's jurisdiction, and the Board may then conduct a limited or plenary review of the adjusted standard, using appropriate procedures, as the situation warrants. The Board has not inserted time deadlines in this provision, although the Board realizes that the Agency must render its permit decisions within a short time. The Board invited comment on this procedure, specifically with regard to its lack of time deadlines.

PC# 2 requests that the Board adopt a heading for subsection (a)(4). The Board has done so, but does not intend that the heading change the plain meaning of subsections (a)(4)(A) and (A)(4)(B) in any way.

Section 732.124

This section derives from 40 CFR 148.24, as added at 53 Fed. Reg. 28157, July 26, 1988. It is a companion to Section 738.123, in that it provides for reappraisal of granted adjusted standards. It is different, however, in that it provides for their termination. It provides for termination in the event of the owner or operator's noncompliance with its provisions, for the owner or operator's failure to fully disclose all relevant facts or misrepresentation of any relevant facts during the course of Board review of the petition, or if new information shows that the basis for approval is no longer valid or there was migration from the injection zone.

The Board revised to 40 CFR 148.24 in order to adapt this provision to the Illinois scheme. First, the adopted rule expressly states that any person may file an enforcement action against an owner or operator, notwithstanding the existence of an adjusted standard. This further clarifies that an adjusted standard does not insulate the owner or operator from other liability. The rule then reiterates that the Agency may petition for reconsideration of any adjusted standard. The adopted rule then proceeds to enunciate the same bases for termination that are set forth in 40 CFR 148.24. The Board invited comment on this scheme.

PC# 2 requests that the Board develop a heading for subsection (a)(1). The Board has done so with the intent that the heading not change the meaning of any portion of this section. PC# 2 also requests that the Board correct the title of the Act in subsection (a)(1)(A). The Board adopts this correction.

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 January, 1990, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board