ILLINOIS POLLUTION CONTROL BOARD
September 13, 1989

IN THE MATTER OF:	)	
	)	
RCRA UPDATE, USEPA REGULATIONS (8-1-88 THROUGH 12-31-88)	)	R89-1

FINAL ORDER. ADOPTED RULE

OPINION OF THE BOARD (by J. Anderson):

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

Section 22.4 of the Act governs adoption of regulations establishing the RCRA program in Illinois. Section 22.4(a) provides for quick adoption of regulations which are "identical in substance" to federal regulations; Section 22.4(a) provides that Title VII of the Act and Section 5 of the Administrative Procedure Act shall not apply. Because this rulemaking is not subject to Section 5 of the Administrative Procedure Act, it is not subject to first notice or to second notice review by the Joint Committee on Administrative Rules (JCAR). The federal RCRA regulations are found at 40 CFR 260 through 270, and 280. This rulemaking updates Illinois' RCRA rules to correspond with federal amendments during the period August 1 through December 31, 1988. The Federal Registers utilized are as follows:

52 Fed. Reg. 46963	December 10, 1987
53 Fed. Reg. 31211	August 17, 1988
53 Fed. Reg. 33950	September 1, 1988
53 Fed. Reg. 34086	September 2, 1988
53 Fed. Reg. 35420	September 13, 1988
53 Fed. Reg. 37045	September 23, 1988
53 Fed. Reg. 37934	September 28, 1988
53 Fed. Reg. 39728	October 11, 1988
53 Fed. Reg. 41649	October 24, 1988
53 Fed. Reg. 43881	October 31, 1988
53 Fed. Reg. 43883	October 31, 1988
53 Fed. Reg. 45090	November 8, 1988

In R87-39 the Board inadvertently omitted a portion of the December 10, 1987 Federal Register. After noting this error, the Board reserved Docket R88-29 for the correction. However, it was not possible to prepare a proposal significantly in advance of this update. The Board has therefore closed R88-

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The Board acknowledges the contributions of Morton Dorothy of the Scientific/Technical Section in drafting the Opinion and Order.

29, and will address the December 10, 1987 Register in this Docket.

In R88-16 the Board expanded the update period to seven months to include July, 1988, in order to allow for quicker adoption of certain important amendments. This update will be shortened to five months to get the updates back on their normal times.

On July 26 and September 26, 1988, USEPA adopted amendments to the UIC permit procedures which are reflected in 35 Ill. Adm. Code 705. (53 Fed. Reg. 28147 and 37410. These will be adressed in R89-2. This update will also include a UIC amendment to Section 702.161, which is derived from one of the Federal Registers otherwise addressed in R89-2.

On September 23 and October 26, 1988, USEPA adopted major revisions to the Underground Storage Tank (UST) program, which is mandated by the Resource Conservation and Recovery Act. The Board has utilized Docket R88-27 and R89-4 to address these amendments. Subsequent amendments to the USEPA UST rules will be addressed in that Docket or a separate UST update Docket. After the UST program is established, the Board will consider recombining the RCRA and UST updates.

On September 23, 1988, USEPA also published a "clarification" as to the status of mixed radioactive and hazardous waste. Although this involved no amendment to the USEPA rules, it has been included in the list since, as discussed below, it could result in a need to amend the Act or Board rules.

The USEPA amendments include several site-specific delistings. As provided in 35 Ill. Adm. Code 720.122(d), the Board will not propose to adopt site-specific delistings unless and until someone files a proposal showing why the delisting needs to be adopted as part of the Illinois program.

PUBLIC COMMENT

The Board adopted a Proposed Opinion and Order on May 25, 1989. The proposal appeared on June 30, 1989, at 13 Ill. Reg. 9661. The Board has received the following public comment:

PC 1 Secretary of State, Corporation Department, dated April 25, 1988, but docketed on April 10, 1989

PC 2 Administrative Code Unit, August 4, 1989

PC 3 Big River Zinc Corporation, August 7, 1989

PC 4 Impact Analysis, Small Business Office, Department of Commerce and Community Affairs (DCCA), August 8, 1989

PC 5 Illinois Environmental Protection Agency (Agency), August 14, 1989

PC 6 Chemical Waste Management, Inc., August 14, 1989

PC 7 United States Environmental Protection Agency (USEPA), August 24, 1989.

PC 8 Joint Committee on Administrative Rules (JCAR) Questions, received September 10, 1989

PC 1 was apparently a public comment which was directed to the Board in response to a request for comment in R87-39. However, the letter bore no Docket number, and was not properly routed until long after it was received. It concerns the requirement, discussed below in connection Section 724.241 et seq., that a corporation register with the Secretary of State before using the corporate guarantee mechanism for financial assurance.

On August 31, 1989, the Board entered an Order pursuant to Section 7.2 of the Act explaining why this rulemaking was not completed within the time limits of Section 22.4(a) of the Act. On September 10, 1989, the Board received from JCAR a series of eight sets of questions addressing various Parts in this rulemaking. It appears that additional questions may be forthcoming, in that not all Parts have been addressed. As noted in the August 31 Order, the Board prefers that JCAR interaction occur during the comment period, and prior to Board adoption of rules. In this matter JCAR has asked its questions some three weeks after the close of the public comment period, and two days before the Board was to move to final adoption. This may further delay this rulemaking. However, the Board has attempted to respond to the specific questions in this Opinion.

USEPA's comment indicated that certain issues identified in "enclosure 2" had been referred to headquarters. However, the enclosure was omitted from the comment. If Region V receives a response from headquarters during the final, post-adoption motion period allowed below, it may wish to file the response with the Board.

The Proposed Opinion included a large number of specific requests for comment on issues. The Board construes silence as an affirmative statement that proposed language was acceptable. In situations in which alternatives were discussed, the Board construes silence as an affirmative statement that either alternative was acceptable.

HISTORY OF RCRA, UST and UIC ADOPTION

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

702	RCRA and UIC Permit Programs
703	RCRA Permit Program
704	UIC Permit Program
705	Procedures for Permit Issuance
709	Wastestream Authorizations
720	General
721	Identification and Listing
722	Generator Standards
723	Transporter Standards
724	Final TSD Standards
725	Interim Status TSD Standards
726	Specific Wastes and Management Facilities

728 USEPA Land Disposal Restrictions
729 Landfills: Prohibited Wastes
730 UIC Operating Requirements
731 Underground Storage Tanks

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

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

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

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

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

The UIC regulations were adopted as follows:

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

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

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

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

R85-23 70 PCB 311, June 20, 1986; 10 Ill. Reg. 13274, August 8, 1986.

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

R87-29 January 21, 1988; 12 Ill. Reg. 6673, April 8, 1988; (1/1/87 through 6/30/87)

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

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

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

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

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

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

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

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

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

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

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

R86-19 73 PCB 467, October 23, 1986; 10 Ill. Reg. 20630, December 12, 1986. (2/1/86 -- 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. Correction at 77 PCB 235, April 16, 1987; 11 Ill. Reg. 8684, May 1, 1987. (4/1/86 -- 6/30/86)

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

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

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

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

R87-39 Adopted June 14, 1988; 12 Ill. Reg. 12999, August 12, 1988. (7/1/87 -- 12/31/87)

R88-16 November 17, 1988; 13 Ill. Reg. 447, effective December 28, 1988 (1/1/88 -- 7/31/88)

R89-1 This Docket (8/1/88 -- 12/31/88)

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

The Underground Storage Tank rules were adopted in R86-1 and R86-28, which were RCRA update Dockets discussed above. A major revision was adopted by the Board in R88-27 on April 27, 1989. The UST financial assurance rules Were adopted in R89-4, July 27, 1989.

The Board added to the federal listings of hazardous waste by listing

dioxins pursuant to Section 22.4(d) of the Act:

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

This was repealed by R85-22, which included adoption of USEPA's dioxin listings. Section 22.4(d) was repealed by S.B. 1834.

The Board has adopted USEPA delistings at the request of Amoco and Envirite:

R85-2 69 PCB 314, April 24, 1986; 10 Ill. Reg. 8112, effective May 2, 1986.

R87-30 June 30, 1988; 12 Ill. Reg. 12070, effective July 12, 1988.

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

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

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

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

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

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

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

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

DETAILED DISCUSSION

The Federal Registers involved in this rulemaking include the following:

December 10, 1987	Subpart X, Miscellaneous Units
August 17, 1988	First Third waste bans
September 1, 1988	Liability Insurance
September 2, 1988	Revisions to Tank Systems rules
September 13, 1988	Listing of smelter wastes
September 23, 1988	Radioactive mixed waste
September 28, 1988	Three Tier Permit Modification Process
October 11, 1988	Statistical Methods for Groundwater Monitoring

October 31, 1988 Delisting of iron dextran and strontium sulfide
November 8, 1988 Manifest form

On September 23, 1988 USEPA published a "Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste". (53 Fed. Reg. 37045). This concerns waste which is hazardous waste and also is radioactive, but which is not "source, special nuclear or byproduct material" as defined in the Atomic Energy Act. This category of waste has always been regulated under RCRA, but there has been substantial confusion. The Board believes that no change is needed either to the Act or the Board rules in order to regulate this category of waste. Specifically, the Board believes that the definition of "hazardous waste" in Section 3.15 of the Act is consistent with this interpretation, as is the exclusion in 35 Ill. Adm. Code 721.104(a)(4). The Board specifically requested comment on this issue, and received no response.

The rules 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 of 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 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.

Section 702.104

This Section is derived from 40 CFR 270.6, which is a short incorporations by reference Section. All but one of these documents incorporated by reference in Section 720.111. The Board has therefore consolidated these lists in the latter Section. This will shorten the rules, ease maintenance of the incorporations by reference file, and avoid inconsistencies as to editions.

Section 702.110

This Section is drawn from 40 CFR 144.3 and 270.2, which was amended at 53 Fed. Reg. 34086 and 37934. These add or modify definitions for "component", "elementary neutralization unit", "facility mailing list", "functionally equivalent component" and "wastewater treatment unit".

The definition of "elementary neutralization unit" has been amended to add "tank system" to the list of possible units. This definition is used in Section 724.101(f)(6), and other places, to state the scope of an exemption from the RCRA permit requirement and standards. The current definition of elementary neutralization unit, as modified by the Federal Register, reads:

> ...a device which: is used for neutralizing wastes ~~which are hazardous wastes only~~ because they exhibit the corrosivity characteristic ...

This produces a substantive change in the definition which is unrelated to the other change, and which USEPA probably did not intend. Under the new federal

definition a subjective test is introduced: Is that the only reason the operator is neutralizing the waste, or does he have a hidden motive? Furthermore, consider an acidic waste which contains a toxic component which is unaffected by the neutralization process. Under the new language, since neutralization has no effect on the toxic component, the treatment unit would be an elementary neutralization unit, and exempt from the permit. Under the old language, the wastestream would be hazardous both because of corrosivity and the toxic component, so that the treatment unit would not qualify as an elementary neutralization unit. It seems unlikely that USEPA intended this about face on this definition. The Board has therefore left the stricken language in the definition.

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 below.

Section 702.160 (UIC amendment)

The proposal included a large number of UIC amendments, some of which reflected federal UIC amendments, but most of which involved separating and renumbering common RCRA/UIC provisions to allow adoption of the RCRA permit rules as discussed below. Because of delays in proposing R89-2, it is now necessary to remove the UIC aspects of this proposal. These will be addressed in R89-2. Specifically, common RCRA/UIC provisions will be retained, but designated as UIC-only provisions. These will be proposed for renumbering to Part 704 in R89-2.

Section 702.181

This Section is drawn from 40 CFR 144.35 and 270.40, which was amended at 53 Fed. Reg. 37934. The federal amendment references the new procedures for permit modification 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.

Only the RCRA provisions, 40 CFR 270, have been amended. However, because these were stated as common RCRA/UIC rules, in 40 CFR 122 at the time the Board originally adopted them, it is necessary to deconsolidate them before the RCRA amendments can be implemented. As discussed above, the Board had intended to renumber these in conjunction with R89-2. However, it is now necessary to leave the UIC material in place pending action on R89-2. (JCAR)

Section 702.182 through 702.185 and 702.187

This Section is drawn from 40 CFR 144.38 and 270.40, which was 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., and the general and UIC only provisions have been retained for action in R89-2.

Section 702.186

This Section is drawn from 40 CFR 144.40 and 270.43, which were not amended during this update period. It has been included to correct an editorial error noted during review of these Sections. The federal language lists causes for terminating a permit, or denying a renewal application. The language adopted in R82-19 changed "terminating" to a reference to revocation by the Board under Title VIII of the Act, but also allowed the Board to "deny" a permit. Only the Agency has this authority under Section 39 of the Act. Accordingly, the Board has deleted the reference to permit denial.

The Board has considered adding a similar provision stating that the Agency can deny a permit if grounds for revocation exist. However, this has been rejected for two reasons. First, it seems to limit the Agency's authority to deny a permit. Second, the federal language itself may be inconsistent with the post-closure care permit provisions of 40 CFR 270.1(c)(5) et seq. (35 Ill. Adm. Code 703.159). In certain situations, rather than deny an application, the Agency should issue a post-closure care permit. The Board solicited comment on this, but received no response.

Section 703.100

The Board has added this Section to the proposal to provide an introduction to acronyms used in this Part. (PC 2)

Section 703.183

This Section is drawn from 40 CFR 270.14(b), which was amended at 53 Fed. Reg. 46963. The amendments correct and add cross references to new Subpart X. The Board has reworded Section 703.183(t) to eliminate a double non-rule.

Section 703.184

This Section is partially drawn from 40 CFR 270.14(b)(11), which was not amended during this update period. This Section is being amended to update statutory references, and to correct language which could be construed as an incorporation by reference.

40 CFR 270.14(b)(11), with necessary State modification, exceeds the subsection levels allowable under the APA, so that the Board was forced to place the contents of the subsection into a separate Section, leaving a cross reference in Section 703.183(k), which is the logical place to look for the equivalent. The Sections in this Part include many "lists", which include both very short and very long elements. Because there are so many short elements, it is not practical to break the list completely and uniformly into Sections. Furthermore, this would make it difficult to reference the complete list. The Board was therefore forced to to use a somewhat confusing format of retaining the main federal Sections intact, but moving the large elements to separate Sections, which are cross referenced from the main list.

Section 703.184(a) is an Illinois Section which has no federal counterpart. This Section is the portion of the Part B application in which the operator demonstrates compliance with the siting requirements of Section 21(l) of the Act, which has been renumbered from Section 21(k).

Section 703.184(c) is drawn from 40 CFR 270.14(b)(11)(iii). This concerns the 100 year floodplain in the Part B application. The existing language could be construed as an incorporation by reference of the flood insurance maps for Illinois published by the Federal Emergency Management Agency. If this an incorporation by reference, the Board is required to be more specific as to the documents, and to maintain a set for public inspection and copying. Also, future amendments could not be automatically referenced. The first problem with this is that the volume of the maps is such that the Board would have to find a new headquarters to house them. Since they are frequently amended, staff would have to be added to maintain the collection. Also, the prohibition on future amendments could produce a conflict between the State and federal rules.

The USEPA Section is ambiguous as to whether it is incorporating the maps by reference. The Board has reworded the Section to avoid such an interpretation. The rule is really deferring to the judgment of FEMA as to the location of the 100 year floodplain, rather than deferring to an existing document. The Board has rewritten the rule to make this clearer. Note that the federal (and State) rule allow the applicant to justify a different flood elevation, although the FEMA map has to be included with the application, if one exists.

Actually obtaining these maps took several day's of research. The Board is concerned that the USEPA rule does not adequately identify them so as to make them available to the public. The Board has therefore provided references to the FEMA map distribution center, and to a collection at the Water Survey.

The USEPA rule calls these "FIA" maps. This term does not appear on the maps the Board has obtained. The Board believes that this agency has been replaced with the "National Flood Insurance Program". The Board has substituted this name into the rule.

Section 703.209

This new Section is drawn from 40 CFR 270.23, which was added at 52 Fed. Reg. 46694, December 10, 1987. This was inadvertently omitted from R87-39. This specifies the contents of the Part B application for miscellaneous units governed by 35 Ill. Adm. Code 724.Subpart X, discussed below.

This provision has been placed in Section 703.209. Section 703.208 is reserved for the equivalent of 40 CFR 270.22, which appears to be reserved.

40 CFR 270.23(b) first requires "Detailed hydrologic, geologic, and meterologic assessments and land use maps..." However, the Section goes on to provide:

> If the applicant can demonstrate that he does not violate the environmental performance standards of §264.601 and the Director agrees with such demonstration, preliminary hydrologic, geologic, and meteorologic assessments will suffice.

This poses several editorial problems. First, while the USEPA rule is worded

as a personal decision of the "Director", Board rules and the Act are generally worded as collective decisions of the "Agency". Second, while the conditional starts with "If the applicant can demonstrate...", it then goes on to refer to "such demonstration", implying that the applicant must actually make the demonstration. A possible rewording is as follows:

> If the Agency determines that the unit will conform with the environmental performance standards of 35 Ill. Adm. Code 724.701, preliminary hydrologic, geologic and meteorologic assessments will suffice.

This is intended to mean the same thing as 40 CFR 270.23, except that it has been worded to clearly require an actual demonstration to the Agency, and to avoid specifying the identity of the Agency decision maker. Note that "Agency determines x" means "A presents facts supporting x to the Agency, and the Agency agrees that x is true."

This rule suffers from a more serious flaw under either of the above interpretations. Under Section 724.701, the Agency is supposed to consider hydrologic, geologic and meterologic factors before deciding whether the unit meets the environmental performance standard. The Agency therefore needs the complete information before it can decide whether to rely on preliminary assessments. The following is a possible alternative which would render this procedure meaningful.

> Preliminary hydrologic, geologic and meteorologic assessments will suffice, unless the Agency notifies the applicant that, based on the preliminary assessments, the unit will not conform with the environmental performance standards of 35 Ill. Adm. Code 724.701. The Agency shall follow the procedures for incomplete applications in 35 Ill. Adm. Code 705.122.

The Board received no comment in response to its request for comment on the meaning of this provision.

40 CFR 270.23(e) requires "any additional information determined by the Director to be necessary..." For reasons similar to those discussed above, the Board has worded this to require "additional information which the Agency determines is necessary..."

Section 703.222

This Section is drawn from 40 CFR 270.62(a), which was amended at 53 Fed. Reg. 37934. This Section is amended to reference the new permit modification procedures discussed below.

This and the following Sections concern short-term RCRA permits which are issued to allow trial burns at incinerators and land treatment demonstrations at land application sites. These have a large number of "shall, must, will and may" problems, which are discussed above in general. The Board has edited these to express what appears to be USEPA's intent with greater uniformity of usage.

Several of the USEPA provisions state that the agency "will" issue a permit. This language is appropriate when the rulemaking body issue the permit. In Illinois a different Agency issues permits. This has generally been changed to "shall".

Several of the USEPA provisions state that the agency "may" issue a permit if the applicant meets certain conditions. The Board has replaced this with "shall", since, under Illinois administrative law, the applicant is entitled to the permit if it meets the conditions.

The Agency objected to the replacement of "may" with "shall" in the 8th line of the introductory paragraph of Section 703.222. (PC 5) This provision allows the Agency to extend the trial burn period for an incinerator one time, for up to 720 hours, "when good cause is shown". The Board believes that the use of "may" in this context would imply that the Agency could arbitrarily refuse to extend the time even though it had determined that "good cause" existed for an extension.

Section 703.223

This Section is drawn from 40 CFR 270.62(b), which was amended at 53 Fed. Reg. 37934. This Section is amended to reference the new permit modification procedures discussed below.

The Agency objected to the replacement of "may" with "shall" in the 3rd line of the introductory paragraph of Section 703.230. (PC 5) This provision allows the Agency to issue land treatment demonstration permits. The Board agrees with the Agency that "may" is appropriate in this introductory statement of purpose. The provisions which follow set forth adequate standards for the issuance of various types of permits.

Section 703.230

This Section is drawn from 40 CFR 270.63, which was amended at 53 Fed. Reg. 37934. This Section is amended to reference the new permit modification procedures discussed below.

Section 703.247

This new Section is drawn from 40 CFR 270.30(l)(2), which was amended at 52 Fed. Reg. 37934. The RCRA only provisions of Section 702.152(b) have been moved to this Section. The main portion of 40 CFR 270.30(l)(2), which has been left behind in Part 702, specifies a permit condition which requires the operator to notify the Agency in advance of any planned changes which would result in non-compliance. Hence, the title of the Section: "Anticipated Noncompliance". This title has been carried with the RCRA only provisions into Part 703. However, it is somewhat misleading, since the RCRA only language really concerns when an operator can commence operations at a new or modified facility. The amendment provides a cross-reference to the new permit modification procedures, which in some cases allow an operator to carry out the modifications prior to Agency approval.

40 CFR 270.30(l)(2)(ii) has levels of subdivision without governing text, a violation of the Code Unit rules. The Board has inserted "either" at the

main level.

40 CFR 270.30(l)(2)(ii)(B) is not grammatically correct. However, there appears to be no way to fix it short of rewriting the whole Section.

Section 703.260

This new Section is drawn from 40 CFR 270.40, which was amended at 53 Fed. Reg. 37934. This and the following Sections are drawn from the RCRA only provisions of Sections 702.181 et seq. This Section governs transfer of permits, which can be effected as a Class 1 modification without prior Agency approval. However, the old operator's financial assurance continues until the new operator demonstrates compliance.

There is a possible conflict between this Section and the chief operator certification rules in Part 745. Some facilities may be subject to the chief operator certification requirement, and would have to have a certified operator prior to the sale. The Board has added a Board note with a cross reference.

Section 703.270

This new Section is drawn from the preamble to 40 CFR 270.41, which was amended at 53 Fed. Reg. 37934. The federal change is to reference the new permit modification procedures. Section 702.183 has been moved to this new Section as a RCRA only provision.

40 CFR 270.41 includes procedures for "revocation and reissuance" of permits. When Sections 702.183 et seq. were originally adopted, these procedures were omitted out of concern that they conflicted with the "revocation" procedures involved in Board enforcement under Section 33(b) of the Act. However, as used by USEPA, the "revocation and reissuance" procedures do not involve enforcement penalties. Rather, this is a mechanism for permit modification by which USEPA cancels an existing permit and replaces it with a new permit. In a subsequent update Docket, the Board decided to reinsert the procedure, but to call it "reissuance" to avoid confusion. However, this was not done to all Sections. Several of the following Sections are now amended along these lines.

Section 703.271

This new Section is drawn from 40 CFR 270.41(a), which was amended at 53 Fed. Reg. 37934. It has been moved from Section 702.184(a). It specifies the causes for modification, but not reissuance. It has been amended to reference the new permit modification procedures.

Section 703.272

This new Section is drawn from 40 CFR 270.41(b), which was not amended during this update period. The text has been moved from Section 702.184(b). The Section states causes for modification or reissuance of permits. The text of 40 CFR 270.41(b)(1) was omitted on original adoption, and in this renumbering, because it allows USEPA to use modification or reissuance in a punitive sense when cause exists for an enforcement action. This is

inconsistent with Title VIII of the Act, which authorizes the Board to revoke permits as a penalty. (See 35 Ill. Adm. Code 702.109.) Also, the USEPA provision is inconsistent with 40 CFR 270.1(c)(5) and (6), which requires USEPA to issue post-closure care permits, rather than revoke permits, in most situations. Section 7.2(a)(5) requires the Board to specify which agency is to make decisions, based on the general division of functions in the Act. Also, Section 7.2(a)(7) allows the Board to correct apparent errors. (JCAR)

Section 703.273

This new Section is drawn from 40 CFR 270.41(c), which was not amended during this update period. The text has been moved from Section 702.185 to avoid future confusion.

Section 703.280 et seq.

This new Section is drawn from 40 CFR 270.42, which was amended at 53 Fed. Reg. 37934. The "minor modification" process, formerly in Section 702.187, has been replaced with three procedures for handling permit modification at the request of the permittee.

40 CFR 270.42 is far too long to meet Code Unit guidelines for a single Section, and uses more levels of subdivision that allowed by the Code Unit. The Section has been broken in four Sections, 703.280 through 703.283, using the "Alien(s)" method followed elsewhere in Part 703. 40 CFR 270.42 is a list with three long elements, Sections 270.42(a) through (c), followed by shorter elements (d) through (h). The longer elements have been placed in separate Sections 703.281 through 703.283. The main list is preserved in Section 703.280, with cross references in place of the long elements.

Section 703.281 addresses Class 1 modifications, which the operator can effect unilaterally, provided he notifies the Agency within 7 days. If the Agency rejects the request, the operator has to go back to the original permit conditions.

Section 703.282 addresses Class 2 modifications. The operator has to give prior notice to the Agency and the public, and hold a public meeting. The operator may effect the change unless the Agency rejects it within certain time frames.

Section 703.282(b) and (d) are drawn from 40 CFR 270.42(b)(1) and (4). These provisions specify the location and form of notice of public meetings. The Agency and USEPA have commented on these provisions. (PC 5 and 7) While the notice and hearing requirements in the Act generally specify just that the notice be published and the hearing held in the County, the USEPA rules generally specify the "vicinity" of the facility. Although the requirements of the Act do not control, the Board has modified this to remain consistent with State procedures in related requirements. However, unlike other States the USEPA rules are directed at, Illinois is a State with small Counties. It is not possible to get very far away from a facility and still be in the same County.

In connection with Section 703.282(b), USEPA has pointed out that there are several areas in Illinois in which there is no newspaper on general

circulation "published" within the County which includes the area. USEPA is taking a narrow view of "published" as referring to the location of the printing plant. The Board has added language to make it clear that the notice is to be published, "to the extent practicable", in a newspaper published in the same County as the facility. If not, a newspaper of general circulation in the vicinity of the facility will be sufficient.

In connection with Section 703.282(d), the Agency has pointed out that requiring the public meeting to be held in the County could be inconvenient in some situations. The Board has modified this to provide that the meeting must be held "in the County in which the facility is located unless it is impracticable to do so, in which case the hearing must be held in the vicinity of facility."

Section 703.283 addresses Class 3 modifications. These are like Class 2, except that the operator has to have a decision from the Agency prior to placing the modification into effect.

The federal rules contain several default provisions which require the operator to comply with 40 CFR 265. (For example, see 40 CFR 270.42(b)(6)(iii). This is unusual, in that it requires a permitted facility to revert to the interim status provisions pending action on a permit revision. However, USEPA considered this and clearly intended this result. (52 Fed. Reg. 35845) (PC 5)

Section 703.Appendix

This new Section is drawn from 40 CFR 42, Appendix I, which was added at 53 Fed. Reg. 37934 and 41649. This includes extensive examples of the Classes of permit modification.

Section 704.161 (Not amended)

This Section is drawn from 40 CFR 144.31, which was amended at 53 Fed. Reg. 46963. This UIC amendment will be addressed in R89-2.

Section 705.128

This Section is drawn from 40 CFR 124.5, which was amended at 53 Fed. Reg. 37934. This will be addressed in R89-2.

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 make these clearly incorporations by reference in compliance with the APA, or to make them clearly not incorporations by reference. In the latter case,

among the possible actions are to eliminate unnecessary references, replace federal references with derivative State rules, or reword provisions so as to reference 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 above for the discussion of this definition in the Part 702 definitions.

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

The definition of "miscellaneous unit" was 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 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 adopted by the Board, the exemption would extend only to those units which have the required permits.

Section 720.111

The changes to the incorporations by reference Section are mainly routine updating of documents. As has been discussed in previous Opinions, while USEPA in actual practice regards its incorporations by reference as referring to future editions of documents, the APA requires the Board to cite to a

certain edition. Although USEPA does not routinely update its rules to reflect the editions actually in use, the Board needs to update incorporations by reference to cite the actual edition USEPA is using as new editions come to its attention.

Most of the revisions to the industry standards arose from the UST rules adopted in R88-27. The RCRA hazardous waste storage tank rules in Section 724.290 et seq. reference some of the same industry standards as the UST rules. The Board has updated Section 720.111 to use the current editions of these standards.

The Board has shifted the reference to ANSI/ASME B31.3 and B31.4 from the "ANSI" heading to "ASME", since the latter organization actually provided the current edition to the Board. A cross reference is left, since the standard is referenced as "ANSI" in the body of the rules.

The API, NACE and NFPA references have been changed to the format preferred by those organizations, as discussed in R88-27.

The CFR citations have been routinely updated to reflect the 1988 edition, which includes rules adopted through July 1, 1988.

The Board has added a reference to 10 CFR 20, Appendix B, which is the NRC's definition of various types of radioactive material. This is used in existing Section 730.103, which is not a part of this rulemaking. The Board has also added a reference to 40 CFR 136, which are USEPA analytical methods cited in various Sections. The Board has also referenced 40 CFR 302.4 through 302.6, which is the USEPA definition of CERCLA "hazardous substance" and reportable quantity rules. These are used in Parts 724 and 725, discussed below.

Section 721.104

This Section is drawn from 40 CFR 261.4, which was amended at 53 Fed. Reg. 35420. Section 721.104(b)(7) has been amended to include (actually to exclude from excluding) certain ore processing wastes. These are related to K064, K065, K066, K088, K090 and K091, new listings discussed below.

There are several minor editorial problems with these amendments. In (b)(7)(A), "slurry/sludge" has been rendered as "slurry or sludge", to avoid offending the Code Unit. In (b)(7)(B), "contained in the dredged from" has been changed to "contained in and dredged from", the wording used in the listing K065. However, this is probably also an editorial error by USEPA, and should probably read "or". How could the sludge be both contained in and dredged from the impoundment?

In (b)(7)(C), "and/or" has been changed to the equivalent "or" to conform with the Code Unit's style manual.

Big River Zinc Corporation (Big River) has commented on this listing. (PC 3) Big River is a primary zinc manufacturer which produces a sludge which meets this listing. According to Big River, the sludge has no hazardous characteristics. USEPA's action in listing the waste was based on 1980 data concerning zinc wastes, which is no longer valid. Big River has asked USEPA

to reconsider the listing. However, it has not obtained a federal Court stay of the listing. Compliance with the listing will cost several million dollars, and will place Big River at a competitive disadvantage with respect to certain other competitors whose waste does not fall within the listing.

Section 22.4(a) of the Act obligates the Board to adopt, within specified times, the general regulations which USEPA promulgates pursuant to the RCRA Act. The definition of "identical in substance" in Section 7.2 of the Act gives the Board some latitude to correct USEPA errors. However, this does not extend to correcting bad decisions. The Board therefore finds that it has no alternative but to adopt a listing which is "identical in substance" to the USEPA listing.

Big River has also requested a hearing. Section 22.4(a) of the Act exempts this rulemaking from the hearing procedures of both Title VII of the Act and Section 5 of the APA. Given the time constraints and narrow scope of this rulemaking the Board cannot schedule a discretionary hearing.

Under the facts as alleged by Big River, the sludge appears to be a candidate for delisting pursuant to 35 Ill. Adm. Code 720.120 and 720.122. Delisting is an appropriate action for a waste which meets the definition of a listed waste, but which does not have the hazardous characteristics which caused the waste to be listed. This could be approached either by requesting that USEPA delist the waste pursuant to 40 CFR 260.22, and asking the Board to adopt the delisting as an identical in substance rule. Alternatively, Big River could file a rulemaking petition asking the Board to delist the waste pursuant to Sections 22.4(b) and (c). As an interim measure, the Board might be able to grant a variance from the listing.

As is discussed below, the Board will withhold filing of these amendments to allow for motions for reconsideration by the agencies involved in the authorization process. Because of the unusual nature of the issues raised by the comment, the Board asks that USEPA review it and advise the Board if it believes that the Board should withhold action or modify the USEPA listing in this context. In addition, the Board may need to know whether this is a situation in which it has authority to proceed with independent delisting.

Section 721.132

This Section is drawn from 40 CFR 261.32, which was amended at 53 Fed. Reg. 35420. The amendments add the listings K064 through K091 discussed above. Similar wording changes have been made.

Section 721.133

This Section is drawn from 40 CFR 261.33 which was amended at 53 Fed. Reg. 43881 and 43883. The amendments delist iron dextran and strontium sulfide.

Section 721.Appendix G

This Section is drawn from 40 CFR 261.Appendix VII, which was amended at 53 Fed. Reg. 35420. These add the bases for the listings K064 through K091 discussed above.

Section 721.Appendix H

This Section is drawn from 40 CFR 261.Appendix VIII, which was amended at 53 Fed. Reg. 43881 and 43883. Strontium sulfide and iron dextran have been removed from the table of hazardous constituents.

Section 722.Appendix

This Section is drawn from 40 CFR 262.Appendix, which was amended at 53 Fed. Reg. 45090. The Board has updated the incorporation by reference of the federal uniform hazardous waste manifest form.

Section 724.110

This Section is drawn from 40 CFR 264.10, which was amended at 52 Fed. Reg. 46963. The amendments add a reference to new Subpart X.

Section 724.113

This Section is drawn from 40 CFR 264.13, which was amended at 53 Fed. Reg. 31211. The amendments add waste analysis requirements related to the landfill bans discussed below in Part 728. The USEPA rule exceeds the Code Unit's limit on subsection levels, so that 40 CFR 270.13(b)(7)(iii)(B)(1) and (2) have to be combined into the final available level, 35 Ill. Adm. Code 724.113(b)(7)(C)(ii).

Section 724.115

This Section is drawn from 40 CFR 264.15, which was amended at 52 Fed. Reg. 46963. The amendments correct cross references, and and a reference to new Subpart X.

Section 724.118

This Section is drawn from 40 CFR 264.18, which was amended at 52 Fed. Reg. 46963. The amendments add a reference to new Subpart X.

Section 724.154

This Section is drawn from 40 CFR 264.54, which was amended at 53 Fed. Reg. 37934. The "note" following this Section has been removed, in relation to the new permit modification procedures discussed above.

Section 724.173

This Section is drawn from 40 CFR 264.73, which was amended at 52 Fed. Reg. 46963 and 53 Fed. Reg. 31211. The amendments add a reference to new Subpart X, and add requirements for the facility operating record relating to the landfill bans.

Section 728.106, discussed below, requires an adjusted standard pursuant to 35 Ill. Adm. Code 106. In adopting this Section, the Board referenced Part 106 directly, rather than by way of Section 728.106. This could have been a

typographical error, caused by the similarity of the numbers. The Board has changed this to reference the lead in Section.

Section 724.190

This Section is drawn from 40 CFR 264.90, which was amended at 52 Fed. Reg. 46963. It states the applicability of the groundwater monitoring requirements to miscellaneous units, which are discussed below. The federal provision has been edited to shorten it and make it say something.

Section 724.191

This Section is drawn from 40 CFR 264.91, which was amended at 53 Fed. Reg. 39728. The amendments add definitions of "detected" and "exceeded" for use in the groundwater monitoring rules which follow.

Section 724.192

This Section is drawn from 40 CFR 264.92, which was amended at 53 Fed. Reg. 39728. The language has been amended to conform with the definitions in the preceding Section.

Section 724.197 through 724.199

This Section is drawn from 40 CFR 264.97 through 264.99, which were amended at 53 Fed. Reg. 39728. These amendments address the question of how to tell if a sample exceeds the groundwater protection standard in the permit. The existing rules are very specific as to the number of samples, and require the use of a variation of the Student's t-test for statistical significance. Under the new rules the sampling, analysis and statistical evaluation plan are described by general rules. The operator is required to propose a plan in the permit application, meeting the general rules. Compliance with the groundwater monitoring standard is judged by reference to the plan in the permit.

40 CFR 264.98(f)(2) has an apparent typographical error which has been corrected. ("as" instead of "at" the compliance point.)

Section 724.211

This Section is drawn from 40 CFR 264.111, which was amended at 52 Fed. Reg. 46963. The amendments add references to new Subpart X.

Section 724.212

This Section is drawn from 40 CFR 264.112, which was amended at 52 Fed. Reg. 46963 and 53 Fed. Reg. 37934. The amendments add references to new Subpart X, and correct references to permit modification procedures.

40 CFR 264.112(b) requires the closure plan to identify steps necessary "to perform partial and/or final closure". This has been changed to "partial or final closure", to conform with the Code Unit requirements, which equate "and/or" with "or". However, the USEPA rule may be wrong in using "and/or" in the first place. "Or" seems wrong, since the plan would always have to

address final closure. "And" also seems wrong, since partial closure would not have to be addressed unless the operating plan called for partial closure, such as in landfilling by opening and closing a succession of trenches. The Board suggested the following, and received no comment:

> The plan must identify steps necessary to perform final closure of the facility at any point during its active life. The plan must also identify steps necessary for partial closure if necessary under the operating plan for the facility.

Section 724.214

This Section is drawn from 40 CFR 264.114, which was amended at 52 Fed. Reg. 46963 and 53 Fed. Reg. 34086. The amendments add references to new Subpart X, and to reference the rules on disposal of tank system components on closure. The latter Federal Register action appears to have inadvertently repealed the first. The Board assumes this is an error, and has retained to earlier language.

Section 724.217

This Section is drawn from 40 CFR 264.117, which was amended at 52 Fed. Reg. 46963. The amendments add references to new Subpart X.

Section 724.218

This Section is drawn from 40 CFR 264.118, which was amended at 52 Fed. Reg. 46963 and 53 Fed. Reg. 37934. The amendments add references to new Subpart X and to the revised permit modification procedures.

Section 724.241

This Section is drawn from 40 CFR 264.141, which was amended at 53 Fed. Reg. 33950. The USEPA amendment adds a definition of "substantial business relationship", which is used in the liability insurance requirements discussed below. These amendments raise issues which are closely related to the issues discussed in the Opinion in R89-4, financial assurance for underground storage tanks. The issues are also closely related to issues discussed in the Opinions in R86-46 and R87-39, which included amendments to the liability insurance provisions.

The financial assurance requirements will be discussed below in detail. These rules have a number of broad issues concerning the place of the financial assurance requirements in State law. These concern the State laws which govern the financial assurance instruments and State agencies which regulate the financial institutions and corporate guarantors.

As noted above, Section 22.4(d) requires the Board to adopt regulations which are "identical in substance" with USEPA UST rules. This term has recently been defined in Section 7.2 of the Act in a manner which codifies the Board's longstanding interpretations of it. (See R85-23, June 20, 1986, 70 PCB 311, 320; R86-44, December 3, 1987, pages 14 and 19.) Generally the "identical in substance" mandate is to adopt the verbatim text of the USEPA rules so as to effect a program which requires the same actions by the same

group of affected persons as would the USEPA rules if USEPA administered the program in Illinois. However, there are certain situations enumerated in Section 7.2 in which the Board is to depart from the verbatim text of the USEPA rules. Several of these are relevant to the financial assurance rules.

Several provisions in the USEPA rules appear to be requirements for program approval or directives from USEPA as to the types of rules the states are to adopt, rather than "pattern" rules which the states are supposed to adopt verbatim.

Section 7.2 of the Act also requires the Board to modify the text as necessary to accommodate the requirements of State law. Several provisions need to be modified to correctly state the requirements of State law. Indeed, these provisions may also be construed as directives from USEPA to insert the correct State law.

These complexities arise out of the nature of the financial assurance mechanisms. Although the use of the mechanisms is mandated by federal law, the mechanisms themselves are a matter of state law. Operators subject to the federally-mandated environmental regulations must contract, pursuant to state law, with financial institutions which are created and mainly regulated under state law, and which are not themselves usually the subject of environmental regulation. This is further complicated by balancing the need for a national financial assurance system versus the necessity for state administration and enforcement, given the national policy of delegating to the states.

The State agencies which regulate the financial institutions and other providers include: Commissioner of Banks and Trust Companies; Department of Insurance; and, Secretary of State, Corporation Division. The Corporation Division has responded in PC 1. The Board sent the others a copy of this Opinion and Order, together with a cover letter specifically requesting comment, and received none.

In R86-46 and R87-39 the Board has addressed multistate problems with respect to hazardous waste financial assurance. The following is a hypothetical which illustrates some of the problems with multi-state financial assurance as apparently contemplated under the USEPA rules.

Suppose a Delaware corporation, with headquarters in New Jersey, operates a hazardous waste facility located in Illinois. The financial institution is a Nevada corporation with headquarters in Connecticut. The financial assurance documents are drafted at the financial institution's office in New York, and mailed to the operator's corporate headquarters in New Jersey. Whose law applies? Which State has jurisdiction to decide?

For a second example, suppose the Delaware corporation, headquartered in New Jersey, owns an Illinois subsidiary, which owns a facility in Illinois.

The Board suggests that the following are general legal rules which govern the choice of law governing financial assurance documents.

The financial institution must have the power to issue the document. This mainly depends on the law of the state of incorporation, and the terms of the charter or articles of incorporation. In addition, the institution needs

to be licensed by at least some state to engage in the activity.

The validity of a corporate guarantee is similar. The corporation must have the power to make the guarantee under the laws of the state of incorporation, and under its articles of incorporation.

Generally the validity of an instrument is governed by the law of the state in which the instrument is executed. This probably means the place at which the signed document is delivered to the operator. (Where it's placed into the mailbox?) However, the parties can agree that the law of another state governs the instrument. There may be limitations on this, especially if the instrument violates some law of the state in which it is executed.

The financial institution certainly has to be licensed in the states in which it has its offices. It is not clear whether licensure is required in all states in which instruments are executed or in which facilities are located. A business entity which guarantees the debts of an operator may, or may not, be "doing business" in the operator's State, and may have to register with the Corporation Division. Generally a parent corporation is not "doing business" in a state by virtue of ownership of a subsidiary which is doing business.

There are constitutional limitations as to where the providers of financial assurance can be sued. Licensing and registration would allow the financial institution or guarantor to be sued in the State in which the facility is located. Otherwise, they can generally be sued in the state courts or U.S. District Courts in the states in which they are organized or do business. There are ways to obtain jurisdiction in Illinois, but none appear to be generally applicable. This may not be important to USEPA, which maintains a presence in all states. However, for Illinois it is important to be able to sue in Illinois courts pursuant to Illinois law. Otherwise, the State would have to have experts on the financial laws of many states to review documents, and would have to set up regional collection offices around the country.

40 CFR 264.147(g)(2) allows an operator to use a corporate guarantee bond only if the Attorneys General in the states in which the guarantor has its pronciple place of business and facilties. In addition, 40 CFR 271.7 and 271.12 require an Attorney General's statement that all of the mechanisms are valid and enforceable.

The Board notes in passing that the specific certification requirement probably misses the point. As discussed above, the validity of the guarantee or bond is probably governed by the law of the State of incorporation or chartering of the guarantor or surety, and the law of the place where the financial instrument is executed, rather than the law of the places where the facility is located or the operator has its principal place of business.

The Board faced a similar question with respect to Attorney General certification of hazardous waste corporate guarantees in R86-46 and R87-39. There are a number of ways of interpreting this requirement. For the reasons discussed above, the validity of the financial mechanisms under the USEPA rules may be determined under the laws of several states. If the certification requirement is asking the Attorney General of Illinois to make a

generic certification at the time of application for program approval, it is asking for a certification that mechanisms are valid under the laws of other states. It is not right to even ask the Illinois Attorney General to make this certification.

The Board discussed a number of other interpretations in R86-46 and R87-39. One possibility would be to limit multistate combinations to those involving a small number of neighboring states, and ask the Attorneys General in each to certify. This is probably unworkable. Another possibility would be to require each operator using a multistate combination to obtain individual Attorney General certifications with respect to each of the states involved in the combination. USEPA rejected this possiblity in the most recent preamble as unworkable. (53 Fed. Reg. 33945) In R86-46 and R87-39 the Board limited hazardous waste corporate guarantees to those which were governed entirely by Illinois law, so as to allow the Illinois Attorney General to certify alone that the guarantees were valid and enforceable. The Board received no adverse comment to this interpretation.

The Board has followed the same course with respect to the new financial mechanisms discussed below. The Board has limited financial mechanisms to those which are governed entirely by Illinois law. Financial institutions will have to obtain approval from Illinois regulatory authorities before they can issue financial assurance which will be acceptable as meeting the regulatory requirements. Corporate guarantors will have to register with the Secretary of State. And, the guarantors and trustees will have to agree that Illinois law governs.

The term "substantial business relationship", defined in Section 724.241(h), is used to limit the types of non-financial institutions which can offer a guarantee to the operator which will function in lieu of liability insurance. As defined in the federal rule, a "substantial business relationship" is the extent of a business relationship which will support a valid and enforceable guarantee contract under State law.

This federal definition is a directive to the states to write a definition, rather than a "pattern" rule which the states are supposed to adopt. Section 7.2 of the Act authorizes the Board to use identical in substance procedures in crafting definitions meeting such federal directives.

There are two types of guarantees. One is a performance bond written by a regulated financial institution. The other is a guarantee by one business entity, which is not a financial institution, but which meets the financial test, that it will pay any clean up costs if another entity fails to do so. The latter type of guarantee is subject to the objection that the guarantee may be invalid unless the guarantor is regulated as a financial institution. It may also be subject to consumer protection legislation, since the relationship is rather like a teenager getting his aged aunt to cosign a loan for a car. The question is, what is the extent of the relationship between the guarantor and operator such that the guarantee is valid?

The rules discussed below limit these guarantees to those from a parent corporation to a subsidiary. Although the amendments extend the guarantees to indirect corporate ownership patterns, the main rules are still limited to parent/subsidiary relationships. A subsidiary is defined as a corporation

which is more than 50% owned by the parent. This is probably a sufficient relationship to result in a valid guarantee anywhere.

The Board addressed this question in R84-22C. Since the 50% ownership requirement appeared to be rather restrictive, the Board proposed to allow guarantees from any entity with any ownership interest in the operator. (See 35 Ill. Adm. Code 807.666(h).) This was accepted by the State regulatory agencies. Since this is sufficient to ensure enforceability of the guarantee, Board has proposed to follow the R84-22C formulation in this definition. The Board recieved no comment on this issue.

The USEPA definition is really directed not at ownership interests, but at other commercial relationships. (See 53 Fed. Reg. 33941 and 33945). There are two examples. First, suppose a large firm which meets the financial test generates a hazardous waste. The large firm might wish to guarantee any liabilities a small treatment firm might incur, in exchange for a reduction in treatment costs. Second, a hazardous waste treatment equipment vendor might wish to guarantee liabilities as an inducement to firms to buy its equipment.

There are potential problems with allowing these guarantees. These may be illustrated with an example. Suppose a fire extinguisher dealer offered to replace its customers houses if they burned down. Department of Insurance should probably regulate this activity, to make certain that the company was treating its customers fairly, and was maintaining an adequate loss reserve to meet claims. How do the hazardous waste guarantees compare to this example? First, hazardous waste guarantees are commercial relationships which may not need the protections afforded consumer relationships. However, third parties, the State and innocent bystanders, are really the benficiaries of the liability guarantee, and may be deserving of protection. Second, the guarantor must meet the financial test in the rules, affording something akin to a loss reserve. However, the rules do not specifically require the guarantor to establish a loss reserve. For example, an equipment vendor would incur a potential annual aggregate loss of $6 billion after selling 1000 units with guarantees. How big of a loss reserve should be established is complicated by the possibility that all of the units could have the same defect.

Aside from the question of whether this activity needs to be regulated by the Department of Insurance, there is also the question of whether it is. If these activities fall within the Department of Insurance's jurisdiction, then the Board cannot allow this type of guarantee as meeting the financial assurance requirement. The Board specifically requested comment from the Department of Insurance to whether it can or should extend the definition of "substantial business relationhip" into this area, and received no response.

Existing Section 724.241(h) includes definitions applicable to the liability insurance requirement. The introductory paragraph defines "bodily injury" and "property damage" by reference to "applicable state law". This really is a directive, rather than a pattern rule. In R89-4 the Board attempted to find the applicable Illinois definitions, and found none. In Illinois definitions of these terms are left to the parties in the insurance contract. If the terms are not defined in the rules, the insurers might issue policies covering "bodily injury" and "property damage" with restrictions

which would defeat the purpose of the financial assurance requirement. For example, an insurer might limit "bodily injury" to one which is manifested within a short period of time, or limit "property damage" so as to not compensate for loss of use of property which is rendered unihabitable by pollution. If these terms are not defined in the rules, the State would be obliged to accept the policies as meeting the regulatory requirement.

Since these definitions are essential to the program, Section 7.2 of the Act requires the Board to craft a definition to fill the hole. (JCAR)

In the preamble to the UST financial assurance rules, USEPA refers to the definitions of these terms as prescribed by the Insurance Services Office (ISO), a private entity which, among other things, drafts standard forms used by many insurance companies. (53 Fed. Reg. 43333, October 26, 1988) Commenters urged USEPA to adopt the ISO definitions so as to make the regulations conform with insurance industry practices. USEPA refused to do so, and instead referenced state law, out of fear that some states would have conflicting definitions in their insurance regulations. In such states confusion would have resulted from having the ISO definition in the UST rules, and an insurance regulatory definition in the policy. However, since Illinois has no definitions in its insurance regulations, no conflict should result from using the standard industry terms in the text of the rules. The Board has therefore used the ISO definitions of "bodily injury" and "property damage".

The Board has reviewed the text of these definitions, and finds no problems with the language of these two definitions themselves. The Board received no comment to the contrary.

The ISO definition of "property damage" depends on two other ISO definitions: "property damage" includes loss of use of property because of a "pollution incident", which includes a release, provided such release results in "environmental damage". The Board has adopted definitions of these ISO terms also. However, there may be problems associated with these terms. The terms may conflict with the USEPA terms "occurrence" and "accidental release".

The ISO definition of "pollution incident" includes yet another definition, "pollutants", which the Code Unit has asked the Board to factor out. (PC 2) Also, the definition of "property damage" has been rearranged to meet Code Unit indentation requirements.

USEPA specifically rejected the ISO definition of "pollution incident", instead retaining its definitions of "occurrence" and "accidental release". However, USEPA added language specifically authorizing the use of alternative terms, including the ISO terms, in policies. (53 Fed. Reg. 43334, October 26, 1988) Of course, this tends to defeat the goal of having the regulatory and policy language the same.

The Board has resolved these problems by adding the following sentence to the ISO definition of "pollution incident": "The term 'pollution incident' includes an 'accidental release' or 'occurrence'". This allows an insurer to bring the ISO policy form into line with the USEPA regulations by adding a simple rider. If the insurer fails to do so, the policy would be amended by

the endorsement form of 40 CFR 264.151(e), incorporated by reference in Section 724.252. Since this amendment would be simple, it is unlikely that any conflict would result between the language of an ISO policy form and the regulations.

Section 724.242 and 724.244

These Sections are drawn from 40 CFR 264.142 and 264.143, which were amended at 52 Fed. Reg. 46963. The amendments add references to new Subpart X.

Section 724.247

This Section is drawn from 40 CFR 264.147, which was amended at 52 Fed. Reg. 46963 and 53 Fed. Reg. 33950. The former amendments added references to new Subpart X, which were apparently repealed by the latter. The Board assumes this is an editorial error, and has retained the references.

There are two other ambiguities in the Federal Register. The introductory text indicates that paragraph (g)(1)(ii) is removed and reserved. However, this is a critical Section which prevents cancellation of guarantees until alternative financial assurance is provided. The Board has left the equivalent Section 724.247(g)(1)(B) in the rules. It is also unclear whether the final sentence of the introductory text to Section 724.247(g) is in or out. The Board has left it in.

40 CFR 264.147(b)(7), as amended at 53 Fed. Reg. 33950, requires the operator to notify whenever a claim is made "and" whenever the amount of coverage is reduced. In Section 703.247(b)(7), the Board has rendered this as "or". As the Board reads this, USEPA intends notification in either situation, rather than notification only if both conditions are met. The latter reading does not make sense. USEPA frequently uses "and" to mean "or", and vice versa. Also, in this Section there is a deeper ambiguity in the structure of the rule. What USEPA probably meant was: "The operator ... shall notify if a claim is made; and, shall notify if the amount of coverage is reduced." This can be fixed more easily by changing "and" to "or", and retaining the basic language. (JCAR)

The main amendments to this Section expand the methods by which an operator may meet the liability insurance requirement. The operator can presently meet the requirement with insurance, by passing a financial test or with a guarantee from a parent corporation which meets the test. As amended, the rules will also allow surety bonds, letters of credit and trust funds for liability insurance. As discussed above, the rules also expand guarantees to indirect corporate parents, and to firms with a "substantial business relationship" with the operator. The Board has above defined this term as an ownership interest in the operator, and has rejected contract relationships. The Board received no comment on this.

For the reasons discussed above, the Board has limited the new mechanisms to those which are governed by Illinois law, so as to allow the Attorney General to certify alone that the mechanisms are "valid and enforceable." The Board has also limited insurance to that available from companies licensed by the Illinois Department of Insurance. In R86-46 and R87-39 the Board has

already limited corporate guarantees to those which are executed in Illinois by a corporation with a registered agent in Illinois. In R84-22C, 66 PCB 463, November 21, 1985, the Board determined the appropriate agencies for similar mechanisms with respect to financial assurance for non-hazardous waste landfills. The rules track the language adopted in R84-22C. (See 35 Ill. Adm. Code 807.661 et seq.) Specifically, surety bonds require licensing by the Department of Insurance, and letters of credit and trust funds require licensing by the Commissioner of Banks and Trust Companies.

Out of State trustees are allowed if they comply with the Corporate Fiduciary Act (Ill. Rev. Stat. 1987, ch. 17, pars. 1551-1 et seq.). The Code Unit pointed out that Act cited in the proposal has been repealed and replaced with the Corporate Fiduciary Act. (PC 2)

The mechanisms for financial assurance for closure and post-closure care may need to be similarly limited. However, these have not been proposed for amendment in this update. At the time these were adopted, they were presented to the Board as something which had to be adopted as pattern rules regardless of State law. On the other hand, the liability requirements have come to the Board with specific USEPA directives to adapt the mechanisms to State law and as to the Attorney General's statement. The Board will consider limiting the other mechanisms if they are amended by USEPA in a similar manner.

Section 724.251

This Section is drawn from 40 CFR 264.151, which was amended at 53 Fed. Reg. 33950. The Board has updated the incorporation by reference of the financial assurance forms. Under the existing language of this Section, the Agency will promulgate forms based on the new rules.

Section 724.290

This Section is drawn from 40 CFR 264.190, which was amended at 53 Fed. Reg. 34086. This Section has been amended to use the newer terminology "tank systems".

Section 724.293

This Section is drawn from 40 CFR 264.193, which was amended at 53 Fed. Reg. 34086. The Section has been amended to require sealless valves in tank systems.

Section 724.296

This Section is drawn from 40 CFR 264.196, which was amended at 53 Fed. Reg. 34086. The amendment is to a note in the federal Section which was not adopted with this Section, since it concerns corrective action orders entered by USEPA pursuant to the federal Act. The Agency has similar authority under Section 4(q) of the Act. The Board requested comment as to whether a reference to Section 4(q) was needed, and received no response.

The second note to this Section references the CERCLA reporting requirements of 40 CFR 302. The Board has updated the reference to the federal rules. The Board has done so by removing the date from this Section,

and by referencing 40 CFR 302.6, which is already incorporated by reference in Section 720.111. This is actually the Section in Part 302 which requires notification.

Section 724.700 et seq. Miscellaneous Units

The following Sections are drawn from 40 CFR 264, Subpart X, which was added at 52 Fed. Reg. 46694, December 10, 1987. These were inadvertently omitted from R87-39. This Subpart contains general rules for permitting hazardous waste management units which are outside the specific categories for which there are Subparts.

40 CFR 264.601(b)(7) requires the USEPA to consider "any water quality standards established for those surface waters". The Board has inserted a reference to the standards of 35 Ill. Adm. Code 302 and 303. The Board is not aware of any other water quality standards which might apply within Illinois.

Section 725.113

This Section is drawn from 40 CFR 265.13, which was amended at 53 Fed. Reg. 31211. This Section governs the waste analysis plan at an interim status facility. The amendments amend subsection (b)(7)(C), concerning analyses related to land disposal bans. The USEPA language exceeds the subsection levels available under the Code, and has been condensed.

Section 725.173

This Section is drawn from 40 CFR 265.73, which was amended at 53 Fed. Reg. 31211. This Section requires that certain notifications and certifications required under the land disposal bans be kept in the operating record. (Section 725.173(b)(8) et seq.)

Section 725.210 (Not amended)

This Section is drawn from 40 CFR 265.110, which was amended at 53 Fed. Reg. 34086. The amendments add subsection (b)(2), which is already present in the Board rules, representing an editorial error previously corrected.

Section 725.212

This Section is drawn from 40 CFR 265.112, which was amended at 53 Fed. Reg. 37934 to reference the new permit modification procedures which sometimes apply with respect to closure plans at interim status facilities.

Section 725.214

This Section is drawn from 40 CFR 265.114, which was amended at 53 Fed. Reg. 34086, to add references to the tank regulations to the preface.

Section 725.218

This Section is drawn from 40 CFR 265.118, which was amended at and 53 Fed. Reg. 37934, to reference the new permit modification procedures which sometimes apply with respect to post-closure plans at interim status

facilities.

Section 725.241 and 725.247

These Sections are drawn from 40 CFR 265.141 and 265.147, which were amended at 53 Fed. Reg. 33950. The amendments closely follow the amendments to the financial assurance rules for permitted facilities, which are discussed above. The Board has responded to JCAR's comments above in connection with Section 724.241 and 724.247. (JCAR)

Section 725.290

This Section is drawn from 40 CFR 265.190, which was amended at 53 Fed. Reg. 34086, to use the preferred term "tank systems".

Section 725.293

This Section is drawn from 40 CFR 265.193, which was amended at 53 Fed. Reg. 34086, to add a reference in subsection (f)(3) to sealless valves, and to correct a cross reference in subsection (g)(3)(C).

The Board has also modified the note following Section 725.293(c)(4) to improve references to other programs. The reference to the pretreatment requirements of the Clean Water Act have been changed to reference the new, derivative Board rules in Parts 307 and 310. The broadside reference to the CERCLA notification requirements in 40 CFR 302 has been narrowed to the specific requirement in 40 CFR 302.6, which is incorporated by reference in Section 720.111. The Board has also referenced the equivalent State notification requirement in Section 750.410.

Section 725.296

This Section is drawn from 40 CFR 265.196, which was amended at 53 Fed. Reg. 34086. As is discussed above in connection with Section 724.296, the federal note which is the subject of this amendment is not in the Board rules. However, the Board has improved a reference to the CERCLA reporting requirements in 40 CFR 302.6.

Section 725.301

This Section is drawn from 40 CFR 265.201, which was amended at 53 Fed. Reg. 34086 to correct a cross reference in subsection (c)(3).

Section 726.120

This Section is drawn from 40 CFR 266.20 which was amended at 53 Fed. Reg. 31211. This concerns the exemption for products, such as fertilizer, which are used in a manner which constitutes disposal.

Section 728.101

This Section is drawn from 40 CFR 268.1, which was amended at 53 Fed. Reg. 31211. These amendments concern the "first third" landfill bans. The amendments delete old subsection (c)(3), which postponed the effective date

for certain CERCLA and RCRA corrective action wastes, and add subsection (c)(5), which allows certain delays until May, 1990. The amendmants also add Section 728.101(d), which references "waivers" under CERCLA.

Section 728.104

This Section is drawn from 40 CFR 268.4, which was amended at 53 Fed. Reg. 31211. The amendments modify the conditions under which a banned waste can be treated in an impoundment.

This, and several following sections, have references to statutory prohibitions under Section 3004 of RCRA. In an earlier Docket, the Board added Section 728.139, which contains the statutory prohibition, in order to minimize problems with possible incorporation by reference of a federal statute.

Section 728.105

This Section is drawn from 40 CFR 268.5, which was amended at 53 Fed. Reg. 31211. This Section allows case-by-case extensions to effective dates for bans. In an earlier Docket, the Board incorporated the USEPA procedures by reference, and provided that USEPA extensions are to be deemed Board extensions. It is unlikely that the Board could respond to these short-term USEPA extensions within the lifetime of the extension. The Board has updated the incorporation by reference.

Section 728.106

This Section is drawn from 40 CFR 268.6, which was amended at 53 Fed. Reg. 31211. This Section concerns petitions to allow land disposal of a restricted waste. In an earlier Docket, the Board adopted these procedures as petitions for adjusted standards addressed to the Board.

The amendments add Section 728.106(a)(4) and (5). The latter references "other laws" restricting waste disposal. The Board solicited comment as to whether there are any laws other than Section 39(h) of the Act and 35 Ill. Adm. Code 709 and 729, but received no response.

These amendments bumped existing Section 728.106(a)(4) to (a)(6). This is a Board addition to the information requirements which was adopted in a previous rulemaking. The Board needs to know the permit status of the applicant. This is omitted from the federal information requirements, since USEPA, as the permitting entity, already knows this.

Section 728.107

This Section is drawn from 40 CFR 268.7, which was amended at 53 Fed. Reg. 31211. This Section concerns the waste analysis requirements for complying with the landfilling bans.

Section 728.108

This Section is drawn from 40 CFR 268.8, which was amended at 53 Fed. Reg. 31211. The USEPA Section allows certain generators and operators to

avoid some bans under certain circumstances through May, 1990. Because of the short-term nature of this provision, the Board has incorporated the USEPA rule by reference, instead of setting it forth.

The Board has added the incorporations by reference litany to this Section. (JCAR)

40 CFR 268.12 was also amended at 53 Fed. Reg. 31211. The Board has not adopted any equivalent to the USEPA schedules for regulating wastes, since these apply only to USEPA.

Section 728.130

This Section is drawn from 40 CFR 268.30, which was amended at 53 Fed. Reg. 31211. This Section concerns the prohibitions on solvent wastes, which were adopted in a previous Docket.

The USEPA rules include many dates which have already passed. These dates have generally been omitted from the Board rules. New bans whose dates have passed will become immediately effective as State rules as soon as the rules are filed.

As is discussed below, in order to comply with codification requirements, Tables CCW and CCWE have to be separated from the governing Sections and made Tables A and B.

These Sections contain many references to CERCLA response and RCRA corrective actions wastes. In a previous Docket, these terms were defined in Section 728.102, which is not involved in this rulemaking. These references are somewhat more complicated at the State level, since they have to deal with CERCLA and RCRA wastes from Illinois sites, other authorized states and USEPA administered programs. These problems are localized in the definitions.

Section 728.131

This Section is drawn from 40 CFR 268.31, which was amended at 53 Fed. Reg. 31211. This Section prohibits landfilling of certain dioxin-containing wastes. The amendments extend the compliance date for certain dioxin-containing wastes which are soil and debris which result from CERCLA response or RCRA corrective action.

There are a number of minor editorial problems with this Section. The provision concerning soil and debris is in 40 CFR 268.31(a)(1). However, it is impossible to codify this provision in this format, since there is no subsection (a)(2). The Code Unit requires that there be at least two entries at a level of subdivision. This immediate problem is resolved by placing the soil and debris at the end of subsection (a). However, this creates difficulties in cross referencing. In the USEPA rule the exception in 40 CFR 268.31(a)(1) is used as a defining Section for the waste in question. The Board has shifted the definition to subsection (b), which states the ban on dioxin contaminated soil and debris. The references to subsection (a)(1) have generally been changed to (b). Placing the definition in the exception is an editorial error by USEPA. The problem with this structure is illustrated by the cross reference in subsection (c) back to subsection (a)(1). This could

be construed as extending the compliance date for the dioxin waste itself.

Chemical Waste Management has pointed an editorial error in the proposal. (PC 6) The November 8, 1990 effective date for the ban in subsection (b) was omitted.

Section 728.132

This Section is drawn from 40 CFR 268.32, which was amended at 53 Fed. Reg. 31211. This Section bans the "California list" wastes. Note the 40 CFR 268.32(b) and (c) are reserved Sections.

The main purpose of the amendment appears to be to extend the compliance date for CERCLA response and RCRA corrective action wastes, as provided in Section 728.132(d).

Chemical Waste Management has pointed out an editorial error in subsection (d)(1). (PC 6) This subsection sets a November, 1989, ban date for wastes which are not CERCLA wastes. CERCLA wastes are extended to November, 1990, as provided in subsection (d)(2).

Existing 40 CFR 268.32(e) bans certain chlorinated solvents effective July 8, 1989, the date reflected in Section 728.132(e). The amendment appears to accelerate this ban to November 8, 1988. If adopted by the Board at this time, this would be a retroactive ban. Since even the July date will be passed before these rules are final, the Board has made this ban immediately effective as a State rule on filing. A similar problem has also been addressed in subsection (f). Note that the chlorinated solvents ban will have little effect in Illinois, since these wastes are already prohibited in 35 Ill. Adm. Code 729, adopted in R81-25.

Section 728.133

This Section is drawn from 40 CFR 268.33, which was amended at 53 Fed. Reg. 31211. This is a new Section which bans the "First third" wastes.

Section 728.140

This Section is drawn from 40 CFR 268.40, which was amended at 53 Fed. Reg. 31211. It concerns the applicability of the treatment standards of this Subpart.

Section 728.141 (not amended)

This Section is drawn from 40 CFR 268.41, which was amended at 53 Fed. Reg. 31211. However, the amendments concern only Table CCWE, Constituent Concentrations in the Waste Extract. For codification reasons, these had to be adopted as Table A, which appears at the end of the Part as though it were an appendix.

Section 728.142

This Section is drawn from 40 CFR 268.42, which was amended at 53 Fed. Reg. 31211. This Section contains treatment standards expressed as certain

technologies. The amendment authorizes treatment of certain halogenated organic solvents by burning in boilers or industrial furnaces, "in accordance with applicable standards".

Section 728.143

This Section is drawn from 40 CFR 268.43, which was amended at 53 Fed. Reg. 31211. This Section sets standards for land disposal by setting concentration limits in the waste itself, as opposed to Section 721.141, which sets standards for constituents in an extract. Most of the text of this Section consists of Table CCW, Constituent Concentrations in Waste. It is impossible to place this table into the text of the Section and meet codification requirements. It has therefore been factored out and presented as Table B, which will appear at the end of the Part.

Section 728.144

This Section is drawn from 40 CFR 268.44, which was amended at 53 Fed. Reg. 31211. This Section concerns "variances" from treatment standards. In a previous Docket the Board adopted these as adjusted standards using the mechanisms of Part 106. The amendments add subsections (h) through (l), which add procedures for "site specific variances". These too appear to be appropriate for adoption as "site-specific adjusted standards".

The USEPA rule includes language which appears to function appropriately as a "justification" for an adjusted standard. 40 CFR 268.44(h) requires the person seeking the "variance" to demonstrate that, "because the physical or chemical properties of the waste differs significantly from the waste analyzed in developing the treatment standard, the waste cannot be treated to specified levels or by the specified methods." This is a classical square peg, round hole justification for an adjusted standard.

The USEPA rule includes a requirement that the applicant include the information required for a USEPA regulatory petition in 40 CFR 260.20. This language is not included in the text of the equivalent 35 Ill. Adm. Code 720.120, and hence must be incorporated by reference. The Board has added an incorporation to Section 720.111, discussed above.

40 CFR 268.44(k) has an additional information clause which is doubly contingent: USEPA may (or may not) request additional information which may (or may not) be required to evaluate the application. This has been rendered as "the Board will request any additional information or samples which the Board determines are necessary to evaluate the application."

Section 728.150

This Section is drawn from 40 CFR 268.50, which was amended at 53 Fed. Reg. 31211. This Section prohibits storage of hazardous waste to evade the landfilling bans. A reference to Section 728.106 has been added to subsection (d).

Appendices

There are no amendments to the Appendices, which incorporate the USEPA

Appendices by reference. The Board has updated the references to the current CFR Edition anyway.

Table A

This is Table CCWE from 40 CFR 268.41, which was amended as discussed above. The amendment adds treatment standards, expressed as a concentration in the waste extract, for the First Third wastes. As discussed above, this Table cannot be presented within the text of Section 728.141 in the codification format. To help avoid confusion, the Board has added the acronym/federal table number "CCWE" to the heading of the table.

USEPA has pointed out an error for the entry for silver under the F006 heading. The correct number is "0.072".

Table B

This is a new table derived from Table CCW in 40 CFR 268.43. This contains treatment standards expressed as a concentration in the waste itself.

This Opinion supports the Board's Order of this same day. The Board will withhold filing of the final rules until October 13, 1989, to allow motions for reconsideration by the agencies involved in the authorization process.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 13th day of September, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board