ILLINOIS POLLUTION CONTROL BOARD
April 6, 1989

IN THE MATTER OF:	)	
	)	
UST FINANCIAL ASSURANCE	)	R89-4
USEPA REGULATIONS (10/26/88)	)	

PROPOSAL FOR PUBLIC COMMENT

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

By a separate Order, pursuant to Section 22.4(e) of the Environmental Protection Act (Act), the Board is proposing to add to the UST underground storage tank regulations.

Section 22.4 of the Act governs adoption of regulations establishing the RCRA program in Illinois. Section 22.4(e) provides for quick adoption of regulations which are "identical in substance" to federal regulations. Section 22.4(e) provides that Title VII of the Act and Section 5 of the Administrative Procedure Act (APA) shall not apply. Because this rulemaking is not subject to Section 5 of the APA, it is not subject to first notice or to second notice review by the Joint Committee on Administrative Rules (JCAR). The federal UST rules are found at 40 CFR 280. This rulemaking updates Illinois' UST rules to add financial assurance rules to the UST program, corresponding to USEPA financial assurance rules adopted at 53 Fed. Reg. 43370, October 26, 1988.

HISTORY OF UST RULES

The UST rules are contained in 35 Ill. Adm. Code 731. They were adopted and amended as follows:

R86-1	71 PCB 110, July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986.
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.
R88-27	Proposed on February 2, 1989; 13 Ill. Reg. 2650, March 3, 1989.

On February 2, 1989 the Board proposed to adopt regulations which are identical in substance to the major revisions to the USEPA UST rules which appeared at 53 Fed. Reg. 37194, September 23, 1988. This proposal assumes that the R88-27 proposal will be adopted prior to or at the same time as the financial assurance rule in this Docket.

The Board separated the financial assurance rules from the September 23 rules in order to avoid delaying adoption of the latter. Addressing the financial assurance rules separately appears to be more consistent with the USEPA procedure.

Until R88-27 the UST rules were addressed in the RCRA update Dockets. The Board separated the September 23, 1988 rules from the RCRA update process because of the size and timing of the rulemaking, and because of the desirability of developing a separate mailing list for persons interested only in tanks. The Board will consider recombining the RCRA and UST updates after initial adoption of the new program

STATUTORY AUTHORITY

The February 2, 1989 Opinion in R88-27 included a lengthy discussion of Section 22.4(e) of the Act, and other provisions of P.A. 85-861, the statutory basis of the UST program. The Board will reference that discussion here, and will only summarize it in this Opinion.

Section 22.4(e) of the Act requires the Board to adopt regulations which are "identical in substance" with USEPA's UST regulations. Ill. Rev. Stat. 1987, ch. 127 1/2, par. 154(b)(i) requires the Office of the Illinois State Fire Marshal to adopt regulations which are also to be "identical in substance"[1] to the same USEPA UST regulations. While the Fire Marshal is to adopt regulations only through "corrective action", the Board is to adopt the entire set of rules. In R88-27 the Board has proposed regulations which, among other things, reflect the delineation between regulations before and after "corrective action".

The financial assurance regulations bridge the corrective action gap. Operators are required to provide financial assurance immediately or in the near future. This will mainly be for tanks which are not known or suspected to be leaking. However, if a tank leaks, and the operator fails to take sufficient corrective action, the financial institutions will pay funds for corrective action which will be under the direction of the Agency. Thus the Fire Marshal will be responsible for receiving the financial assurance documents, but the Agency will be the recipient of any funds.

Ill. Rev. Stat. 1987, ch. 127 1/2, par. 154(b)(ii) allows the Fire Marshal to adopt "additional requirements". Section 22.4(e) of the Act allows the Board, upon receiving notice of such requirement, to adopt further Board requirements which are "identical in substance" to the additional Fire Marshal requirements. The R88-27 proposal followed the USEPA rules closely. The Board will consider adopting "additional requirements" following notice from the Fire Marshal.

HISTORY OF FINANCIAL ASSURANCE RULES

The Board has adopted two other federally-derived financial assurance systems: with the RCRA hazardous waste rules in 35 Ill. Adm. Code 724.240 and 725.240 et seq., and with the UIC underground injection control rules in 35

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[1]The phrase "identical in substance" has recently been defined in Section 7.2 of the Act, adopted in P.A. 85-1048. This Section may be subject to renumbering, since another Section 7.2, concerning fees, was adopted in the same Session.

Ill. Adm. Code 704.210 et seq. The UST financial assurance requirement is closely linked with these programs at the federal level. The UST requirement arises out of the same federal statute as the hazardous waste rules, the Resource Conservation and Recovery Act. Furthermore, at the federal level the regulations are explicitly linked. For example, 40 CFR 280.95(b)(1) pegs the financial test to the sum of the financial assurance amounts required under the three programs.

The complete history of the RCRA and UIC rulemakings are contained in the most recent RCRA update (R88-16, November 17, 1988). The following rulemakings were important in the adoption and amendment of the RCRA and UIC financial assurance rules:

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

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

R86-46 July 16 and August 14, 1987; 11 Ill. Reg. 13435.

R87-39 June 14, 1988; 12 Ill. Reg. 12999, August 12, 1988.

The RCRA hazardous waste financial assurance rules were originally adopted in R82-19, the UIC financial assurance rules in R85-23. The RCRA financial assurance rules were recently amended in R86-46 and in R87-39. These amendments are closely related to some of the issues discussed below.

The Board has also adopted, pursuant to State law, closure and post-closure care and financial assurance requirements for non-hazardous waste landfills:

R84-22C 66 PCB 463; November 21, 1985

As is discussed below, the USEPA rules include a number of provisions which need to be interpreted in light of R84-22C.

STATE FINANCIAL ASSURANCE REQUIREMENTS

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, State agencies which regulate the financial institutions and corporate guarantors, and the possibility of special State financial mechanisms.

As noted above, Section 22.4(e) 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 intepretations 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. For example, 40 CFR 280.94 restricts the use of bonds unless the Attorney General has certified that bonds are a legally valid and enforceable obligation in the state. This appears to be a requirement for program approval. For another example, 40 CFR 280.100 and 280.101 contain "prescriptions" and approval requirements for state insurance funds and alternative financial assurance mechanisms.

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. For example, 40 CFR 280.99 limits letters of credit to those from institutions "with authority to issue letters of credit in each state where used", and which are "regulated and examined by a state or federal agency". In Illinois, as determined in R84-22C, this means that the issuing institution must be regulated and examined by the Illinois Commissioner of Banks and Trust Companies.

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. Many of the issues have been discussed in connection with the RCRA and UIC financial assurance rules, most recently in R87-39.

ILLINOIS REGULATORY AGENCIES

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 Board will send each a copy of this Opinion and Order, together with a cover letter specifically requesting comment.

CHOICE OF LAW AND JURISDICTION IN MULTISTATE SITUATIONS

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 tank 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? 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. 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 tanks are located. (53 Fed. Reg. 43353, October 26, 1988) A business entity which guarantees the debts of an operator may be "doing business" in the operator's State, and may have to register with the Corporation Division.

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.

CERTIFICATION BY THE ATTORNEY GENERAL

40 CFR 280.94(b) allows an operator to use a corporate guarantee or surety bond only if:

> ... the Attorney(s) General of the state(s) in which the ... tanks are located has (have) submitted a written statement to the implementing agency that a guarantee or surety bond is a legally valid and enforceable obligation in that state.

In addition, 40 CFR 281.25 and 281.37 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 guarantee or bond is executed, rather than the law of the places where the tanks are located.

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. 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. The Board rejected these possibilities as unworkable. The Board instead 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 proposed to follow the same course in this matter. As is discussed in greater detail below, the Board has proposed to limit 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 under the proposal. Corporate guarantors will have to register with the Secretary of State. And, the guarantors and trustees will have to agree that Illinois law governs.

SHOULD FINANCIAL ASSURANCE DOCUMENTS BE DEPOSITED WITH THE STATE?

40 CFR 280.106, discussed below, appears to contemplate that the operator keep the financial assurance documents until after a release. This is much different than the hazardous waste and UIC financial assurance rules, and the Part 807 rules adopted in R84-22. USEPA indicates that the rules are written this way out of concern that the states may not be able administer a system of receiving financial assurance documents, because of the large number of tanks. (53 Fed. Reg. 43357, October 26, 1988) However, there is a question as to whether this adequately secures the State under State law. The Board specifically solicits comments on this, and the following discussion.

Consider a familiar example. Most banks require that a homeowner have fire insurance before they will lend money to buy a house. Most require evidence of insurance before they will loan the money. The federal rules place the State in the position of a bank which lends money, requiring

evidence of insurance within 30 days after the house burns down. If the owner didn't get the insurance, the bank can sue him, but probably won't be able to collect, since the homeowner will likely be bankrupt.

With the UST rules there is also a possibility of fraud and collusion between the financial institution and the operator. Suppose the operator establishes a trust fund at a bank which is also his business and personal lender. A release occurs which is likely to bankrupt the operator's business. The operator and bank would have an incentive to destroy the trust documents, and apply the proceeds of the trust to the operator's other debts prior to the bankruptcy. Since the State never received copies of the trust documents, it would have no way of proving that the trust ever existed. Beyond that, it would have to guess which financial institution provided the financial assurance before it could even sue and attempt discovery of records.

There is also a question as to whether the State acquires any legally enforceable rights in the absence of delivery of the documents. For example, some of the rules make the State the beneficiary of an insurance policy. Generally the beneficiary of such a policy acquires no rights absent notification: the insured and insurer can agree to modify the terms without consulting the beneficiary. Although the policy has provisions limiting cancellation, the parties to the contract would be free to modify these provisions. As a practical matter, the beneficiary cannot enforce its rights unless it knows they exist and has a copy of the policy.

The Board suggests that it might be advisable to exercise the discretion allowed in 40 CFR 280.106(c) by adopting a rule which requires delivery of the financial assurance documents to the State, in order to ensure that the mechanisms are enforceable under State law. The Board specifically solicits comment on this.

STATE MECHANISMS

The USEPA rules allow for two types of state mechanisms. 40 CFR 280.100 allows State mechanisms in general. 40 CFR 280.101 allows a State fund for financial assurance. (53 Fed. Reg. 43354, October 26, 1988) The Board has not proposed to adopt rules pursuant to these prescriptions.

Section 7.2 of the Act allows the Board to craft rules meeting this type of federal prescription only with respect to essential parts of the program. The state mechanisms are not essential to the UST program. They are not required for program approval and not necessary for the program to function.

The Fire Marshal may adopt State mechanisms. If so, the Board may consider adopting these pursuant to Section 22.4(e), following notification from the Fire Marshal.

Section 22.18 of the Act arguably sets up the Underground Storage Tank Fund as a State Fund which could be used to meet a portion of the financial assurance requirement. However, the fund cannot be used to pay third-party damage claims, and hence would not reduce the total amount of financial assurance, which is required to meet either clean-up costs or damages under Section 731.193. In that this use of the fund ends in 1991, it is best interpreted as an interim measure intended to provide funds for tanks which

are unable to obtain financial assurance because they are found to be leaking at the time they first apply.

CONDITIONS OF DEFAULT

The conditions of default are discussed in detail below in connection with Section 731.208.

The financial assurance system provides funds for corrective action and third party liability claims in the event there is a release from the tank and the operator is unable or unwilling to provide corrective action and pay damages. The release does not necessarily have to be caused by a violation of the regulations. And, the financial assurance is used only if the operator fails to take action himself. Rather than directly ensuring compliance with the regulations, the financial assurance is mainly directed at providing a pool of money in the event the operator becomes insolvent. The insolvency could result from the expenses associated with a release, or it could be a simple business failure.

FINANCIAL ASSURANCE FORMS

The USEPA rules set out the forms at length. Section 3.09 of the APA excludes standardized forms from the definition of "rule". The Code Unit prefers that forms not be placed in rules. At a minimum the forms would have to be moved to appendices, since it would be impossible to comply with some format requirements with these forms.

In the hazardous waste and UIC rules, the Board incorporated the USEPA forms rules by reference, and directed the Agency to promulgate forms based on the USEPA forms, with such changes as are necessary under State law. (35 Ill. Adm. Code 724.151). In R84-22, the Board promulgated forms, in an Appendix to the rules, to be used until the Agency forms became available.

In this proposal, the Board has incorporated the USEPA forms by reference, and required the operator to prepare the forms based on the federal rules, with required changes in wording. If the Board actually adopts the rules with this approach, it should be only an interim measure. If possible, the Board would prefer to have forms promulgated by the implementing agencies. USEPA has indicated that it expects the states to make minor changes in wording of the instruments to assure their validity under state law. (53 Fed. Reg. 43340, October 26, 1988)

The financial assurance forms may pose difficulties. The rules and forms refer to the "Director of the implementing agency". As discussed in R88-27, and elsewhere in this Proposed Opinion, in Illinois this could refer to the Fire Marshal or the Agency. The Illinois financial assurance forms need to be promulgated by one of these agencies, with the proper agency spelled out in the forms. The choice may be too complex to be left to the operators to decide on a case-by-case basis. It also opens the door to loopholes which might be used to prevent application of proceeds to a clean-up.

In the Order the Board has proposed to replace "Director of the implementing agency" in the text of the rules with "Fire Marshal". An operator initially deals with the Fire Marshal's Office, which is responsible

for ascertaining that the financial assurance is sufficient. Once a leak is confirmed, responsibility for the site passes to the Agency. One approach would be to provide that responsibility for administration of financial assurance also passes to the Agency. However, there is a major drafting problem with this approach.

The main ambiguity arises with respect to maintenance of the financial assurance documents between the time a leak is confirmed and the time a default occurs. For example, suppose an operator initiates corrective action, but becomes bankrupt before completing it. The bankruptcy would be a form of default which would render the operator incapable of completing corrective action, and would result in application of the proceeds of the financial assurance. Which agency should be responsible for the routine maintenance of the financial assurance documents during the interval between confirmation of the leak and the default? For example, who would receive and review a self-insurance financial test if the operator's fiscal year ended during this interval?

The drafting problem arises because, if the Agency is to take over routine administration following a release, each of the numerous routine provisions of the rules and instruments have to be edited to allow for this possibility. This might open the door to loopholes created by situations in which the rules were ambiguous as to which agency was in charge. The Board therefore suggests that the entire financial assurance system needs to be under the control of one agency.

As drafted, the statute places the Fire Marshal initially in control. Hopefully releases will be rare, such that most operators will always be under the Fire Marshal's control. The Board has therefore proposed that the Fire Marshal have complete control of the financial assurance process. In the event of a release, the Agency and Fire Marshal will have to work together to make certain that financial assurance is available if the operator is unable to provide corrective action.

The Board notes, however, that the Agency has an ongoing financial assurance program with respect to the related hazardous waste and UIC programs. Would it not make more sense to direct all financial assurance to the Agency?

The Agency contended in R84-22, and in connection with the hazardous waste rules, that it is impossible to administer the financial assurance system with operators preparing forms based on the rules, whether federal or state. The Agency insists on the use of preprinted forms. If operators were left to prepare their own forms, the Agency would be forced to compare them word by word with the rules to assure that the documents conform with the rules. Typographical errors could render the legal obligations unenforceable. Worse, operators could deliberately introduce subtle changes in wording which would benefit them in the event of an occurrence. The Board suggests that the UST financial assurance rules need eventually to require the use of preprinted forms, and specifically solicits comment as to which agency should promulgate the forms.

GENERAL ORGANIZATION OF THE PROPOSAL

The proposal is to add a new Subpart H to the proposal in R88-27. Although there is actually very little cross-referencing, to be completely understood the proposal needs to be read alongside the Order in R88-27.

The following Sections are numbered from the USEPA rule according to a simple correspondence rule:

USEPA Section number	280.90
Insert zeros to right of decimal point so there are 3 digits after decimal	280.090
Add constant	451.100
Section number in 35 Ill. Adm. Code	731.190

In the following discussion the Board will avoid unnecessary repetition of the CFR and Ill. Adm. Code numbers for Sections. In some cases a reference to the Board Section number should be taken as a reference to the underlying CFR number, and vice versa.

DETAILED DISCUSSION

Section 731.190

This is an applicability Section, which is drawn from 40 CFR 280.90, as adopted at 53 Fed. Reg. 43370, October 26, 1988. The financial assurance requirements do not apply to UST's which are excluded or deferred from regulation under Section 731.110(b) or (c), or to State and federal entities.

There is a question as to the interpretation of 40 CFR 280.90(c). Is the federal rule intended to exempt all state government, or only the State in which the facility is located? When shrunk to a State rule, should "liabilities of a state" become "liabilities of the State" or "liabilities of any state"? For purposes of the Illinois program, are governmental subdivisions of other states subject to the financial assurance requirement if they own a UST in Illinois? Whether this is a real problem depends on whether any such facilities exist. The Board specifically solicits comment as to whether any such exist.

This ambiguity arises because the USEPA rules are regulating many states. In most cases "state" means "the State which is applying for the program". This could be a contrary example. Another is discussed below in Section 731.195.

The Board believes the rationale for the exemption in the federal rules is to avoid requiring servicing fees for financial assurance for facilities which are ultimately state taxpayer responsibilities anyway. However, when this is shrunk to a State rule it could shift responsibility from the taxpayers of one state to the taxpayers of Illinois. Furthermore, in a USEPA-administered program, USEPA can sue any state. However, it could be very difficult for one state to force another to pay clean up costs, since this might involve an original action before the United States Supreme Court, and the other state might be able to claim sovreign immunity for damage actions. Therefore, a provision exempting other states makes no sense at the State

level. The Board specifically solicits comment on this interpretation.

Units of local government are subject to the financial assurance requirement, although the date is delayed.

Section 731.190(a) provides that financial assurance is required only for petroleum UST's. Hazardous substance tanks are not required to provide financial assurance.

Section 731.191

This Section sets dates through October 26, 1990, for compliance with the financial assurance requirements. One of these dates has already passed. Operators with 1000 or more tanks, or with a tangible net worth in excess of $20 million, were required to provide financial assurance by January 26, 1989. In Illinois these operators face practical problems as to how to comply with this requirement in the absence of an authorized agency with regulations and forms in place. There is a question as to whether Section 22.4(e), and federal law, require the Board to adopt a retroactive requirement as State law, or whether it is sufficient to simply make the requirement immediately effective upon filing of the State rule. The Board suggests that it would be a waste of enforcement resources to attempt enforce a retroactive requirement which may have been impossible to comply with, and that any enforcement during this period should be under federal law. The Board has proposed to follow the latter course and require financial assurance by the time these rules are filed, but specifically solicits comment.

It is arguable that even the immediately-effective requirement would be unduly burdensome. However, the affected public has had notice by way of the federal rules, and will have had notice by way of this proposal, well in advance of the effective date.

There may be practical problems with compliance with the immediately-effective State rules. There may not be time between the time the Board adopts the final rule and its filing and effective date for persons to obtain financial assurance in conformity with State law. There may be a need for a transitional rule which deems persons in compliance with the federal financial assurance requirements to be in compliance with State requirements for a period of time.

As was discussed in R88-27, the Board has proposed to repeal the delayed compliance date for the UST program in Illinois. The result of this will be a State UST program which will operate in parallel with the federal program pending authorization. The transitional rule for financial assurance may need to extend up to the point of authorization of the Illinois program, to avoid requiring separate State and federal financial assurance while the federal program continues in Illinois. The Board specifically solicits comment on this also.

40 CFR 280.91(c) requires financial assurance from "local government entities" by October 26, 1990. The Board has substituted the Illinois term "units of local government", which is defined below.

Section 731.192 Definitions

The introductory paragraph, and several definitions, provide that terms "shall have" the meanings given. This has been edited to "have". "Shall" is surplusage, in that there is no future date associated with the definitions, and there is no sanction if the terms fail to take the meanings given. The Board has generally restricted the use of "shall" in the rules to situations where a person "shall" do something, or else a sanction will happen.

The definition of "accidental release" provides that it means a release which results in a need for corrective action "and/or" compensation for bodily injury. The Administrative Code Unit discourages the use of "and/or". In normal English "A or B" may mean "A or B or both". The Board has followed the Code Unit's convention, and shortened "and/or" to "or". In these rules, if the Board means "either A or B (not both)", the Board will so specify.

The next definition is "bodily injury". This is related to the definition of "property damage", which is discussed below. Section 731.193 requires operators to have financial assurance "for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases." The terms "bodily injury" and "property damage" therefore define the scope of a portion of the financial assurance requirement. They will also appear in the text of insurance policies used to satisfy the insurance requirement.

The USEPA definition of "bodily injury" is that it has the meaning given by "applicable state law". Since these rules will apply to tanks in the ground in Illinois, the applicable state law will always be Illinois law. (53 Fed. Reg. 43334, October 26, 1988) However, so far as the Board has been able to determine, there is no definition of these terms in Illinois law. The Board specifically solicits comment on whether this is true.

The effect of adopting the USEPA definition in Illinois would be equivalent to leaving these terms undefined. However, these definitions are essential to the UST program. If the terms are not defined, 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.

In the preamble 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 proposed to use the ISO definitions of "bodily injury" and "property damage", but specifically solicits comment.

The Board has reviewed the text of these definitions, and finds no problems with the language of these two definitions themselves. However, the Board specifically solicits comment as to whether these definitions omit damages which should be covered, or include damages which should not be covered.

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 proposed to adopt definitions of these ISO terms also. However, there may be problems associated with these terms. First, the terms are not specifically directed at storage tanks. Second, the terms may conflict with the USEPA terms "occurrence" and "accidental release".

The ISO definition of "environmental damage" requires that a release be "injurious". In the context of financial assurance for petroleum UST's, this limitation is unnecessary. Any release of petroleum from a UST is "injurious". There is no reason to leave the insurer the option of arguing that a release of gasoline to groundwater is not "injurious" so long as you don't try to drill a well or smoke in the basement.

The ISO definition of "pollution incident" is much broader than needed for UST coverage, including releases of caustics and wastes. However, it does not specifically include release of petroleum. This would leave insurers free to argue that the coverage applies to releases of "bads", but not "goods" such as gasoline.

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 proposed to resolve 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 paragraph (2) of the endorsement form of 40 CFR 280.97(b)(1), incorporated by reference in Section 731.197(b). 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.

The above discussion assumes that the "applicable state law" is Illinois law. As is discussed in general above, the USEPA rules contemplate that in a federal program an operator might purchase insurance in one state to cover

tanks in another state. In such a situation the "applicable state law" might not be the law of the state in which the tanks are located. The Board has above rejected this possibility in Illinois.

40 CFR 280.92 includes a definition of "Director of the implementing agency." The financial assurance rules and instruments give certain rights to the Director. This is apt to cause some problems in the Illinois rules, since, as discussed above, two different agencies are responsible for aspects of the program. The Board has provided cross references to the definition of "implementing agency" in Section 731.112, and to Section 731.114, which are in the R88-27 proposal. The effect of this is to defer the question of the division of authority to R88-27.

The definition of "owner or operator" specifies that, when they are separate "parties", the term refers to the one which is obtaining the financial assurance. Section 731.190(e) allows either to obtain financial assurance, but provides that both are liable in the event of failure. The Board has replaced "party" with the defined term "person". In the Board's procedural rules, a "party" is a person involved in a contested case.

"Pollution incident" is an ISO definition inserted, and modified, as discussed above. "Property damage" has been modified to insert the ISO definition, also as discussed above.

In 40 CFR 280.92, "provider of financial assurance" includes the issuer of a state-required mechanism or the state. These relate to 40 CFR 280.100 and 280.101, which allow for state-required mechanisms or for the State itself to provide financial assurance. Since the Board has not proposed to use these mechanisms, the references have been deleted from the definitions.

40 CFR 280.92 defines "substantial business relation" as the extent of a business relationship necessary under state law to make a guarantee contract enforceable. This appears to be a directive from USEPA to write a definition which limits guarantees to those which are valid in Illinois. (53 Fed. Reg. 43345, October 26, 1988)

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 RCRA hazardous waste and UIC rules limit these guarantees to those from a parent corporation to a subsidiary. A subsidiary is defined as a corporation which is more than 50% owned by the parent guarantor. (See 40 CFR 264.141 and 264.143(f).) 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 UST rules mainly affect petroleum marketers. This industry is quite a bit different than the waste industry in that it is involved in selling a product to the public. Specifically, there may be a "substantial business relationship" arising from the sale of petroleum by manufacturers to wholesalers, and by wholesalers to retailers. It is possible that a supplier of petroleum may want to guarantee the clean up costs of its customers, even though they are independent entities. However, the normal business practice in the industry is for the buyer to indemnify the seller. (53 Fed. Reg. 43345, October 26, 1988) The Board finds in the hazardous waste rules or R84-22C no guidance on this question of whether such guarantees would be valid in Illinois, and has hence proposed no language. The Board specifically solicits comment from any persons who may be interested in this form of financial assurance.

As noted above in Section 731.191, local government units do not have to get financial assurance until October 26, 1990. The Board has proposed to add a definition of "unit of local government", a term used in the Illinois Constitution, and to use this term above in relation to the delayed requirement.

Section 731.193

This Section sets the amount of financial assurance required. Unlike the hazardous waste and UIC rules, the amounts are set by rule, rather than by a cost estimate and plan. The required amounts represent the total for corrective action and third party liability. While Section 731.193(a) sets limits on a per-ocurrence basis, Section 731.193(b) sets annual aggregate limits. Petroleum marketing facilities and other large throughput facilities are required to have at least $1 million per occurrence. Smaller facilities which do not market petroleum must have at least $500,000 per occurrence. Operators of 100 or fewer tanks must have an annual aggregate of $1 million. Larger operators must have an annual aggregate of $2 million.

USEPA expects an annual probability of 11.8% that a tank will leak during the first five years of the program. The annual aggregates are set at a level which is well below the levels which the expected leak rate implies. USEPA has done this out of concern that annual aggregate coverage in excess of $2 million may be unavailable. USEPA has justified this on the basis that the per occurrence amount has been set high enough that 99% of occurences will be covered. (53 Fed. Reg. 43337, October 26, 1988)

Section 731.194

This Section specifies the allowable mechanisms and combinations of mechanisms by which the operator provides financial assurance. 40 CFR 280.94(b) allows guarantees or surety bonds only if the Attorney General certifies that the mechanism is a legally valid and enforceable obligation. This is related to the definition of "substantial business relationship"

discussed above. The Attorney General certification is also discussed in general above. In this situation the rules will be in the definitions, discussed above, and in the provisions governing the guarantee and bonds, which are discussed below. The Board will seek to comply with 40 CFR 280.94(b), but will not adopt its text.

There will be a hole left in the subsection lettering at this point. The Board will not reletter the subsections, so as to preserve the close correspondence with the USEPA Section numbers. The Code Unit will not allow the insertion of "reserved" to mark the hole, so this is apt to cause some confusion. However, this is less than would result from relettering.

40 CFR 280.94(c) refers to the financial test under "this rule". In the Administrative Code this would probably be construed to mean "this Section". However, the financial test is not in this Section. The reference is probably intended to be to the entire Subpart, i.e. the entire "rule" which appeared in the October 26 Federal Register.

The financial test applies only to business entities. USEPA has indicated that it intends to propose a financial test for units of local government. (53 Fed. Reg. 43343, October 26, 1988)

Section 731.195

This Section governs the financial test which the owner or operator, or guarantor, must meet to avoid providing hard financial assurance. 40 CFR 280.95 refers to the "owner or operator, and/or guarantor." For the reasons discussed above, the Board has replaced "and/or" with the shorter and more correct "or".

The operator is allowed to meet the financial test of either subsection (b) or (c).

40 CFR 280.95(b) and (c) contain subsections, but there is no text following the main subsection label ("(b)" or "(c)"). This is prohibited by the Code Unit. The Board has inserted headings to comply with Code Unit requirements. The Board specifically solicits comment as to whether these headings are properly descriptive of the contents.

To meet the financial test of subsection (b) the operator, among other things, must have a tangible net worth of at least ten times the total required financial assurance under the UST program, the RCRA hazardous waste program and the UIC program. This raises a question as to the meaning of "state", similar to that discussed in connection with Section 731.190 above.

There are probably many multistate UST operators. As the Board understands the UST program, the multistate operators will have to provide separate financial assurance to each authorized state in which they have tanks. In other words, after the program has been delegated to the states, there appears to be no mechanism by which a multistate operator could provide national financial assurance to USEPA covering all tanks nationwide. However, with respect to the financial test, the financial multiple appears to be based on all required financial assurance nationwide. This makes sense in that it is compared to nationwide tangible net worth of the guarantor. (53 Fed. Reg.

43341, October 26, 1988)

40 CFR 280.95 cites to the USEPA financial assurance rules, and to the rules which govern authorization of states. The Board has proposed to reference the USEPA rules, the corresponding Illinois rules, and the USEPA approval rules. This will require aggregation of: amounts required to be supplied to USEPA in states where USEPA administers the program; amounts to be supplied to Illinois; and, amounts to be supplied to other states with approved programs.

With respect to financial assurance for UIC wells, petroleum production injection wells are regulated in Illinois by the Department of Mines and Minerals. The Board has cited to these rules as well as its own UIC rules, which apply to hazardous waste injection and other types of wells. Note that petroleum marketers are more likely to have petroleum injection wells than hazardous waste wells.

40 CFR 280.95 is quite specific in citing to the USEPA financial assurance requirements. These provisions would become very lengthy if the Board provided exact citations to all of the USEPA, Board and Mines and Minerals Sections which require financial assurance. Instead, the Board has shortened these to reference only the Parts. There is no change in meaning, since USEPA cites all of the Sections which require financial assurance.

The financial assurance provided to other states is identified by referencing the USEPA rules governing approval of the UIC, hazardous waste and UST programs. These are 40 CFR 145, 271 and 281.

These references to federal regulations are not incorporations by reference. The Board is not, for example, requiring persons to comply with these federal regulations. These references serve to identify the various types of financial assurance by citing to the federal regulations which require that it be provided, or which govern approval of state programs which require that it be provided. These references therefore do not need to be placed in the incorporations by reference Section (Section 731.113 in R88-27), and there is no limitation on future amendments.

Section 731.195(c) allows operators which meet the RCRA financial assurance test for third-party liability insurance to qualify for the UST test. The UST amounts are substituted into the RCRA formula.

The Board has referenced the Board equivalent of 40 CFR 264.147, which is 35 Ill. Adm. Code 724.247. The way this provision is worded, the operator demonstrates that it meets this test, as opposed to demonstrating that it has met this test as determined by another agency. A reference to the USEPA rule at this point would be an incorporation by reference, in that the rule would be defering to the federal rule for the contents of the test, as opposed to defering to a federal action. The problems associated with incorporations by reference are avoided by referencing the equivalent State rule.

40 CFR 280.95(c)(5)(i) has an apparent typographical error which could lead to a misreading of the rule. "Letter form" should read "letter from". Compare the similar language in 40 CFR 264.147.

As is discussed in general above, Section 731.195(d) incorporates the federal forms by reference, and requires the operator to use the federal forms, with appropriate changes.

Section 731.196

This Section governs "guarantees". This is a mechanism in which another, non-financial business entity promises that it will pay any corrective action or damage claims if the operator fails to do so. (53 Fed. Reg. 43343, 43345 and 43355, October 26, 1988)

40 CFR 280.96(a)(1) and (2) allow guarantees from parent corporations to subsidiaries, and from firms "engaged in a substantial business relationship" with the operator. This is related to the definition of "substantial business relationship", and to 40 CFR 280.94(b), which are discussed above. In R84-22 the Board determined that, under Illinois law, any ownership interest in the operator is sufficient to support an enforceable guarantee. The Board has edited this provision to be consistent with the discussion above. The Board has also solicited comment as to other business relationships which might support the guarantee.

40 CFR 280.96(b) requires the guarantor to submit financial statements within "120 days of" the close of the fiscal year. From the context it is clear that this means "120 days after".

Section 731.196(c) incorporates the federal form by reference, and requires the operator or guarantor to prepare and execute a form based on the federal rule, with appropriate changes in wording. The problems associated with this are discussed in general above.

The Board has proposed to add Section 731.196(e) to limit guarantees to those governed by Illinois law, as discussed in general above. Before making a guarantee satisfying the financial assurance requirement, the corporation must register with the Secretary of State. The guarantor must include a letter identifying its registered agent in Illinois, state that the guarantee was executed in Illinois and agree that Illinois law governs the guarantee.

In R86-44 the Board criticised the federal hazardous waste guarantee forms as being weak on the guarantor's obligation and the conditions under which the guarantor has to pay. Although USEPA has addressed some of these concerns in the forms in 40 CFR 280.96(c), the UST forms are still weak. There is no clearly stated obligation of the operator to pay a sum certain. Rather than being a guarantee, the form is more like an original undertaking of the "guarantor" to pay the clean-up costs. To collect, the Fire Marshal may have to prove that the operator failed to carry out the clean-up. The Board is concerned that the guarantor may have a defense in that the title of the document is legally misleading, and wishes to avoid this type of construction. The Board specifically solicits comment on this.

The Board suggests that forms similar to those contained in 35 Ill. Adm. Code 807.App A, Illustration H, adopted in R86-44C, would be more effective. An operator using a parent corporation financial guarantee under Part 807 has to execute a bond with the parent as a surety. The operator is obligated to pay unless it meets the conditions. The primary obligation is worded as a

bond, which places the burden on the operator to show that it met the conditions. USEPA has rejected this as unnecessary, but acknowledges that states may need to change forms to meet state law. (53 Fed. Reg. 43344 and 43345, October 26, 1988) The Board specifically solicits comment on this.

Section 731.197

This Section allows the operator to obtain financial assurance by obtaining liability insurance from an insurer or risk retention group.

40 CFR 280.97(c) limits acceptable insurance to that which is issued by an insurer or group which is "licensed to transact the business of insurance or eligible to provide insurance as an excess or surplus lines insurer in one or more states." As far as the federal rule is concerned, licensing in one state is sufficient to qualify an insurer in all states. For the reasons discussed above, the Board has proposed to limit insurers to those which are licensed by the Illinois Department of Insurance.

Section 731.198

This Section allows the operator to meet the financial assurance requirement by providing a surety bond. In the event there is a release which the operator fails to correct, the surety funds a standby trust, which is then available to pay for the clean up.

40 CFR 280.98 limits sureties to those which are acceptable under the latest Circular 570 of the U.S. Treasury. For the reasons discussed above, the Board has proposed to limit sureties to those which are licensed by the Illinois Department of Insurance. In R84-22 the Department of Insurance indicated that most sureties on Circular 570 are licensed in Illinois, so that this will not restrict the availability of sureties.

Unlike the hazardous waste and UIC rules, UST rules do not include a "performance bond" as such. The bond allowed by this Section is a forfeiture bond in which the surety does not have the option of performing the corrective action instead of paying the penal sum.

Section 731.199

This Section allows the operator to meet the financial assurance requirement by delivering a letter of credit to the Fire Marshal. In the event of a default, the Fire Marshal writes a sight draft, which it presents to the financial institution through banking channels. The institution pays the amount of the draft into a standby trust fund. The institution then has to try to collect the amount of the draft from the operator as though it were a loan.

For the reasons discussed in general above, the Board has proposed to limit letters of credit to those from financial institutions which are regulated and examined by the Illinois Commissioner of Banks and Trust Companies. This provision also limits letters of credit to those from institutions with authority to issue them. In addition to regulatory approval in Illinois, institutions must have authority to issue letters of credit under the laws of the state in which they were organized, and this authority must be

reflected in their charter.

The Board has proposed no equivalents for 40 CFR 280.100 and 280.101, which allow for financial assurance by way of alternative State-required mechanisms, or by a State fund. The merits of a State fund are discussed in general above.

Section 731.202

This Section allows the operator to satisfy the financial assurance requirement by establishing a trust fund. USEPA indicates in the preamble that states are free to limit trusts to those established in their jurisdictions. (53 Fed. Reg. 43356, October 26, 1988) In R84-22 the Board determined that trustees must either be regulated by the Illinois Commissioner of Banks and Trust Companies, or comply with the Foreign Corporations as Fiduciaries Act (Ill. Rev. Stat. 1987, ch. 17, par. 2801 et seq.). For the reasons discussed above, the Board has proposed to so limit trusts. In addition, operators and trustees will be required to agree that the trust is governed by Illinois law.

Section 731.203

This Section requires that an operator using certain mechanisms establish a standby trust to receive the proceeds of certain financial assurance mechanisms. In the event of a default, the financial institutions pay the proceeds into the standby trust. The Fire Marshal then directs the trustee to pay claims.

The Board has proposed to adopt the standby trust. However, in R84-22 the Board determined that the standby trust was not necessary in Illinois, since Section 21.1 of the Act created a fund in the State Treasury to receive the proceeds of financial assurance. The financial mechanisms of 35 Ill. Adm. Code 807 therefore provide for payments directly to the State. This avoided imposing on the regulated community the costs associated with maintaining the standby trust, and placed the State in a more secure position in the event of a default. (53 Fed. Reg. 43355, October 26, 1988)

Section 22.13 of the Act creates the "Underground Storage Tank Fund". The Board specifically solicits comment as to whether the proceeds of the financial assurance mechanisms could or should be made payable to this, or another fund, avoiding the necessity of a standby trust fund.

Section 731.204

This Section allows the operator to substitute financial assurance mechanisms, so long as the total amount satisfies the requirements of Section 731.193 as to amounts.

Section 731.205

This Section allows the provider of financial assurance to cancel by giving 60 to 120 days notice to the operator, depending on the type. The operator has 60 days to obtain alternate financial assurance. If the operator fails, he must notify the Fire Marshal. (53 Fed. Reg. 43356, October 26,

1988)

Section 731.206

This Section governs reporting by the operator with respect to financial assurance. The operator has to submit forms documenting current evidence of financial responsibility within 30 days after a release from a tank, and after receives notice of incapacity by a provider of financial insurance. Incapacity of the provider may be caused by bankruptcy, revocation of authority or failure to meet a financial test.

Section 731.206(b) requires the operator to certify compliance with the financial assurance requirements as a part of the notification form for a new tank.

40 CFR 280.106(c) allows the implementing agency to require the operator to submit evidence of financial assurance at other times. The rule does not specify whether this is to be done on a case-by-case basis, or by rule. As discussed in general above, the Board suggests that the rules need to require actual prior filing of financial assurance documents with the State, and specifically solicits comment. (53 Fed. Reg. 43357, October 26, 1988)

Section 731.207

This Section requires the operator to maintain the financial assurance documents at the site or at its place of business. This is subject to the discussion of Section 731.206(c) above.

Apart from the problems noted above, this Section appears to allow a multi-state operator to maintain the financial assurance documents outside of Illinois. The system under which the operators keep the instruments depends on the Fire Marshal conducting inspections to make sure operators actually have the documents. This may not be feasible if the documents can be kept out of State. USEPA does not address the question of whether documents can be kept out of state. (53 Fed. Reg. 43358, October 26, 1988) The Board specifically solicits comment as to whether it might be necessary to require Illinois documents to at least be kept in the State.

40 CFR 280.207(b)(5) includes a reference to documents concerning a State-required mechanism. Since this is not being proposed, the reference has been dropped. The Board will leave a hole in the subsection numbering, so as to avoid disrupting the simple correspondence between Board and USEPA numbering.

Section 731.208

40 CFR 280.108(a) provides that the implementing agency is to require financial institutions to fund the standby trust if the operator fails to establish alternate financial assurance within 60 days after cancellation "and" if the agency determines or suspects that a release has occurred from the tank, or if there is a final determination that payment out of the fund is needed, as discussed below. There are several problems with this language.

First, 40 CFR 280.108(a)(1) has subparagraphs, but no language at the

(a)(1) level. This is prohibited by the Code Unit. The Board has proposed to insert the conjunction "Both:" at the (a)(1) level to satisfy this Code Unit requirement. This assumes that the conjunction "and" at the end of subsection (a)(1)(i) is correct. As discussed in the following paragraph, "Either: ... or" may be what USEPA intended. (53 Fed. Reg. 43359, October 26, 1988)

Second, the USEPA rules frequently use "and" to mean "or", and vice versa. As worded, the USEPA rule requires funding of the standby trust on cancellation of instruments only if the implementing agency suspects a release. This makes some sense in that one would not want to trigger a default in the absence of a leak. On the other hand, the cancellation of the instrument and the operator's failure to obtain alternative financial assurance may be sufficient reason to suspect a leak. As discussed above, there may be situations in which it would be to the operator's and financial institution's advantage to cancel the financial assurance once they know about a release. They might withhold this information from the agency until after the cancellation was effective. Also, it is possible that financial institutions in this business will establish an information sharing network to warn each other of suspected losses. If an institution found independent evidence of a release, it would cancel and warn other financial institutions. In this situation an operator without knowledge of the release might be making a good faith effort to obtain alternate assurance. In either of these situations the implementing agency should have authority to require the standby trust to be funded, even though it had no direct evidence of a leak. The Board specifically solicits comment on the above discussion.

Since the agency can require the standby trust to be funded on suspicion of a leak, there is a possibility that the suspicion will be unfounded. Section (4) of the trust document, specified by 40 CFR 280.103(b), allows for refunds in such a case.

As discussed above, the rules differentiate the funding of the standby trust from the application of proceeds from the standby trust to pay claims. Section 731.208(b) concerns when the implementing agency draws on the standby trust. These could occur at the same time.

The implementing agency draws on the standby trust under one of three circumstances. Section 731.208(b)(1) allows the agency to draw on the trust when the agency makes a "final determination" that a release has occurred, that corrective action is needed and that the operator, after receiving notice and the opportunity to comply, has not conducted corrective action. Section 731.208(b)(2) allows the agency to draw from the standby trust: if it receives certification from the operator that a claim should be paid to a third party; or, if a third party has a final judgment against the operator and the agency determines that it has not been satisfied.

This Section assumes that a standby trust will be used. As discussed above, there are arguments against the necessity of standby trusts at the State level. This Section would require substantial revision if a State fund were to be used to receive proceeds directly.

Section 731.209

This Section releases the operator from the financial assurance

requirements after a tank has been closed, and any corrective action completed.

Section 731.210

This Section requires the operator to notify the Fire Marshal within 10 days after commencement of bankruptcy proceedings naming the operator as the debtor. A guarantor has to notify the operator within 10 days of the guarantor's bankruptcy. The operator is required to provide alternate financial assurance within 30 days after the bankruptcy, or loss of authority, of of the provider of financial assurance.

40 CFR 280.110(c) and (d) include provisions concerning State mechanisms. Since the Board has not proposed to adopt any of these, the provisions have been ommitted.

Section 731.211

This Section requires the operator to replinish the financial assurance after the standby trust has been funded. The operator must do this by the anniversary date of the mechanism from which funds were drawn.

This proposed Opinion supports the Board's proposed Order of this same date. The Board will accept written public comment for a period of 45 days after the date of publication of the proposed rules in the Illinois Register.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 12th day of April, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board