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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

R93-4

HR-8J

P.C. #8

SEP 27 1993

Ms. Dorothy Gunn
Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Dear Ms. Gunn:

The United States Environmental Protection Agency (U.S. EPA) has reviewed the Illinois Pollution Control Board's (Board) May 27, 1993, Proposed Order of RCRA Update R93-4, which is analogous to the RCRA Cluster III rules that appeared in the Federal Register between July 1, 1992, and December 31, 1992.

Please find enclosed our comments on the proposed rules, as well as responses to the regulatory questions raised in the Proposed Opinion which accompanied the proposed Order. Mr. Gary Westefer, of my staff, previously discussed our responses with Ms. Anne Manly of the Board.

Please contact Mr. Westefer at (312) 886-7450, if you have any questions, or are in need of further assistance.

Sincerely yours,

Norman R. Niedergang
Associate Division Director for RCRA
Waste Management Division

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S COMMENTS ON ILLINOIS' PROPOSED RULES PACKAGE R93-4, ANALOGOUS TO RCRA CLUSTER III RULES.

1. **Part 703** - No comment.

2. **Part 720** - No comment.

3. **Part 721**

a. Section 721.103

The Board has solicited comment on the Board Note which clarifies exclusion levels. We find the clarification acceptable.

b. Section 721.131

The Board has solicited comment on whether Federal amendments to 40 CFR Part 261.31 have the effect of lifting the Federal stay of this regulation. The Board's interpretation is correct: the Federal amendments have the effect of lifting the stay, and so the State stay should also be lifted.

4. **Part 722** - No comment.

5. **Part 724**

a. Section 724.247

The Federal rule at 40 CFR Part 264.147(h)(4) specifies that ". . . [t]he trustee of the standby trust fund must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency." (Emphasis added.) The Board has concluded that ". . . there are no practical situations where a Federally regulated entity doing business in Illinois will not also be regulated by the State." Accordingly, the Board proposes to substitute the language, ". . . regulated and examined by the Illinois Commissioner of Banks and Trust . . . or who complies with the Corporate Fiduciary Act (Ill. Rev. Stat. 1991, ch. 17 . . .)" in lieu of the language underlined above.

The Board should recognize that nothing in the Federal regulation requires the standby trust to be an in-state institution. The language of the Federal regulation is ". . . Federal or State agency." It does not say that the State agency has to be in the State where the owner or operator who is obtaining the standby trust is located. The Board's proposed change seems to contemplate that the standby trustee be an Illinois-regulated entity. The Board may wish to consider that a company doing business here may want to establish the standby trust in a different State.

b. Section 724.414

The Board solicited comment on the renumbering of this Section to correlate with the Federal regulations, and the citing of 35 IAC 106 Illinois Petition Process to provide an equivalent to U.S. EPA's petition process.

The U.S. EPA agrees with the changes proposed in Section 724.414.

c. Sections 724.670 through 724.673 (Subpart W)

i. The Board solicited comments on whether 1) the U.S. EPA cited a non-existent stay to the drip pad provisions in 57 FR 61493, 2) the U.S. EPA had appropriately terminated the stay, and 3) the drip pad exception is a HSWA requirement.

Our responses to these questions are the following:

Item 1 - The Board has correctly terminated the stay on drip pad provisions. The Federal stay was terminated in the December 24, 1992, Federal Register;
Item 2 - The Board has correctly interpreted that there was no stay on June 6, 1992 as was reported incorrectly at 57 FR 61493; and
Item 3 - The preamble to the December 6, 1990, Federal Register indicates that the Wood Preserving Rule is a HSWA provision.

ii. In Section 724.673 (3)(A), the Board cites that owners and operators must manage residues in accordance with 35 IAC 721 through 728, and Section 3010 of RCRA. This appropriately covers the Federal equivalent of 40 CFR Parts 261-268, and Section 3010 of RCRA. However, the citation does not cover Part 270 which is also cited in the corresponding Part 264.573.

d. Section 724.1100

i. The Board has proposed to include the introductory language of the Federal regulation, which states:

> "The requirements of this subpart apply to owners or operators who store or treat hazardous waste in units . . .. These provisions will become effective on February 18, 1993, although the owner or operator may notify the U.S. EPA of his intent to be bound . . .."

Since February 18, 1993, has passed, it would be appropriate to change this language to read, "The Federal regulations became effective on February 18, 1993, although owners or operators were entitled to notify U.S. EPA . . .." This language would also be appropriate at Section 725.1100.

ii. In Sections 724.1100(a) and 725.1100(a), the Board has proposed, for the sake of clarity, breaking out into separate sections the factors that cause failure in containment buildings, which must be prevented by proper design of such buildings. U.S. EPA finds this clarification to be acceptable if the Board inserted an "or" instead of the current "and" at Sections 724.1100(a)(4) and 725.1100(a)(4). By so doing, the Board ensures that the containment building must be designed to prevent failure by any one of these factors, which is the intention of the Federal regulation.

iii. In Section 724.1100(d), the Board did not catch an error in the Federal regulations. As promulgated in the Federal Register at 57 FR 37265 (8/18/92), the Federal regulation requires an owner or operator of a containment building to ensure that the unit:

> (d) Has controls sufficient to prevent fugitive dust emissions to meet the no visible emission standard in 40 CFR 264.1101(c)(1)(iv). . .

The word "prevent" is a misprint. It should be "permit." Please insert either "permit" or another word that conveys the proper meaning, i.e., that fugitive dust emissions in containment buildings must meet the no visible emission standard of the regulations.

e. Section 724.1101

i. In Sections 724.1101(a)(2) and 725.1101(a)(2), the Board has proposed regulations that require containment buildings to meet the structural integrity requirements established by recognized professional organizations. The corresponding Federal regulation states that U.S. EPA will consider the standards established by professional organizations in determining the structural integrity of containment buildings. Illinois' regulation is more stringent than its Federal counterpart. This is permissible and U.S. EPA has no objection.

ii. In Part 264.1101(b)(4) and 265.1101(b)(4), U.S. EPA allowed the owner or operator of an existing containment building to apply for a delay in implementing the secondary containment requirement for up to two years. Such owners and operators were required to submit written notice describing operating practices and plans for retrofitting the unit with secondary containment to the Regional Administrator, by November 16, 1992.

The Board, noting that no criteria are provided for the Regional Administrator's determination whether the owner's or operator's unit justifies a two year delay, solicited comment on what enforcement responsibility is placed on the State by this provision, and whether the State should properly adopt this provision at all.

Since no applications for the two-year extension period were received in Region V, the State will not have any enforcement responsibility. The State is not required to adopt the provision allowing for a two year delay.

iii. In Part 264.1101(e), the Federal regulation provides: ". . . the Regional Administrator may waive requirements for secondary containment for a permitted containment building where the owner or operator demonstrates that . . . ." The Board has proposed to substitute the language "the Agency shall not require secondary containment for a permitted containment building if . . . ." The Board should recognize that the Federal regulation does not require the Regional Administrator to waive the requirement for secondary containment, but leaves it to his discretion in case other factors weigh against such a waiver. The proposed Illinois analog leaves the State agency with no similar discretion, and may cause the agency to be less stringent.

6. **Part 725**

a. Section 725.245

On lines 13 and 15, on page 200, the words guarantee and guarantor are misspelled.

b. Section 725.247

In Section 725.247(h)(4), a line is missing. The words "will be deposited by the issuing institution into the standby trust" should be inserted between the words "trust" and "in accordance" on line 5 of Part 725.247(h)(4) located on page 209.

c. Section 725.321

The Board has pointed out a problem with new 40 CFR Part 265.221(h). This new regulation provides that surface impoundments newly subject to RCRA due to the promulgation of additional listings must be in compliance with "paragraphs (a), (c) and (d) of this section not later than 48 months after the promulgation . . .."

Section (c) of the Federal regulations provides an exemption to the requirements of section (a). Section (d) provides a waiver mechanism from the requirements of Section (a). Accordingly, no surface impoundment will be in compliance with any two of these sections at the same time. The Board has proposed to substitute "or" for "and." The Board has correctly interpreted the intent of the Federal regulation.

d. Section 725.414

In this Section, Section (a)(2) appears to be missing from the Illinois regulations. This Section found in the Federal analogue at 40 CFR Part 261.314(a)(2) reads:

> "Before disposal, the liquid waste or waste containing free liquids is treated or stabilized, chemically or physically (e.g. by mixing with a sorbent solid), so that free liquids are no longer present."

e. Section 725.443

In line 1 under Section 725.443(b)(3) on page 219, "A leaking collection system..." should read "A leakage collection system...". In line 4 of the same section, the word "properly" is misspelled. In line 6 of the same section, the word "of" should be "or".

f. Section 725.1100

i. In Section 725.1100(c)(3) the Board has pointed out a potential Federal typographical error. This regulation provides design and construction specifications for the secondary containment systems of containment buildings not operating under a permit system. In almost every respect, all of the non-permitted containment building regulations are exact copies of those regulating permitted containment buildings. In this Section, however, the phrase "at the earliest possible time" is used instead of the phrase "at the earliest practicable time." (Emphasis added.)

The Board has proposed to substitute "practicable" for the Federal term "possible." The Federal Register preamble supports this assumption. At 57 FR 37211, it is stated that ". . . containment buildings under Part 265 interim status standards . . .to meet the same design and operating requirements as (Part 264) permitted containment buildings . . .." Further, at 57 FR 37214, the fact that the leak detection system should remove leaks of hazardous material at the earliest "practicable" time is reiterated. U.S. EPA believes the Board's proposed substitution complies with the intention of the Federal regulation.

ii. Regarding Section 725.1100(d):

See the discussion concerning the words "prevent" and "permit" with regard to Section 724.1100(d), in comment d. iii on page three above.

g. Section 725.1101

In line 1 of Section 725.1101(b)(3)(B) on page 224, the words "int he building" should be "in the building".

In line 2 of Section 725.1101(d)(2) on page 226, the word "inot" should be "into".

7. Part 726

a. Section 726.203

In Section 726.203, the Board has proposed to add a Board Note stating the following:

> Federal Sections 726.203(c)(1)(11)(A)(1) and (2) are condensed into the above Section.

The cited regulation is a State, not Federal, regulation. The appropriate citation would be Part 266.103(c)(1)(11)(A)(1)and(2).

In line 2 of Section 726.203(c)(1)(B)(111) on page 244, the words "adjusted tire" should be "adjusted tier". The same error appears again in line 3 of Section 726.203(c)(1)(F) on page 244.

8. **Part 728**

a. Section 728.107

The Board has noted that 40 CFR Part 268.7 contains a typographical error at (a)(2), which references Part 261.3(e)(2). Part 261.3(e) is a sunset provision. The Board has proposed to replace all references to 261.3(e) [728.103(e)] with 261.3(d) [728.103(d)].

The Board is correct in its assumption that the reference to Part 261.3(e) is an error. However, the Board's proposed substitute is also incorrect. According to U.S. EPA Headquarters, the correct substitution for references to Part 261.3(e) is new regulation Part 261.3(f)(2) [728.103(f)(2)]. This provision is the new "contained-in" policy, which allows the Regional Administrator to make case-by-case determinations.

On line 3 of Section 728.107(a)(4) on page 277, "tanks or containers" should read, "tanks, containers or containment buildings".

b. Table B

On page 324, under the chemical listings for K136, the concentration for Ethylene Dibromide should be 15 mg/l. In addition, the chemicals Methyl Bromide and Chloroform are missing.

c. Table D

On page 338, under the chemical listings for K109, line 3 should read "CARBN; or BIODG fb CARBN".

d. Table F

One part of Table F includes three columns. The headings of these columns are "Technology Description", "Performance or Design and Operating Standard", and "Contaminant Restrictions". The language in the rule is complete; however, in many cases it is in the wrong columns. The misplaced language appears as follows:

Under 2b and c on page 357, the first column of 2c is in the second column of 2b. The second column of 2c is in the third column under 2 b, and the third column of 2b is under the second column under 2b.

Under 3a the containment restrictions that should appear in column 3 are instead located in column 1.

On Page 360 the first 8 lines in the second paragraph of column 1 which begins "Debris contaminated...", should be located in the first paragraph of column 3.

The word "none" which appears in paragraph 3, column 1, on page 360, should be in paragraph 2 column 3.

In paragraph 1 of column 1 on Page 360, under Thermal destruction, the language "35 Ill. Adm. Code 265.Subpart O" should be "35 Ill. Adm. Code 725.Subpart O."

e. Table G

On page 361, under the chemical listing F006, the C.A.S. Number for Arsenic should be "7440-38-2".

On page 361 under the chemical listing K062, Illinois appears to have adopted an error that appeared in the Federal Register. The constituent listed as "Lean" should be listed as "lead".

9. Part 739

a. Section 739.100

The Board has noted that certain definitions used in Part 739 are different from definitions for the same terms used elsewhere in the regulations. The Board proposes to add Board Notes alerting readers that certain definitions are limited to this Section only. The Board may want to consider defining slightly different terms for purposes of this Section. For example, the term "Aboveground tank" is defined differently in Part 739 than it is for purposes of Section 720.110. In order to reduce the chances of confusion, the Board may want to consider defining the term as "Aboveground Used Oil Tank" here, so that readers do not rely on an inapplicable definition provided in a different Part.

b. Section 739.110

i. The Board has solicited comment about its interpretation of the Federal definition of "used oil." The Federal regulation excludes from the definition of used oil, ". . . that type of oil generated on farmland property devoted to agricultural use and used on that property for heating or burning."

The Board has concluded that ". . . oil which is produced on farms, and is devoted to agricultural use, and used on the farm for heating or burning [is] not subject to regulation under the Act . . .."

Under the Federal regulation there are two classes of farmers: 1) those generating used oil from vehicles or machinery in quantities greater than 25 gallons per month; and 2) those generating used oil from vehicles or machinery in quantities less than or equal to 25 gallons per month. If a farmer generates greater than 25 gallons per month on farmland property devoted to agricultural use, and uses the used oil for heating or burning, the farmer's used oil would be subject to 40 CFR Part 279 regulations. If a farmer generates less than or equal to 25 gallons per month, the farm property, not the oil, must be devoted to agricultural use in order to fall within the exemption. The used oil must be used for burning or heating.

ii. The Board also solicited comment as to whether definitions for "metalworking oils or fluids" and "off-specification used oil" should be included in the regulations. These definitions would clarify the scope of the regulations. Any such definitions should be consistent with the definition of "used oil" at RCRA Section 1004(36) and 40 CFR Part 279.

iii. The Board solicited comment as to whether "de minimis used oil" has a different meaning in any Part of the Federal regulations other than Part 279. "De minimis" is addressed in 40 CFR Part 261.3, and may be addressed in the new Federal hazardous waste identification rule. That is why the definition of "de minimis" with respect to used oil is limited to a specific subpart.

iv. The Board listed 5 interpretations on page 55 of its Proposed Opinion and solicited comment as to whether these interpretations are correct. All interpretations are correct except item 2. Used oil exceeding 1,000 ppm total halogens (less than the 4,000 ppm specification level) may be regulated as a hazardous waste, depending on the handler's success in rebutting the presumption of mixture.

c. Sections 739.124 and 739.131

The Board has requested comment on whether new Federal regulations regarding the transportation and collection of used oil contemplate the creation of a permit process. The regulations require that used oil collection centers must be registered, licensed, permitted or recognized by a State, county or municipal government to manage used oil.

Section 3014 of RCRA provides for "permit by rule." This is similar to interim status for hazardous wastes and basically means that so long as someone complies with the regulations, they are permitted to conduct the activity. The Administrator may require owners and operators to obtain a permit pursuant to RCRA Section 3005(c) if he determines that an individual permit is necessary to protect human health and the environment. (See Section 3014(d) of RCRA, as amended.)

We have contacted Headquarters about this issue. Mr. Randy Hill, who is in charge of issues attendant to the new used oil regulations, informed us that State and local governments retain some discretion to choose the type and extent of oversight.

d. Section 739.143

On page 61 of the Board Opinion, the Board has stated that it interprets 40 CFR Part 279.43(a)-(c) to mean, ". . . that the transportation of more than 55 gallons of used oil is not regulated if it is being delivered to a Do-It-Yourself collection center, a collection center, or an aggregation point." We believe this interpretation is incorrect. Section 739.140 of Illinois' proposed regulation specifies that the regulations are not applicable to generators who transport 55 gallons or less, of used oil to a used oil collection point, or to an aggregation point owned by the same generator. The key point is who is doing the transporting. If the transporter is not the generator, or if the transporter is not transporting Do-It-Yourselfer used oil, then the transporter is subject to regulation even if transporting 55 gallons or less, of used oil.

e. Section 739.144

Section 739.144 regulates the manner in which a used oil transporter must determine the total halogen content of used oil being transported or stored at a transfer facility. To ensure that the used oil is not a hazardous waste, the used oil transporter must determine whether the total halogen content of used oil being transported or stored is above or below 1,000 ppm. The Board is concerned that the transporter can make this determination simply by ". . . applying knowledge of the halogen content of the used oil in light of the material or processes used." (Section 739.144(b)(2), 40 CFR Part 279.44(b)(2).) The Board notes that the test does not require that the transporter possess any level of expertise or background when determining the halogen content of the used oil. The Board notes that the issue arises again in Sections 739.163 and 739.153. This is a legitimate concern that also appears in Section 722.111(c) of Illinois' rules, and 40 CFR Part 262.11(c) (the corresponding Federal analog). Note that the requirements are fundamentally alike. The U.S. EPA decided not to establish a more rigorous management standard for used oil than for hazardous waste. In an enforcement situation the inspector may not find the determination acceptable and might allege that an inadequate determination did not rebut the presumption.

As the Board notes, Section 739.155 mitigates potential problems with unskilled transporters by requiring processors to state the basis of their knowledge of the halogen content of the used oil. The Board may want to add such a requirement to Sections 739.144 and 739.163. Such a requirement would make the Illinois regulation more stringent than its Federal equivalent, but U.S. EPA would not object.

f. Section 739.156

In lines 1 and 2 of Section 739.156(a)(1) and (a)(3) on page 391, the word "delivereded" should be "delivered".

g. Section 739.182

1. In line 6 of Section 739.182(b) on page 401, the word "nad" should be "and".

10. Effect of Interim Final Rule

On page 3 of the Board Opinion accompanying Rules Package R93-4, the Board solicited comment on the May 24, 1993, interim final rule. We have discussed this with our Office of Regional Counsel. Our response is as follows:

The Board notes that U.S. EPA has issued an interim final rule in response to the remand in Chemical Waste Management, Inc. v. EPA, 976 F.2d 2 (D.C. Cir. 1992). The Board proposes to wait until the interim final rule is made final before codifying the Illinois equivalent.

The effect of the Chemical Waste Management decision was to vacate the deactivation treatment standards for certain ignitable and corrosive wastes. U.S. EPA's interim final rule was promulgated as an emergency measure because, if no treatment standard is in place, land disposal of these wastes is absolutely prohibited. See 58 FR 29860 (May 24, 1993).

Because the Federal standards for certain ignitable and corrosive wastes were vacated, the State equivalents may not be enforceable. (In re Hardin County, No. RCRA-V-W-89-R-29 [May 27, 1993]). As a result, if the Board fails to promulgate an Illinois equivalent to U.S. EPA's interim final rule, land disposal of the wastes affected by the Chemical Waste Management decision may be absolutely prohibited in Illinois.

At least on other issues, U.S. EPA has taken the position that a state cannot absolutely ban action allowable under the Federal regulations, i.e., that an absolute ban is not merely more stringent than Federal regulations, but rather substantially different. Accordingly, we recommend that the Board promulgate an Illinois equivalent to the interim final rule. If U.S. EPA later modifies the interim rule in response to comments, the Board should modify the state equivalent accordingly.

As a result, the Board should consider adopting the rule in the next rules package.