

ILLINOIS POLLUTION CONTROL BOARD
April 12, 1990

IN THE MATTER OF:)
)
PRETREATMENT UPDATE) R89-12
(1/1/89 - 6/30/89)) (Identical in Substance Rules)

ADOPTED RULE. FINAL ORDER.

OPINION OF THE BOARD (by J. Anderson):

The Board is amending the pretreatment regulations pursuant to Section 13.3 of the Environmental Protection Act (Act). The text is contained in a separate Final Order of this same day.

Section 13.3 of the Act requires the Board to adopt regulations which are "identical in substance" with federal regulations promulgated by the United States Environmental Protection Agency (USEPA) to implement the pretreatment requirements of Sections 307 and 402 of the Clean Water Act, previously known as the Federal Water Pollution Control Act. Section 13.3 provides that Title VII of the Act and Sections 5 and 6.02 of the Administrative Procedure Act (APA) shall not apply to identical in substance regulations adopted to establish the pretreatment program. However, Section 13.3 of the Act does require the Board to provide for notice and public comment before rules are filed with the Secretary of State.

S.B. 1834 (P.A. 85-1048) includes a definition of "identical in substance" in new Section 7.2 of the Act. This legislation codifies the Board's past interpretations of its mandate under Section 13.3 of the Act.

This rulemaking updates the pretreatment rules to cover USEPA rules adopted from January 1 through June 30, 1989. The following Federal Registers are included:

54 Fed. Reg. 246	January 4, 1989
54 Fed. Reg. 11346	March 17, 1989
54 Fed. Reg. 13606	April 4, 1989
54 Fed. Reg. 13716	May 2, 1989
54 Fed. Reg. 27351	June 29, 1989

The pretreatment rules govern discharges by industrial users to publicly owned treatment works (POTWs). The rules are intended to prevent industrial discharges from passing through POTW treatment plants without adequate treatment to waters of the State, and to prevent industrial discharges from interfering with the operation of the treatment plant. Effluent discharges are regulated pursuant to 35 Ill. Adm. Code 304 and 309.

The Illinois pretreatment rules are contained in 35 Ill. Adm. Code 307 and 310. Part 307 includes the categorical

pretreatment standards, which are incorporated by reference from the USEPA rules. Part 310 specifies how a POTW sets up a pretreatment program, and how industrial users get pretreatment permits or authorizations to discharge.

PUBLIC COMMENTS

The Board proposed the instant amendments to 35 Ill. Adm. Code 307 and 310 by its Proposed Order and accompanying Proposed Opinion of December 6, 1989. The Board immediately submitted the proposed amendments for publication in the Illinois Register and for public comment. The Notice of Proposed Amendments appeared on December 29, 1989, at 13 Ill. Reg. 20240 for Part 310 and at 13 Ill. Reg. 20257 for Part 307.

The statutory public comment period ended on February 12, 1990, 45 days after the date of publication in the Illinois Register. The Board adopted an Order on March 8, 1990 that effectively extended the public comment period through the end of March. In the December 6, 1989 Proposed Opinion, the Board stressed the importance that commenters make their submissions promptly and directly to the Board, so the Board could obtain the benefit of their input. The Board received only one, non-substantive public comment on the proposed amendments.

Public Comment number one (PC #1) was from the Secretary of State, and received January 30, 1990. The Board has made the format revisions to the Board Notes in Section 310.110 suggested by the Secretary of State.

The detailed discussion that follows indicates each topic on which the Board invited public comment. The Board construes silence as no objection to the Board's approach to each topic.

HISTORICAL OUTLINE OF BOARD PRETREATMENT REGULATION

The Illinois pretreatment rules were adopted in R86-44, Opinion and Order of the Board of December 3, 1987. The rules appeared on January 29, 1988 at 12 Ill. Reg. 2502. They were filed with the Secretary of State on January 13, 1988.

The pretreatment rules were recently amended in the following update rulemakings:

- R88-11 June 14, 1988; 12 Ill. Reg. 13094, effective July 29, 1988 (USEPA amendments through December 31, 1987).
- R88-18 December 17, 1988; 13 Ill. Reg. 1794, effective January 31, 1989 (USEPA amendments January 1 through June 30, 1988).

- R89-3 September 28, 1989; 13 Ill. Reg. 19243, effective November 17, 1989 (Part 307) and November 27, 1989 (Part 310) (USEPA amendments July 1 through December 31, 1988).
- R89-12 This docket; Proposal for Public Comment December 6, 1989; 13 Ill. Reg. 20240 (USEPA amendments January 1 through June 30, 1989).

DETAILED DISCUSSION

The specific amendments derived from the USEPA actions made on March 17 and June 29, 1989 affect the categorical pretreatment standards reflected in Part 307. The amendments derived from USEPA actions made on May 2, 1989 affect the program requirements reflected in Part 310. No amendments arise from the federal amendments of January 4 and April 4, 1989.

In R86-44 the Board generally referenced the 1986 edition of the Code of Federal Regulations. The Board is updating the references to all Sections up for review in this update to the 1989 edition of the Code of Federal Regulations. Pursuant to the Board's mandate in Section 7.2(a)(1) of the Act, amendments concerning directives for program approval have not been adopted.

PART 307 SEWER DISCHARGE CRITERIA

SUBPART O: ORGANIC CHEMICALS, PLASTICS AND SYNTHETIC FIBERS

35 Ill. Adm. Code 307.2490 incorporates 40 CFR 414, App. A by reference, and 35 Ill. Adm. Code 307.2491 incorporates 40 CFR 414, App. B by reference. USEPA amended both federal appendices at 54 Fed. Reg. 27352, June 29, 1989. The Board updates both incorporations by reference to include the revisions as embodied in the 1989 edition of the Code of Federal Regulations.

The effect of the amendment to Section 307.2490 (corresponding to 40 CFR 414, App. A) is to exclude "Anti-knock fuel additive/Blending purchased tetraethyl lead & tetraethyl lead additives" from the list of "non-complexed metal-bearing waste streams and cyanide-bearing waste streams" under lead in the organic chemicals, plastics, and synthetic fibers (OCPSF) category. The effect of the revision to Section 307.2491 (corresponding to 40 CFR 414, App. B) is to exclude "Vat dyes/Mixing purchased dyestuffs (Anthraquinones, polycyclic Quinones and Indigoids)" under chromium and copper from the list of "complexed metal-bearing waste streams" in that category. For the Section 307.2491 revision, "Vat dyes" is substituted under chromium (as it already appears under copper).

USEPA asserts at 54 Fed. Reg. 27351 that the corresponding

federal amendments, upon which the amendments are based, delete misleading language. The regulations apply only to wastewaters from the manufacture of OCPSF product/process, under 40 CFR 414.11(a) (35 Ill. Adm. Code 307.2400(b)). USEPA includes chemical syntheses and engineering within this, but it does not include formulation that exclusively comprises blending and mixing operations. USEPA deleted these references because they relate exclusively to blending and mixing and were, therefore, erroneous.

SUBPART CT: NONFERROUS METALS FORMING AND METAL POWDERS

35 Ill. Adm. Code 307.8103(c)(1) incorporates 40 CFR 471.34 by reference, 35 Ill. Adm. Code 307.8103(d)(1) incorporates 40 CFR 471.35 by reference, 35 Ill. Adm. Code 307.8109(c)(1) incorporates 40 CFR 471.94 by reference, and 35 Ill. Adm. Code 307.8109(d)(1) incorporates 40 CFR 414.95 by reference. USEPA amended all four federal sections at 54 Fed. Reg. 11352, March 17, 1989, and corrected 40 CFR 471.34(d) at 54 Fed. Reg. 13606, April 4, 1989. The Board updates the four incorporations by reference to include the revisions as embodied in the 1989 edition of the Code of Federal Regulations.

The effect of the amendments to Sections 307.8103(c)(1) (corresponding to 40 CFR 471.34(d)), 307.8103(d)(1) (corresponding to 40 CFR 471.35(d)), 307.8109(c)(1) (corresponding to 40 CFR 471.94(g)), and 307.8109(d)(1) (corresponding to 40 CFR 471.95(g)) is to provide an alternative to zero discharge of process wastewaters from tube reducing for new and existing sources in the nickel-cobalt and zirconium-hafnium forming subcategories of the nonferrous metals forming and metal powders point source category. Under the amendments, such entities may discharge their wastewaters if the results of monthly chemical analyses show no levels of three nitrosamines above the detection limits for method 1625 (40 CFR 136.3, Table 1C & App. A, Method 1625, incorporated by reference at 35 Ill. Adm. Code 307.1003 and 310.107). (These nitrosamines and their corresponding detection limits are N-Nitrosodimethylamine, 0.050 mg/l; N-Nitrosodiphenylamine, 0.020 mg/l; and N-Nitroso-n-propylamine, 0.020 mg/l.) The sampling frequency reduces to quarterly if none of these amines are detected above the limits set forth. There is no mass allowance, and the analytical procedure must have sufficient sensitivity to allow for back-calculation to remove any effects of dilution from the point of discharge from the reducing process to the point of sampling.

PART 310
PRETREATMENT PROGRAMS

SUBPART A: GENERAL PROVISIONS

Section 310.107 Incorporations by Reference
Section 310.110 Definitions

USEPA promulgated new 40 CFR 503 and amended 40 CFR 122, 123, and 124 at 54 Fed. Reg. 18780, May 2, 1989. This action implemented the permitting and state program portions of new sewage sludge management requirements under Section 405 of the federal Clean Water Act, as amended by Section 406 of the Water Quality Act of 1987. At 54 Fed. Reg. 5746, February 6, 1989, USEPA proposed substantive requirements as part of this program. It is apparent that USEPA intends to promulgate this new body of rules in stages, progressively including new segments of the regulated community and new requirements.

From a very general perspective, the Board notes several issues arising from this new federal program. The primary focus of these relates to whether the Board should proceed to assemble rulemaking proposals incorporating the federal sludge use and management rules as USEPA promulgates them, or whether the Board should take some alternative action.

Section 13.3 of the Act mandates that the Board adopt regulations identical in substance to USEPA regulations promulgated pursuant to Sections 307(b), 307(c), 307(d), 402(b)(8), and 402(b)(9) of the Federal Water Pollution Control Act (Clean Water Act). All five of those federal provisions relate to pretreatment regulation. The Board notes that USEPA preamble discussions in the Federal Register and Code of Federal Regulations regulatory authority notes are not always as explicit or complete as to the statutory authority for particular USEPA rules. The USEPA sludge use and management regulations are apparently outside the authority of Sections 307(b), 307(c), 307(d), 402(b)(8), and 402(b)(9). In its Proposed Opinion of December 6, 1989, the Board requested clarification of this issue, but it received no comments.

Section 13(b) of the Act mandates that the Board adopt "requirements, standards, and procedures ... necessary or appropriate to enable the State of Illinois to implement and participate in the [NPDES program]" Newly amended 40 CFR 123.25(a) provides that sludge use and management rules are not a mandatory part of the state NPDES program. The states may implement sludge use and management rules as a separate program or as part of a program independent of their NPDES programs. USEPA will implement the sludge program in states not authorized to administer it. Initially this raises questions as to whether the Agency has authority to impose NPDES permit conditions based

on the federal rules as they take effect. It also raises issues as to whether state- or federally-imposed permit conditions become "sludge requirements" within the meaning of the pretreatment program. Finally, it raises the question as to whether the Board should begin to assemble a rulemaking proposal under Section 13(b) to incorporate the federal sludge use and management requirements.

In its Proposed Opinion, the Board summarized its concerns: Does any aspect of the new federal sludge use and management requirements fall within the "identical in substance" mandate of Section 13.3 of the Act? Do they fall within the mandate of Section 13(b)? Should the Board begin to assemble a rulemaking proposal that would incorporate the substance of these requirements? If so, should the Board propose their incorporation into the existing NPDES program, the solid waste disposal program, some other program, or create an independent program? Should the Board approach the General Assembly for some new rulemaking authority to adopt rules identical in substance to the federal requirements? Does the Agency have the authority to impose NPDES permit conditions derived from the federal sludge requirements? The Board solicited comment from any interested persons on these issues, most specifically from the Agency, USEPA, and the Attorney General. The Board received no such comments from any source. Therefore, these issues remain without resolution at the present time.

More specifically to this particular rulemaking, the Board amends the 35 Ill. Adm. Code 310.110 definition of "sludge requirements" to incorporate any requirements imposed by NPDES permit condition, whether by the Agency or USEPA. The Board adds language to the definition as follows, in order to accommodate the May 2, 1989 federal amendments:

"Sludge requirements" means any of the following permits or regulations: ...309.155 (NPDES Permits), ... Section 39(b) of the Act (NPDES Permits), and Section 405(b) of the Clean Water Act (federally-imposed sludge use and management requirements).

An alternative method of accommodating these new federal requirements in the pretreatment rules is to reference them by federal rules (i.e., by specifically referencing 40 CFR 122 sections), but this method would lengthen the reference to the federal requirements and necessarily result in a less comprehensive reference that would require greater effort in future pretreatment updates. The intended effect of this amendment is to include these new federal requirements within the "sludge requirements" referred to in such diverse provisions as 35 Ill. Adm. Code 310.201(a)(2)(B) and 310.303(d), which relate to affirmative defenses and removal credits, respectively. Revising this definition does not broaden the Agency's permitting

authority by authorizing the Agency to impose federal regulations. Rather, the effect is to allow consideration of the impact of an industrial user's discharge on the POTW's compliance with any state or federally-imposed sludge use rules.

As a routine matter, the Board adopts a small number of revisions to the text of Sections 310.107 and 310.110. The Board amends all the incorporations of federal regulations by reference at Section 310.107(c) to the 1989 edition of the Code of Federal Regulations. The Board similarly updates the CFR references in the Board Notes of Section 310.110. The Board adds the name of the court and date of decision to the reference to NRDC v. Costle in Section 310.107(a), to complete that reference. Finally, the Board adds the phrase "et seq." to the statutory reference to Subtitles C and D of the Resources Conservation and Recovery Act in Section 310.107(c), in order to avoid any confusion that the Board did not intend the entirety of those Subtitles.

The Board solicited comments, most specifically from USEPA and the Agency, as to these updates to the definition of "sludge requirements," at least until alternative references to Board rules are available, and to the incorporations by reference. The Board received no comments on this issue.

SUBPART G: FUNDAMENTALLY DIFFERENT FACTORS

Section 310.711 Application Deadline

This section derives from 40 CFR 403.13(g). USEPA amended the corresponding federal section at 54 Fed. Reg. 258, January 4, 1989. The Board updates the Board note to this Section, but does not amend 35 Ill. Adm. Code 310.711(b) to include the federal amendment. Such revision is unnecessary.

The USEPA amendments to 40 CFR 403.13(g) insert July 3, 1989 as the deadline for "fundamentally different factors" petitions from those affected by categorical pretreatment standards promulgated prior to February 4, 1987 (the date that Congress adopted the Water Quality Act of 1987). Under the federal revisions, USEPA will give those affected by later standards 180 days from the date of promulgation to file their petitions. USEPA intends to revise the substantive "FDF" criteria at a later date in response to the WQA of 1987.

The Board will update the date of the CFR in the Board note to this section, but it will not make any substantive change to 35 Ill. Adm. Code 310.711 in response to the federal amendment. Section 310.711(b)(1) provides that petitioners must direct their FDF petitions to USEPA until USEPA approves the state pretreatment program. USEPA has not yet authorized the Illinois program. Section 310.711(b)(2) already provides that petitioners must submit their petitions within 180 days of when the Board adopts

or incorporates a standard that brings that person into the program.

The Board invited comments, most specifically from USEPA and the Agency, as to its proposed amendment to this section, and received none.

FEDERAL AMENDMENTS NOT MADE TO THE PRETREATMENT RULES

During this update period USEPA also updated effluent criteria contained in 40 CFR 414 and 471. As was discussed in the R86-44 Opinion (pages 6, 12, 13 and 15), the Board construes Section 13.3 of the Act as requiring adoption of regulations. However, the Board recognizes that the language of Section 13.3 does not specifically limit the authority to "pretreatment". The Board solicited comment as to whether, absent legislative clarification, it is correctly construing its Section 13.3 authority as precluding it from augmenting or replacing the effluent standards of 35 Ill. Adm. Code 304, and NPDES permit rules of 35 Ill. Adm. Code 309, using the identical in substance procedures. The Board received no public comments on these issues.

Amendments to the effluent standards in the instant proceeding impact the direct discharge point sources in the organic chemicals, plastics, and synthetic fibers category (40 CFR 414, Subparts I and J) and in the nickel-cobalt forming, the zirconium-hafnium forming, and the metal powders subcategories of the nonferrous metals forming and metal powders point source category (40 CFR 471, Subparts C, I, and J). These effluent rules are companions to the federal pretreatment requirements in the USEPA rules. We also note that these recent parallel federal effluent amendments raise several of the same issues and questions as do the new federal sewage sludge use and management program. As it did for the above discussion of the sludge rules, the Board notes that USEPA preamble discussions and authority notes do not always fully guide the Board. Is the authority exercised by USEPA in adopting effluent amendments outside the scope of those Clean Water Act provisions that would evoke the Board's Section 13.3 identical in substance mandate? The Board requested comment on this issue, but received no comments.

Also as described above, Section 13(b) of the Act mandates that the Board adopt "requirements, standards, and procedures ... necessary or appropriate to enable the State of Illinois to implement and participate in the [NPDES program]" These categorical effluent rules are necessarily a mandatory part of the state NPDES program. Section 39(b) of the Act and various of the Board's Part 309 rules authorize the Agency to impose permit conditions predicated on federal NPDES standards and limitations. Noting the potential anomaly of the Board adopting pretreatment regulations but not the companion effluent regulations for the

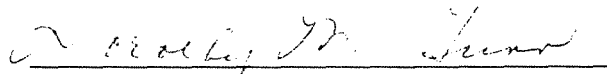
same industrial categories, the Board requested comments as to whether it should assemble a rulemaking proposal to adopt the federal effluent limitations into the Water Pollution Control requirements. The Board received no comments on this issue.

In the Proposed Opinion, the Board summarized its concerns: Does any aspect of the categorical federal effluent requirements fall within the "identical in substance" mandate of Section 13.3 of the Act? Do they fall within the mandate of Section 13(b)? Should the Board begin to assemble a rulemaking proposal that would incorporate the substance of these requirements? Should the Board approach the General Assembly for some new rulemaking authority to adopt rules identical in substance to the federal categorical effluent requirements? Having received no comment on these important issues, the Board will defer any discussion as to possible alternatives until some future time.

The Board will withhold filing the adopted amendments with the Secretary of State for 30 days, in order to give USEPA an opportunity to comment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Opinion was adopted on the 17th day of April, 1990, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board