

ILLINOIS POLLUTION CONTROL BOARD  
June 7, 1990

IN THE MATTER OF: )  
 )  
UST UPDATE. USEPA REGULATIONS ) R90-3  
(6/30/89 through 12/31/89) ) Rulemaking

ADOPTED RULE. FINAL ORDER.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

Pursuant to Section 22.4(d) of the Environmental Protection Act (Act), the Board is amending the UST underground storage tank regulations in 35 Ill. Adm. Code 731.

Section 22.4 of the Act governs adoption of regulations establishing the RCRA/UST program in Illinois. Section 22.4(d) provides for quick adoption of regulations which are "identical in substance" to federal regulations. Section 22.4(d) 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 correspond with the following USEPA actions, during the period June 30, 1989, through December 31, 1989:

54 Fed. Reg. 47081 November 9, 1989

PUBLIC COMMENT

The Board adopted a Proposed Opinion and Order on March 8, 1990. The proposal appeared on March 23, 1990, at 14 Ill. Reg. 4406. The Board has received the following public comment, which is addressed in the body of this Opinion, below.

PC 1 Administrative Code Division

In the Proposed Opinion, the Board requested comment on a number of specific issues. The Board received no response to these specific requests for comment. The Board therefore assumes affirmation of its proposed resolution to each of these issues.

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.

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The Board acknowledges the contributions of Morton F. Dorothy and Anne E. Manly in drafting this Opinion and Order.

- 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 April 27, 1989; 13 Ill. Reg. 9519, effective June 12, 1989 (9/23/88 Technical Standards)
- R89-4 July 27, 1989; 13 Ill. Reg. 15010, effective September 12, 1989 (10/26/88 Financial Assurance Requirements)
- R89-10 March 1, 1990; 14 Ill. Reg. 5797, effective April 10, 1990 (10/27/88 - 6/30/89)
- R89-19 Adopted Rule April 26, 1990 (UST State Fund)
- R90-3 This Docket (7/1/89 - 12/31/89)

On April 27, 1989 the Board adopted 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. The Board separated the financial responsibility rules from the September 23 rules in order to avoid delaying adoption of the latter. The financial responsibility rules (53 Fed. Reg. 43370, 10/26/88) were adopted in R89-4.

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.

#### FIRE MARSHAL RULES

As is discussed in greater detail below, the legislation requires that both the Board and Office of the State Fire Marshal adopt equivalents of much of the USEPA UST rules. The Fire Marshal's rules are contained in 41 Ill. Adm. Code 170, along with preexisting rules adopted prior to the USEPA equivalent rules. They were adopted, amended, corrected and objected to in the following actions:

- 13 Ill. Reg. 5669, effective April 21, 1989 (Technical Standards)
- 13 Ill. Reg. 7744, effective May 9, 1989.
- 13 Ill. Reg. 8515, effective May 19, 1989 (Financial Assurance)
- 13 Ill. Reg. 8875, effective May 19, 1989.
- 13 Ill. Reg. 13288, August 18, 1989.
- 13 Ill. Reg. 13305, August 18, 1989.
- 13 Ill. Reg. 14992, effective September 11, 1989.
- 13 Ill. Reg. 15126, September 22, 1989
- 14 Ill. Reg. 63, January 5, 1990
- 14 Ill. Reg. 5781, April 20, 1990

### STATUTORY AUTHORITY

The February 2, 1989 Opinion in R88-27 included a lengthy discussion of Section 22.4(d) 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(d) 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"<sup>1</sup> 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 adopted regulations which, among other things, reflect the delineation between regulations before and after "corrective action".

The financial responsibility 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(d) 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 and R89-4 rules followed the USEPA rules closely. The Board will consider adopting "additional requirements" following notice from the Fire Marshal.

### SUMMARY OF CHANGES

The amendments are all derived from 54 Fed. Reg. 47081, November 9, 1989. They concern details of termination of insurance coverage.

#### Section 731.192

A definition of "termination" has been added. This applies in 40 CFR 280.97(b)(1) and (2), which is incorporated by reference in 35 Ill. Adm. Code 731.197(b). Note that, because of the use of incorporation by reference, the cross references do not have precise counterparts in Board rules.

#### Section 731.197

The forms for insurance were also amended at 54 Fed. Reg. 47081, November 9, 1989. In R89-4, the Board incorporated these forms by reference, rather than setting them forth in full. The Fire Marshal's Office will promulgate forms based on the USEPA rules. In this Section the Board has updated the incorporation by reference to include the revisions.

Section 731.205

This Section is derived from 40 CFR 280.105, which was also amended at 54 Fed. Reg. 47081, November 9, 1989. The existing rules allow an insurer to terminate a policy on 60 days notice. The amendments allow termination on 10 days notice in the case of non-payment or misrepresentation by the insured.

The amendments also make the 60 day notice requirement applicable to "state funded assurance". Section 731.200 in R89-19 authorizes the use of the UST State Fund to meet the financial assurance requirements of this Part. The Board references Section 731.200 here, and makes the 60 day notice requirement applicable to the UST State Fund. However, this poses other questions similar to the issues raised in the R89-19 Opinion. The Board solicited comment, but recieved no response, as to whether the 60 day notice requirement is consistent with the statutes, cited in R89-19, which establish the UST State Fund. The Board therefore assumes affirmation of its resolution to this problem.

CONCLUSION

The Board will adopt the Sections set forth below. The Board will not file these Sections with the Administrative Code Division until June 26, 1990, to allow time for post adoption comment particularly by the entities involved in the authorization process.

ORDER

The Board hereby adopts the following Sections as 35 Ill. Adm. Code 731.192, 731.197 and 731.205.

TITLE 35: ENVIRONMENTAL PROTECTION  
SUBTITLE G: WASTE DISPOSAL  
CHAPTER I: POLLUTION CONTROL BOARD  
SUBCHAPTER d: UNDERGROUND INJECTION CONTROL  
AND UNDERGROUND STORAGE TANK PROGRAMS

PART 731  
UNDERGROUND STORAGE TANKS

SUBPART A: PROGRAM SCOPE AND INTERIM PROHIBITION

- Section 731.101 Definitions and exemptions (Repealed)
- 731.102 Interim prohibitions (Repealed)
- 731.103 Notification Requirements (Repealed)
- 731.110 Applicability
- 731.111 Interim Prohibition for Deferred Systems
- 731.112 Definitions
- 731.113 Incorporations by Reference
- 731.114 Implementing Agency

SUBPART B: UST SYSTEMS: DESIGN, CONSTRUCTION, INSTALLATION AND NOTIFICATION

- Section 731.120 Performance Standards for New Systems

731.121 Upgrading of Existing Systems  
731.122 Notification Requirements

SUBPART C: GENERAL OPERATING REQUIREMENTS

Section  
731.130 Spill and Overfill Control  
731.131 Operation and Maintenance of Corrosion Protection  
731.132 Compatibility  
731.133 Repairs Allowed  
731.134 Reporting and Recordkeeping

SUBPART D: RELEASE DETECTION

Section  
731.140 General Requirements for all Systems  
731.141 Petroleum Systems  
731.142 Hazardous Substance Systems  
731.143 Tanks  
731.144 Piping  
731.145 Recordkeeping

SUBPART E: RELEASE REPORTING, INVESTIGATION AND CONFIRMATION

Section  
731.150 Reporting of Suspected Releases  
731.151 Investigation due to Off-site Impacts  
731.152 Release Investigation and Confirmation  
731.153 Reporting and Cleanup of Spills and Overfills

SUBPART F: RELEASE RESPONSE AND CORRECTIVE ACTION

Section  
731.160 General  
731.161 Initial Response  
731.162 Initial Abatement Measures and Site Check  
731.163 Initial Site Characterization  
731.164 Free Product Removal  
731.165 Investigations for Soil and Groundwater Cleanup  
731.166 Corrective Action Plan  
731.167 Public Participation

SUBPART G: OUT-OF-SERVICE SYSTEMS AND CLOSURE

Section  
731.170 Temporary Closure  
731.171 Permanent Closure and Changes-in-Service  
731.172 Assessing Site at Closure or Change-in-Service  
731.173 Previously Closed Systems  
731.174 Closure Records

SUBPART H: FINANCIAL RESPONSIBILITY

Section  
731.190 Applicability  
731.191 Compliance Dates  
731.192 Definitions  
731.193 Amount and Scope of Required Financial Responsibility  
731.194 Allowable Mechanisms and Combinations  
731.195 Financial Test of Self-insurance

731.196	Guarantee
731.197	Insurance or Risk Retention Group Coverage
731.198	Surety Bond
731.199	Letter of Credit
731.200	UST State Fund
731.202	Trust Fund
731.203	Standby Trust Fund
731.204	Substitution of Mechanisms
731.205	Cancellation or Nonrenewal by Provider
731.206	Reporting
731.207	Recordkeeping
731.208	Drawing on Financial Assurance
731.209	Release from Financial Assurance Requirement
731.210	Bankruptcy or other Incapacity
731.211	Replenishment
731.900	Incorporation by reference (Repealed)
731.901	Compliance Date (Repealed)

Appendix A Notification Form

AUTHORITY: Implementing and authorized by Ill. Rev. Stat. 1988 Supp., ch. 111 1/2, pars. 1022.4, 1022.13 and 1027, as amended by P.A. 86-125 and P.A. 86-0958 (Sections 22.4(d) and 27 of the Environmental Protection Act; and 22.13(d) of the Environmental Protection Act, as amended by P.A. 86-125 and P.A. 86-0958).

SOURCE: Adopted in R86-1 at 10 Ill. Reg. 14175, effective August 12, 1986; amended in R86-28 at 11 Ill. Reg. 6220, effective March 24, 1987; amended in R88-27 at 13 Ill. Reg. 9519, effective June 12, 1989; amended in R89-4 at 13 Ill. Reg. 15010, effective September 12, 1989; amended in R89-10 at 14 Ill. Reg. 5797, effective April 10, 1990; amended in R89-19 at 14 Ill. Reg. effective ; amended in R90-3 at 14 Ill. Reg. effective

NOTE: Capitalization denotes statutory language.

SUBPART H: FINANCIAL RESPONSIBILITY

Section 731.192 Definitions

When used in this Subpart, the following terms have the meanings given below:

"Accidental release" means any sudden or nonsudden release of petroleum from an underground storage tank that results in a need for corrective action or compensation for bodily injury or property damage neither expected nor intended by the tank owner or operator.

"Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. However, this term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury.

BOARD NOTE: Derived from 40 CFR 280.92, as adopted at 53 Fed. Reg.

43370, October 26, 1988, modified to insert the Insurance Services Office definition.

"Controlling interest" means direct ownership of at least 50 percent of the voting stock of another entity.

"Director of the Implementing Agency". See Section 731.114.

"Environmental damage" means the injurious presence in or upon land, the atmosphere or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants.

BOARD NOTE: This term is used in the definition of "pollution incident".

"Financial reporting year" means:

The latest consecutive twelve-month period for which any of the following reports used to support a financial test is prepared:

A 10-K report submitted to the Securities Exchange Commission;

An annual report of tangible net worth submitted to Dun and Bradstreet; or

Annual reports submitted to the Energy Information Administration or the Rural Electrification Administration.

"Financial reporting year" may thus comprise a fiscal or a calendar year period.

"Legal defense cost" is any expense that an owner or operator or provider of financial assurance incurs in defending against claims or actions brought,

By USEPA or the State to require corrective action or to recover the costs of corrective action;

By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or

By any person to enforce the terms of a financial assurance mechanism.

"Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank.

BOARD NOTE: This definition is intended to assist in the understanding of these regulations and is not intended either to limit the meaning of "occurrence" in a way that conflicts with standard insurance usage or to prevent the use of other standard insurance terms in place of "occurrence".

"Owner or operator", when the owner or operator are separate persons, refers to the person that is obtaining or has obtained financial assurance.

"Petroleum marketing facilities" include all facilities at which petroleum is produced or refined and all facilities from which petroleum is sold or transferred to other petroleum marketers or to the public.

"Petroleum marketing firms" are all firms owning petroleum marketing facilities. Firms owning other types of facilities with USTs as well as petroleum marketing facilities are considered to be petroleum marketing firms.

"Pollution incident" means emission, discharge, release or escape of pollutants into or upon land, the atmosphere or any watercourse or body of water, provided that such emission, discharge, release or escape results in "environmental damage". The entirety of any such emission, discharge, release or escape shall be deemed to be one "pollution incident". "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. "Waste" includes materials to be recycled, reconditioned or reclaimed. The term "pollution incident" includes an "accidental release" or an "occurrence".

BOARD NOTE: This definition is used in the definition of "property damage."

"Property damage" means

Physical injury to, destruction of or contamination of tangible property, including all resulting loss of use of that property; or

Loss of use of tangible property that is not physically injured, destroyed or contaminated, but has been evacuated, withdrawn from use or rendered inaccessible because of a "pollution incident".

This term does not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for property damage. However, such exclusions for property damage do not include corrective action associated with releases from tanks which are covered by the policy.

BOARD NOTE: Derived from 40 CFR 280.92, as adopted at 53 Fed. Reg. 43370, October 26, 1988, modified to insert the Insurance Services Office definition.

"Provider of financial assurance" means an entity that provides financial assurance to an owner or operator of an underground storage tank through one of the mechanisms listed in Section 731.195 through

731.203, including a guarantor, insurer, risk retention group, surety or issuer of a letter of credit.

"Substantial business relationship" means that one business entity has an ownership interest in another.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties. For purposes of this definition, "assets" means all existing and all probable future economic benefits obtained or controlled by a particular entity as a result of past transactions.

"Termination" under Section 731.197(b) means only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy.

BOARD NOTE: Derived from 40 CFR 280.92(o), as adopted at 54 Fed. Reg. 47081, November 9, 1989.

"Unit of local government" is as defined in the Illinois Constitution of 1970, Art. VII, Section 1.

Source: Amended at 14 Ill. Reg.                    effective

Section 731.197      Insurance or Risk Retention Group Coverage

- a) An owner or operator may satisfy the requirements of Section 731.193 by obtaining liability insurance that conforms to the requirements of this Section from a qualified insurer or risk retention group. Such insurance must be in the form of a separate insurance policy or an endorsement to an existing insurance policy.
- b) Forms.
  - 1) The Board incorporates by reference 40 CFR 280.97(b) as adopted at 53 Fed. Reg. 43370, October 26, 1988, as amended at 54 Fed. Reg. 47081, November 9, 1989. This Section incorporates no future editions or amendments.
  - 2) The Fire Marshal shall promulgate forms based on the forms in 40 CFR 280.97(b), with such changes as are necessary under Illinois law.
  - 3) Each insurance policy must be amended by an endorsement, or evidenced by a certificate of insurance. The owner or operator shall use the forms specified in subsection (b)(2), if available; otherwise, the owner or operator shall use the forms in 40 CFR 280.97(b), except that instructions in brackets must be replaced with the relevant information and the brackets deleted.

- c) Each insurance policy must be issued by an insurer or a risk retention group which is licensed by the Illinois Department of Insurance.

Source: Amended at 14 Ill. Reg.                      effective

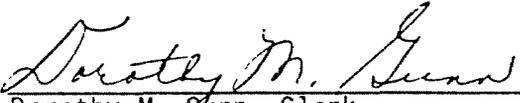
Section 731.205      Cancellation or Nonrenewal by Provider

- a) Except as otherwise provided, a provider of financial assurance may cancel or fail to renew an assurance mechanism by sending a notice of termination by certified mail to the owner or operator.
  - 1) Termination of a guarantee, a surety bond or a letter of credit must not occur until 120 days after the date on which the owner or operator receives the notice of termination as evidenced by the return receipt; or
  - 2) Termination of insurance or risk retention group coverage, except for non-payment or misrepresentation by the insured, or coverage by the UST State Fund under Section 731.200, must not occur until 60 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt. Termination for non-payment of premium or misrepresentation by the insured must not occur until a minimum of 10 days after the date on which the owner or operator receives the notice of termination, as evidenced by the return receipt.
- b) If a provider of financial responsibility cancels or fails to renew for reasons other than incapacity of the provider as specified in Section 731.206, the owner or operator shall obtain alternate coverage as specified in this Section within 60 days after receipt of the notice of termination. If the owner or operator fails to obtain alternate coverage within 60 days after receipt of the notice of termination, the owner or operator shall notify the Fire Marshal of such failure and submit:
  - 1) The name and address of the provider of financial assurance;
  - 2) The effective date of termination; and
  - 3) The evidence of the financial assistance mechanism subject to the termination maintained in accordance with Section 731.207(b).

Source: Amended at 14 Ill. Reg.                      effective

IT IS SO ORDERED

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7<sup>th</sup> day of June, 1990, by a vote of 7-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board