

ILLINOIS POLLUTION CONTROL BOARD
May 18, 1995

IN THE MATTER OF:)
) R95-4
UIC UPDATE, USEPA REGULATIONS) (Identical-in-Substance Rules)
(7-1-94 THROUGH 12-31-94))

IN THE MATTER OF:)
) R95-6
RCRA UPDATE, USEPA REGULATIONS) (Identical in Substance Rules)
(7-1-94 THROUGH 12-31-94))

Request for Additional Comment.

ORDER OF THE BOARD (by E. Dunham):

The Board proposed 409 pages of amendments to the Illinois RCRA Subtitle C and UIC regulations by our opinion and order of March 2, 1995 in this docket. Notices of the proposed amendments appeared in the Illinois Register on March 24, 1995. The public comment period ended May 8, 1995. The Board was prepared to adopt all of the amendments involved in this docket today, as promised in our January 11 order granting expedited consideration. This adoption would have included the Phase II LDRs and the Subtitle CC air emissions amendments to the RCRA Subtitle C rules.

This matter is before the Board on two motions recently filed. The Board further received two related public comments. As detailed below, the motions and comments request the Board delay adoption of certain of the amendments.

MOTIONS AND COMMENTS REQUESTING A STAY

The Chemical Industry Council of Illinois (CICI) filed a "motion to stay" on May 8, 1995. That motion requests that the Board stay further action on the "RCRA Subpart CC" amendments adopted by U.S. EPA on December 6, 1994. These amendments, which impose requirements relating to the control of organic material emissions from tanks, containers, and surface impoundments, primarily involve new subparts CC of 40 CFR 264 and 265. The Board proposed these amendments as 35 Ill. Adm. Code 724.Subpart CC and 725.Subpart CC.

CICI states that the Chemical Manufacturers Association (CMA) recently filed a suit in federal court, Chemical Manufacturers Association v. EPA, No. 95-1143 (D.D.C.), challenging the validity of the Subpart CC amendments and that a separate, unspecified suit involving these rules is also pending. CICI states that due to these actions "and other confusion surrounding the promulgation of the RCRA Subpart CC amendments", U.S. EPA has stated that it will delay their effective date by six months, until December 6, 1995, and that U.S. EPA will

publish corrections in the Federal Register. CICI states, and Board staff has verified, that the RCRA/Superfund Hotline in Washington, D.C. and the docket information contact in Research Triangle Park, North Carolina give recorded messages announcing U.S. EPA's intent to delay the effective date of the federal amendments by an announcement in the Federal Register "within the next month".

CICI requests that the Board stay that portion of this docket relating to the Subpart CC amendments due to the confusion relating to the underlying federal amendments. It states that delay would allow the Board to incorporate any clarifying federal corrections or changes, thus "alleviating the need for an emergency rulemaking to incorporate these changes at a later date". The motion recites that Sections 7.2 and 22.4(a) of the Act require the Board to adopt amendments within one year, and it allow us to engage in our common practice of "batching" RCRA Subtitle C amendments into six month update periods. CICI notes, however, that the Act does not require "batching". CICI urges the Board to sever the Subpart CC amendments and delay action to adopt them until one year after the date U.S. EPA adopted the amendments upon which they are based--i.e., until December 6, 1995.

The Illinois Environmental Regulatory Group (IERG) filed a motion in support of the CICI motion for stay on May 9, 1995. IERG notes that on January 11, 1995 the Board granted expedited consideration of the amendments involved in this docket in response to their motion filed January 6. The focus of IERG's interest was in the September 19, 1994 Phase II land disposal restrictions (LDRs), which are an independent subject matter from the December 6, 1994 Subpart CC amendments. IERG states that it supports the CICI motion to stay the Subpart CC amendments. It requests that the Board adopt the amendments proposed in this docket without delay, except that the Board sever the Subpart CC amendments and stay that portion.

In addition to these two motions, the Board has received two public comments that request essentially similar action to delaying the effectiveness of the Subpart CC amendments. PC 3, received May 8, 1995 from Robert Burke III, Manager, Regulatory Affairs, Chemical Waste Management (CWM), urges delay because U.S. EPA is "reevaluating the amendments for clarification and applicability". PC 3 reiterates that U.S. EPA has announced its intent to delay the effective date of the amendments until December 6, 1995 and to amend them "during the next several months". CWM recommends that the Board remove the Subpart CC amendments from this docket and proceed to adopt the September 19, 1994 and January 3, 1995 Phase II LDRs. PC 5, received May 9, 1995 from Charles T. Eifler, General Manager, Trade Waste Incineration (TWI), Division of CWM, similarly urges Board delay in the adoption of the Subpart CC amendments until U.S. EPA

"makes all necessary amendments", while requesting that the Board proceed to adopt the Phase II LDRs without delay.

DISCUSSION

The motions for stay raise important issues that must be resolved before the Board proceeds. Neither the CICI motion for stay nor the IERG motion in support cite precisely which of the proposed amendments they want severed from the docket. Not all the federal amendments of December 6, 1994 appear to be limited to Subpart CC; some appear to involve the earlier Subparts AA and BB air emissions rules. Further, neither motion addresses how long the Board should defer action on the Subpart CC amendments. As cited by CICI, the Board must vote to adopt the amendments by December 6, 1995. The Board must do this so that the amendments are filed with the Secretary of State before that date. This would require the Board to repropose the amendments no later than August 3, 1995 to assure publication in the August 25 Illinois Register. This would result in a public comment period that ends on October 9, 1995, so the Board could vote to adopt the amendments on October 19, with the 30-day hold for U.S. EPA comment ending on November 18, 1995.

At this time, it appears that the only action that U.S. EPA has committed itself to undertake is to delay the effective date of the federal Subpart CC regulations. Even if U.S. EPA undertakes to amend anything other than the effective date between now and December 6, Sections 7.2 and 22.4(a) of the Act would require the Board to adopt the December 6, 1994 Subpart CC amendments before the above deadlines, so they become effective within one year. Later amendments, in turn, would have their own one-year deadline for adoption, although the Board could foreshorten the time for adoption in response to an appropriate request submitted after U.S. EPA takes the further action. Any later amendments or corrections would not affect the December 6, 1995 deadline for action on the base Subpart CC rules. The same is true with regard to any pending litigation in federal court.

In the past, when later corrections and amendments have affected the regulations, the Board has attempted to accommodate the issues raised while still fulfilling our mandate to adopt regulations within one year from the date of U.S. EPA's rulemaking action. Thus, we have accelerated the timing on later amendments and corrections, as we have done in this docket with regard to the January 3, 1995 Phase II LDR corrections. We have also added Board notes indicating the existence of a federal stay, as with the wood preserving rules in R91-1, or a federal judicial decision that vacated the rules, as with regard to the American Mining Congress case and the K066 listing, also in R91-1. These actions have consisted of adding language to the regulations by way of a Board Note that explains the problems with the underlying federal regulation and which explains that

the Board does not intend that the state regulation have any more effect than the corresponding federal regulation.

Based on the information before the Board with regard to the federal delay, and in the absence of the two motions to sever and delay the Subpart CC amendments, the Board would be inclined to adopt the amendments, following our traditional course of noting problems with the rules at the federal level. Thus, we would be inclined to revise the amendments as follows (revisions highlighted):

Section 724.980 Applicability

- a) The requirements of this Subpart apply, effective December 6, 1995, to owners and operators of all facilities that treat, store, or dispose of hazardous waste in tanks, surface impoundments, or containers subject to 724.Subparts I, J, or K, except as Section 724.101 and subsection (b) below provide otherwise.

BOARD NOTE: U.S. EPA adopted these regulations at 59 Fed. Reg. 62896 (Dec. 6, 1994), effective June 6, 1995. At 60 Fed. Reg. -- (-- --, 1995), U.S. EPA delayed the effective date until December 6, 1995. If action by U.S. EPA or a decision of a federal court changes the effectiveness of these regulations, the Board does not intend that the 724.Subpart CC rules be enforceable to the extent that they become more stringent than the federal regulations upon which they are based.

...

Section 725.980 Applicability

- a) The requirements of this Subpart apply, effective December 6, 1995, to owners and operators of all facilities that treat, store, or dispose of hazardous waste in tanks, surface impoundments, or containers subject to either 725.Subparts I, J, or K, except as Section 725.101 and subsection (b) below provide otherwise.

BOARD NOTE: U.S. EPA adopted these regulations at 59 Fed. Reg. 62896 (Dec. 6, 1994), effective June 6, 1995. At 60 Fed. Reg. -- (-- --, 1995), U.S. EPA delayed the effective date until December 6, 1995. If action by U.S. EPA or a decision of a federal court changes the effectiveness of these regulations, the Board does not intend that the 725.Subpart CC rules be enforceable to the extent

that they become more stringent than the federal regulations upon which they are based.

. . .

This would give the regulated community in Illinois the benefit of all that is immediately foreseeable in the way of federal action on the regulations. There is simply no way of telling at this time when any litigation involving the amendments would conclude and what its outcome might be. Similarly, there is no way of telling when U.S. EPA might amend the Subpart CC rules. This action would avoid the need for severing the amendments while granting the latest possible effective date allowed under the Board's legislative mandates.

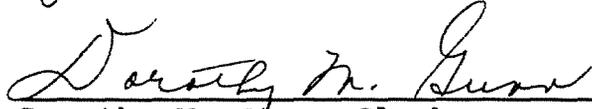
REQUEST FOR ADDITIONAL COMMENTS

In order that the Board might dispose of the amendments and the pending motions at our regularly-scheduled meeting of June 1, 1995, participants, especially CICI, IERG, CWM, TWI, and the Agency, are requested to address the following issues and respond to the Board no later than May 25, 1995:

1. What, if any, indications are there that U.S. EPA will amend or correct the Subpart CC regulations between now and December 6, 1995 to do anything other than delay the effective date?
2. Would inserting the delayed effective date into the amendments and adopting them at this time satisfy the intent of the motions and comments by delaying the effective date until as late as the Board can allow?
3. Would including the added Board Notes adequately address concerns relating to any future U.S. EPA amendments or the outcome of any federal litigation?
4. If the answers to questions 2 and 3 are no, exactly what segments (Sections and/or subsections) of the approximately 410 pages of amendments should the Board stay?

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above order was adopted by the Board on the 18th day of May, 1995, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board