ILLINOIS POLLUTION CONTROL BOARD
February 28, 1991

IN THE MATTER OF:	)	
	)	R90-17
RCRA DELISTINGS	)	Identical in substance
	)	Rulemaking

ADOPTED RULES. FINAL ORDER.

OPINION OF THE BOARD (by J. Anderson):

By a separate Order, pursuant to Section 22.4(a) of the Environmental Protection Act (Act), the Board is amending the RCRA hazardous waste regulations. This action involves 35 Ill. Adm. Code 720 and 721.

Section 22.4 of the Act governs adoption of regulations establishing the RCRA program in Illinois. Section 22.4(a) provides for quick adoption of regulations which are "identical in substance" to federal regulations; Section 22.4(a) provides that Title VII of the Act and Section 5 of the Administrative Procedure Act shall not apply. Because this rulemaking is not subject to Section 5 of the Administrative Procedure Act, it is not subject to First Notice or to Second Notice review by the Joint Committee on Administrative Rules (JCAR). The federal RCRA regulations are found at 40 CFR 260 through 270. This rulemaking makes technical changes to the Board's hazardous waste delisting procedures in response to USEPA's delegation of delisting authority at 55 Fed. Reg. 7320, March 1, 1990.

PUBLIC COMMENT

The Board adopted a Proposed Opinion and Order on July 19, 1990. The proposed rules appeared on August 31, 1990, at 14 Ill. Reg. 13925. The Board has received the following public comment:

PC 1 Administrative Code Division, September 19, 1990

PC 2 Illinois Environmental Protection Agency (Agency), October 15, 1990

PC 3 Chemical Waste Management, Inc. (CWM), October 15, 1990

PC 4 Keystone Steel and Wire (Keystone), October 25, 1990

PC 5 JCAR, September 5 and November 21, 1990

PC 6 USEPA, February 27, 1991

On October 25, 1990, Keystone also filed a motion for leave to file instanter, which is granted. The late comments from JCAR and USEPA are also accepted.

The Administrative Code Division requested changes in the format of the rules, which have generally been made. (PC 1) JCAR indicated that it had no questions regarding this rulemaking. (PC 5)

This rulemaking has generated more comment per page than any other identical in substance rulemaking. The Board appreciates the thorough review which has been conducted by the commenters. Although the USEPA comment is very late, this is because USEPA has made a special effort, outside of its normal procedures, to assure that the adjusted standards mechanism will be approvable under the RCRA Act.

HISTORY

This action is based on USEPA's March 1, 1990, delegation of delisting authority to Illinois. The Board normally "batches" USEPA actions over a calendar half for Board adoption. However, the first half of 1990 did not follow this schedule. The Board addressed the first quarter of 1990 in R90-10, in order to provide expedited adoption of the TCLP test as part of the definition of "hazardous waste". R90-10 was adopted on August 30, 1990, and slightly modified on September 13, 1990. The Board then addressed the second quarter of 1990 in R90-11, including the "third third" land disposal bans. R90-11 was proposed on December 20, 1990. The complete history of the RCRA updates is contained in the Proposed Opinion in R90-11.

The March 1, 1990, delisting delegation was not addressed in R90-10, because delegations do not ordinarily result in any need for modifications to identical in substance regulations. However, when the Board began to receive calls from USEPA concerning transfers of files, and from the public concerning original delisting, it became apparent that the existing rules on delisting were inadequate, for the reasons discussed below. The Board therefore opened this Docket to consider needed amendments.

This rulemaking involves 35 Ill. Adm. Code 720.120, 720.122, 721.110 and 721.111. These Sections were adopted and amended in the following actions:

R81-22	February 4, 1982; 45 PCB 317, 341, 345, 348
R86-1	July 11, 1986; 71 PCB 110, 122
R87-5	October 15, 1987; 82 PCB 391, 396
R89-9	March 8, 1990; p. 10

At the time the proposal was formulated, R90-2 was adopted, but not yet filed, and R90-10 was proposed, but not yet adopted. The base text was drawn from the rules as they existed on adoption of R90-2. As is discussed below, some Sections in this Proposal were amended in R90-10. It is therefore necessary to reformulate the base text to reflect R90-10. To make matters more confusing, R90-11 includes a critical USEPA corrective amendment, which needs to be addressed in this Docket. (PC 6)

GENERAL DISCUSSION

On March 1, 1990, USEPA delegated authority to Illinois to administer several additional components of the RCRA program. (55 Fed. Reg. 7320) This included Board authority to delist hazardous waste, in lieu of USEPA, pursuant to 35 Ill. Adm. Code 720.122.

The USEPA rules define hazardous waste in two basic ways. A waste is hazardous either: because it exhibits a hazardous characteristic; or, because it is listed by name or by the name of the process which produces the waste. In the latter case the listings may be over-inclusive. For example, USEPA might determine that Process A produces Waste M which generally has hazardous constituents X, Y and Z. USEPA would then "list" "wastes from Process A" or "Waste M". Wastes which met this description would be hazardous, regardless of whether constituents X, Y or Z were actually present. Delisting would be appropriate if the generator demonstrated that X, Y and Z were not actually present in its waste, and that there were no other hazardous constituents.

There are two basic problems with the Board's delisting Section, 35 Ill. Adm. Code 720.122.

First, Section 720.122 was premised on the assumption that USEPA would initially delist wastes, followed by essentially ministerial Board action in an "identical in substance" rulemaking. For this reason, the Board relied on incorporation by reference of USEPA rules, rather than following its usual practice of adopting the verbatim text. Worse, the USEPA Section (40 CFR 260.22) in turn references the USEPA standards for defining hazardous waste characteristics and listing hazardous wastes, which standards were also incorporated by reference in 35 Ill. Adm. Code 721.110 and 721.111. In the context of a system in which the Board is the direct recipient of delisting procedures, these provisions may be confusing to the public, contrary to the directive of Section 7.2(a)(4) of the Act.

Second, 35 Ill. Adm. Code 720.122 requires the Board to use traditional site-specific rulemaking to delist hazardous waste. This was the only procedure available at the time. However, in Illinois, site-specific rulemaking can be a slow, resource-consuming process. The Board now has authority under Section 28.1 of the Act to handle this type of decision more efficiently by way of the adjusted standards procedures. This is particularly true where, as here, an economic showing is not at issue. (PC 2, 3, 4)

As is discussed in greater detail below, the Board has addressed these problems in two ways. First, the Board has replaced the incorporations by reference with the verbatim text, tailored to fit Illinois procedures. Second, the Board has adopted, in lieu of the site specific procedures, the adjusted standards procedures, a procedure we believe is compatible with USEPA's requirements.

APPROVABILITY OF ADJUSTED STANDARDS FOR DELISTING

The Board specifically solicited comment as to whether the Agency would need to request reauthorization to use the adjusted standard procedure, or whether USEPA could approve this alternative in a less formal way. The Agency indicated that it was uncertain as to whether formal reauthorization would be

required, but that USEPA had indicated that some form of simplified or expedited authorization procedure may be appropriate. (PC 2, #1)

Once authorized, Illinois can administer the RCRA program pursuant to 40 CFR 271.3, subject only to the potential loss of program authority pursuant to 40 CFR 271.22 and 271.23. (PC 4) It appears therefore that Illinois can revise the delisting procedures subsequent to authorization, and implement the new procedures without awaiting reauthorization from USEPA. Of course, the Board needs to make certain that the new procedures continue to meet USEPA requirements, to avoid future loss of program authorization.

Pursuant to 40 CFR 271.9(b), to receive delisting authority, the State need only adopt regulations equivalent to 40 CFR 260.20(b) and 260.22, and provide "public notice and opportunity for comment before granting or denying delisting requests." (PC 3, 4) As is discussed below, the Board has adopted the equivalent of 40 CFR 260.20(b) and 260.22, and the adjusted standards procedures provide for public notice and opportunity for comment which are equivalent to that provided by USEPA when it delists.

SUMMARY OF THE ADJUSTED STANDARDS PROCEDURE

Adjusted standards are authorized by Section 28.1 of the Act, which allows the Board, after adopting a regulation of general applicability, to grant, in a subsequent adjudicatory determination, an adjusted standard for persons who can justify such adjustment. Adjusted standards come in two varieties. The first, called a "generic adjusted standard", can be granted from any general regulation, if the petitioner makes the general showing specified in Section 28.1(c) of the Act. The second type can be granted only if the petitioner has made the "level of justification" showings that had been articulated by the Board when it adopted the regulation of general applicability. The adjusted standard for delisting is of the latter variety: the Board has specified the level of justification in this rulemaking. The level of justification is that specified in 40 CFR 260, as reflected in Section 720.120 and 720.122.

The use of the term "justification" makes the rules somewhat longer. However, it is necessary to use this round-about terminology in Section 720.122(n)(2) in order to make it clear that the Board intends to be specifying a "level of justification" under Section 28.1 of the Act. (PC 6)

The Board has adopted procedural rules implementing the adjusted standard mechanism of Section 28.1 of the Act. The procedural rules are in 35 Ill. Adm. Code 106.701 et seq., and were adopted in R88-5(A). (June 8, 1989; 100 PCB 95, 110)

The Board also has adjusted standards procedures which are specific for certain types of RCRA determinations, including the "boiler determination" in Section 720.133 (40 CFR 260.33). These were adopted in R85-22 (December 20, 1985, and January 9, 1986; 67 PCB 175), and amended in R86-46 (July 16, 1987 and August 14, 1987) and are found at 35 Ill. Adm. Code 106.401 et seq. These procedures are slightly, but not significantly, different than those in Section 106.701 et seq. However, the Board does not see any reason to cite to

the RCRA-specific adjusted standard procedures in this rulemaking, and hence has cited to the newer, general procedures adopted in R88-5(A).

The adjusted standard procedure may be initiated by a petitioner acting alone, or with the Agency as a co-petitioner. (Section 106.703) The contents of the petition are specified in Section 106.705. As provided in Section 106.701(1), the petitioner would not need to provide information which duplicates that requested in Section 720.122. If the Agency is not a co-petitioner, it is required to file a response within 30 days after the filing of the petition, in which it must recommend a grant or denial of the petition. (Section 106.714)

Within 14 days after filing of the petition, the petitioner must publish a public notice of the filing of the petition in a newspaper in the area likely to be affected. (Section 106.711) The notice gives members of the public 21 days to request a public hearing. (Section 106.713) The Board will schedule a hearing if one is requested, or if it otherwise determines that one is advisable. (Section 106.801) Interested persons are allowed to present testimony and exhibits. (Section 106.806) A final comment period is allowed following the public hearing. (Section 106.807)

40 CFR 271.9(b) requires only that the State provide "public notice and opportunity to comment before granting or denying delisting requests." (PC 3, 4) However, the USEPA has suggested that the State should agree to publish notices of tentative decision for public comment, and provide a 30-day public comment period during which concerned persons may request a hearing. (PC 6) The Board believes that the adjusted standard procedure meets the standard of 40 CFR 271.9(b), and is within the ambit of USEPA's suggestion. The Board views its acceptance of a petition accommodates the USEPA's "tentative decision" notice. Although the "within 14 days after" public notice requirement could conceivably be given immediately upon the filing of the petition, in actual practice it will occur several days later. This time, coupled with the 21 day period following the notice, will be approximately 30 days after the tentative decision.

SECTION-BY-SECTION DISCUSSION
PART 720

Section 720.111

The Board has added an incorporation by reference for the guidance manual for delisting, which is used below. The April, 1985, edition is still current. (PC 2, 3, 6)

This Section also cites to SW-846. During the pendency of this proposal, in R90-10, this was revised to cite to the Third Edition, November, 1986, available from the GPO. (PC 6) The base text has been updated to reflect the rules as amended in R90-10.

Section 720.120

This Section corresponds to 40 CFR 260.20, which sets forth USEPA's procedures for citizens to initiate rulemaking. In adopting the Section the Board referenced its procedures in 35 Ill. Adm. Code 102, which also allow any

person to initiate rulemaking. In addition, the Board differentiated petitions to adopt "identical in substance" rules pursuant to Section 22.4(a) of the Act from other petitions to adopt additional regulations pursuant to Title VII of the Act rulemaking.

Notice an opportunity for public comment on proposed regulations are provided for in Section 7.2 (for identical in substance), and Title VII of the Environmental Protection Act and Section 5 of the Administrative Procedures Act.

The only change to this Section is that it has been amended to include a reference to 35 Ill. Adm. Code 726. This is equivalent to 40 CFR 266, which is omitted from the USEPA list of Sections which may be amended pursuant to citizen petition. This is evidently an inadvertent omission from the USEPA rules. (PC 2)

Section 720.122

This Section corresponds to 40 CFR 260.22, which sets forth the standards for delisting, and the contents of the delisting petition. The existing Section incorporates 40 CFR 260.22 by reference, and explains how delisting fits into the State program. The existing subsections (a) through (f) have been moved down to subsections (m) et seq., to maintain close correspondence with the subsection labels in the USEPA rule, the verbatim text of which is now set forth at length.

The portion of 40 CFR 260.22(a) which specifies that a person must file a regulatory petition to obtain a delisting has been deleted. The Board has replaced this with a cross reference to subsection (n), which will include adjusted standards as the new procedure, as is discussed below.

40 CFR 260.22(a) appears to be stating a general delisting standard, which is supplemented by more specific standards for various types of hazardous waste. The subsequent subsections appear to say pretty much the same thing, as applied to the specific types of waste. (PC 2, 6)

The Board has added headings to subsections (b) through (e) indicating to what types of hazardous waste the subsections apply. The type is obvious except with respect to subsection (b). It appears to apply to "listed wastes and mixtures". However, this overlaps some of the following categories which are also Subpart D listed wastes. (PC 2) This subsection emphasizes that wastes which are hazardous due to the "derived from" or "mixture" (Section 721.103(d)) rules may also be delisted. However, it also clarifies that constituents of concern may arise from the non-hazardous wastes mixed with hazardous waste, and that the petitioner must analyze for everything of concern in the mixture. (PC 6)

The USEPA rules include a number of standards which are a real concern under the Illinois APA. An example is: "demonstrates to the satisfaction of

the Administrator". The Board has changed many of these to clear, objective standards.

The USEPA rules include another standard which is of concern, the standard for whether to consider other possible hazard characteristics besides the ones which caused the waste to be listed. This reads as follows:

> [If the Board] has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste.

The Agency suggested that this language was capable of implementation. (PC 2, #2). On the other hand, CWM recommended the addition of clarifying language, which the Board has included at this and similar points:

> A Board determination under the preceding sentence must be made by reliance on, and in a manner consistent with, "Petitions to Delist -- A Guidance Manual", incorporated by reference in Section 720.111.

40 CFR 260.22(d) applies to D-listed toxic wastes. It includes a reference to the factors USEPA considered in listing these wastes, which are in 40 CFR 261.11. As is discussed below, the Board has replaced incorporations by reference with verbatim text for that Section also.

40 CFR 260.22(f) and (g) are "reserved" for radioactive and infectious waste. Code Division requirements prohibit reserving subsections. However, holes will be left to preserve the correspondence of subsection labels. (PC 1)

Following 40 CFR 260.22(l) is a note referencing the Federal Register publication of a notice of availability of the guidance document on delisting. The Board has replaced this with a reference to the document itself, which has been incorporated by reference in Section 720.111, above.

As noted above, the existing text of Section 720.122 mostly deals with fitting the federal delistings into the State program. The existing text now appears beginning with Section 720.122(m), which continues to authorize persons to propose "identical in substance" delistings following USEPA action. This remains a useful provision even after delegation, because USEPA might retain authority to delist in a multistate situation. In such a case, the Board could continue to use "identical in substance" rulemaking to enter the result into the Illinois rules.

Existing Section 720.120(a) (now renumbered to (m)) allows persons to propose to the Board either "general delistings" or "delisting of specific wastes" which have been adopted by USEPA. By "general delistings", the Board means a USEPA action removing a listing from its regulations. At the time this Section was adopted (R81-22), it was not clear whether 40 CFR 260.22 would govern such "general delistings". It is now clear that it does not, and the Board has therefore removed the reference to "general delistings" from

Section 720.122(m). (PC 6) "General delistings" will be handled through the routine update process.

Section 720.122(n) is drawn from old subsection (b). As is discussed in general above, it allows procedures for original Board action on a delisting. As amended, it requires the use of the adjusted standards procedural rules under 35 Ill. Adm. Code 106.Subpart G. As is discussed in general above, the "justification" for the adjusted standard is the USEPA delisting requirements above. The term "justification" is a term of art in Section 28.1 of the Act. (PC 6)

The Board proposed to allow the use of either site specific rulemaking or the adjusted standards procedures for delisting. In part this was to allow persons to continue to use site specific rulemaking pending formal approval of the adjusted standards mechanism by USEPA. However, as is discussed in general above, the public comment in this matter has pursuaded the Board that the adjusted standard mechanism meets all USEPA requirements, and that prior approval is not required. The Board has therefore deleted the option of continuing to use site specific rulemaking.

A few site specific delisting proposals are pending. (R90-18, R90-22) At the request of the parties, the Board will redocket these as adjusted standards, and will enter such Orders as may be appropriate to continue these as adjusted standards.

Section 720.122(c) has been renumbered to Section 720.122(o). This Section distinguishes the Agency's authority to determine whether something is a hazardous waste from the Board's delisting authority. While the Agency's action must be based on the regulatory definition, the Board's action changes the regulatory definition. This Section was adopted in R81-22. (45 PCB 345) (PC 6)

Old Section 720.122(d) contained the incorporation by reference of 40 CFR 260.22. This has been replaced with the verbatim text discussed above.

Section 720.122(d), renumbered to 720.122(p), also contains the requirement that, before the Board adopts a USEPA delisting, someone demonstrate that the delisting needs to be adopted as a part of the Illinois RCRA program. This was added in R86-1 (71 PCB 123). This limitation is now codified in Section 7.2(a)(1) of the Act. Most USEPA delistings concern wastes generated and managed outside Illinois. Delistings do not need to be added to the Illinois rules unless the waste is generated or somehow managed in Illinois. Consistent with CWM's comments (PC 3), the Board has clarified this language to read as follows:

> Any petition to delist ... ~~shall include a showing that the delisting needs to be adopted as a part of the Illinois RCRA program~~ must include a showing that the waste will be generated or managed in Illinois.

Old Section 720.122(e) has been moved to Section 720.122(q). This provided that the Board would not approve delistings if they would make the Illinois program less than "substantially equivalent" to the USEPA program. The Board has received comment from CWM and USEPA on this language. (PC 3,

6) These appear to stem from the fact that, once Illinois delists a waste in an independent action, the Illinois program will no longer be equivalent to the USEPA program in the sense of regulating the same universe of wastes. CWM has suggested that the language be changed to provide that the petitioner must show that "the delisting, if granted, will not cause loss of authorization of the State RCRA program". (PC 3) USEPA has suggested more specific language to the effect that the Board would "not grant any petition which would render the State program less stringent than if decisions on delisting petitions were made by USEPA". (PC 6) The Board has modified this language along the lines suggested by USEPA.

USEPA has requested a number of minor procedures, which have been added to Section 720.122(q). The petitioner will be required to mail a copy of any adjusted standard petition to USEPA, both Region V and the Office of Solid Waste. The Board will mail copies of the final decision, and any modifying orders, to both USEPA offices. (PC 6)

One minor difference between the USEPA delisting procedure and the adjusted standards procedure is that, while the former results in a permanent "delisting" which appears in the CFR, an adjusted standard is an Order given just to the petitioner (and USEPA and the Agency). This could pose problems, since a delisting affects persons managing the waste, as well as the petitioner. Section 28.1(d)(3) requires an annual publication of a list of adjusted standards in the Illinois Register, but this would not be convenient for the average person using the regulations. It would be preferable if a central listing of adjusted standards were maintained with the rules, similar to the delistings in 40 CFR 261, Appendix IX. However, this could not be done directly, since the Board does not have the power to directly modify a regulation in an adjusted standard proceeding.

In Section 720.122(q), the Board has obligated itself to maintain a list of adjusted standards in 35 Ill. Adm. Code 721.Appendix I, as a part of the routine updating of the regulations in response to USEPA actions. Although there will be a six to twelve month lag before new adjusted standards appear on the list, it will help in keeping track of the older standards.

The Board does not intend to publish the entire text of the adjusted standard in the Appendix. Rather, the Board will list the name of the petitioner, Docket number, date(s) of decisions and a short name for the waste.

It is arguable that the Board cannot publish such a list pursuant to its identical in substance mandate, as defined in Section 7.2 of the Act. However, with respect to delisting, the Board has replaced USEPA as the delisting authority in Illinois. In order to continue to keep the equivalent of 40 CFR 261, Appendix IX up to date, the Board has to publish a listing of its delisting actions. In addition, the Board has independent authority for this Appendix in the directive of Section 28.1(d)(3) of the Act, since it is also a means to assure publication in the Illinois Register.

Old Section 720.122(f) has been moved to Section 720.122(r). Delistings apply only in Illinois. It also includes a provision that generators must comply with Part 722 for waste which is hazardous in any state to which it is transported. CWM has objected to the this language. (PC 3)

The language in question was adopted in R81-22, with the discussion on page 30 of the Opinion (45 PCB 346). The language was amended in R86-1, to recognize the possibility that USEPA would retain primacy in some jurisdictions. (71 PCB 123).

CWM has asserted that generators are subject to the laws of the receiving state. (PC 3) This is incorrect. Although Section 722.121 requires the use of the receiving State's manifest, it is an Illinois law.

CWM's general assertion that generators are subject to the receiving State's law, if true, would create many conflict of law problems. For example, 40 CFR 260.34 and 35 Ill. Adm. Code 720.134 set time limits on generator storage of waste. CWM seems to be saying that the recipient State's law controls these storage times. First, this would mean that a hazardous waste generator could escape regulation in Illinois be declaring that he intended to ship waste to a State in which the waste was delisted. Second, it would be an unacceptable intrusion into Illinois' regulation of hazardous waste generators if other states had the power to grant extensions of storage times for wastes inside Illinois. Third, since the generator would not know which state's storage law applied until after the generator decided where to ship the waste, no state would have jurisdiction to grant extensions of the storage times.

CWM appears to be focusing on a situation in which an Illinois generator of an Illinois delisted waste decided to ship the waste to a state which had not delisted the waste. This is somewhat different, in that the waste would be unregulated in Illinois, but regulated in the other State. This example may not be worth considering, since the generator would not do something against his economic interest. However, in such a situation, the present wording of Section 720.122(r) could be read to give retroactive applicability to the Illinois generator rules.

The definition of "generator" in 40 CFR 260.10 and 35 Ill. Adm. Code 720.110 includes "any person whose act first causes a hazardous waste to become subject to regulation". In the case of an Illinois delisted waste shipped to a state which has not delisted that waste, the act of generation would then be the decision to ship out of State. The generator would have to initiate a manifest under Section 722.123, and comply with various recordkeeping and reporting requirements. If the generator did not have a generator i.d. number, he would have to obtain one under Section 722.112. However, these requirements would arise at the time the person decided to ship the waste, not retroactively to the time the waste was physically created.

The Board has considered rewriting Section 720.122(r) so as to specifically state that the duty to comply with Part 722 arises upon the decision to ship. The Board has not done so, since, as noted above, the ambiguity seems to arise only in what appears to be the unlikely example of a person shipping a delisted waste to an "undelisted" state.

PART 721

As was discussed above, the USEPA standards for delisting reference the criteria for listing hazardous waste in 40 CFR 261.11, which in turn is closely related to 40 CFR 261.10. In adopting equivalents of these Sections

in 35 Ill. Adm. Code 721.110 and 721.111, the Board used incorporation by reference, without setting forth the verbatim text. The Board incorporated these Sections by reference for two reasons.

First, even if the Board were to identify additional criteria or list additional wastes, these two Sections would not be controlling. Rather, the broad mandates of Sections 22.4(c) and 27 of the Act would control. There is nothing in federal or State law which would prevent the Board, acting pursuant to normal rulemaking procedures, from identifying wholly new criteria, or redefining USEPA's criteria in a more inclusive manner.

Second, if the Board adopted the verbatim text of these Sections, it would appear to govern future regulatory actions taken by USEPA. This basis for not adopting is now codified in Section 7.2(a)(1) of the Act.

Section 7.2(a)(4) now authorizes incorporation by reference only where it would not be confusing to the public. As is discussed above, the delisting rules will be incomplete without a portion of these listing rules. The Board has therefore adopted the verbatim text. However, the verbatim text has been reworded so that it governs neither future actions by the Board nor USEPA. Rather, the text is set forth as neutral statements of the criteria which were used by USEPA to identify hazardous characteristics and to list hazardous waste. In this way the needed standards are present, but the unintended effects are avoided.

Section 721.110

This Section is drawn from 40 CFR 261.10. This Section contains the criteria used by USEPA to "identify" the characteristics of hazardous waste. For example, ignitability and toxicity are "characteristics" of hazardous waste which USEPA has identified pursuant to this Section.

As discussed above, the Board has replaced the incorporation by reference with the verbatim text, edited to avoid stating this as a State rule with which USEPA and the Board must comply.

40 CFR 261.10 has a subsection (a), but no (b). (PC 6) This is prohibited by the Code Unit. The simplest way to codify this Section would be to promote the levels of subdivision. However, this would destroy the close correspondence between the Board and USEPA numbering. Instead, the Board has added a do-nothing cross reference as subsection (b).

Section 721.111

This Section is drawn from 40 CFR 260.11. It sets forth the criteria which were used by USEPA to "list" wastes. For example, waste which has LD_{50} (rat) of less than 50 mg/kg is listed as "acute hazardous waste".

As originally adopted, this Section is mainly an incorporation by reference of the USEPA rule. As is discussed in general above, the Board has replaced the incorporation by reference with the verbatim text, edited to avoid stating it as a State rule with which the Board and USEPA must comply.

The Standard which is referenced in 40 CFR 260.22, which is the main purpose of adopting this Section, is 40 CFR 261.11(a)(3). This is the standard for listing a toxic waste. As this formerly read, USEPA listed any waste which contains an Appendix VIII (or H) contaminant, unless it determines that the waste "is not capable of posing a substantial present or potential hazard...", based on consideration of eleven criteria. 40 CFR 261.11(a)(3)(i) through (xi) list factors for consideration. There are a number of editorial problems with the USEPA text.

USEPA has modified the language of 40 CFR 260.22(a)(3), by changing "unless" to "and", and by removing a "not" from the third line as presented in the Board proposal, so that the listing standard now reads: "contains any of the toxic constituents listed in Appendix VIII and, ... the waste is capable of posing ..." (PC 6, 55 Fed. Reg. 18726, May 4, 1990. This change is pending in R90-11, but will be made in this Docket instead.

Following 40 CFR 261.11(a)(3)(xi) is a hanging paragraph. This is prohibited by the Code Division. It is impossible to cite to this paragraph in a simple manner, other than as "the hanging paragraph following Section 261.11(a)(3)(xi)". It is necessary to rewrite this into a format acceptable to the Code Division. The question is whether this paragraph is a portion of the introductory text to subsection (a)(3), a portion of subsection (a)(3)(xi), or subsection (a)(4) with its label missing. The Board proposed this as a subsection (a)(4). The Agency objected. (PC 2) The Agency believes that this merely notes that the substances in Appendix VIII (H) are there because they affect humans (or other life forms) in certain ways. The Agency suggested moving the text up into the introduction to subsection (a)(3), so it appears in parenthesis after "Appendix H". The Board has basically followed the Agency interpretation, but will place the text in a "Board note" following the introduction to subsection (a)(3).

40 CFR 261.11(b) allows USEPA to list wastes based on the definition of hazardous waste in Section 1004(5) of the RCRA Act. The Board generally avoids unnecessary references to federal statutes, especially ones which function as incorporations by reference. However, in this case the Board is merely reciting the standards used by USEPA in making a decision. The possibility that a person would have to actually find and apply this definition in a case before the Board is remote. (PC 2)

CONCLUSION

This Opinion supports the Board's Order of this same day. The text of the rules is set forth in that Order. The Board will allow 30 days for post-adoption comments from the agencies involved in the authorization process before filing the adopted rules.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 28th day of February, 1991, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board