

ILLINOIS POLLUTION CONTROL BOARD
January 25, 1990

IN THE MATTER OF:)
)
UST STATE FUND) R89-19
) (Rulemaking)

PROPOSAL FOR PUBLIC COMMENT

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

Pursuant to Section 22.4(d) and 22.13(d) of the Environmental Protection Act (Act), as amended by P.A. 86-0958, the Board is proposing to amend the UST underground storage tank regulations in 35 Ill. Adm. Code 731.

Section 22.13 of the Act establishes the "Underground Storage Tank Fund". Section 22.13(d) requires the Board to implement the Fund by adopting regulations pursuant to Section 22.4(d), which 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. The rules governing State Funds are 40 CFR 280.100 and 280.101, adopted at 53 Fed. Reg. 43378, October 26, 1988.

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.
- 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.
- R89-4 July 27, 1989; 13 Ill. Reg. 15010, effective September 12, 1989.
- R89-10 Proposed November 15, 1989; January 5, 1990, at 14 Ill. Reg. 153.

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 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.
- 13 Ill. Reg. 7744, effective May 9, 1989.
- 13 Ill. Reg. 8515, effective May 19, 1989.
- 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

The technical standards were adopted at 13 Ill. Reg. 5669. The financial assurance requirements were incorporated by reference at 13 Ill. Reg. 8515. The other actions were corrections and objections.

STATUTORY AUTHORITY

The 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 Proposed 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" 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 provides that the Board may, upon receiving notice of such requirements, to adopt further Board requirements which are "identical in substance" to the additional Fire Marshal requirements.

S.B. 64 AND 752

In R89-4 the Board adopted the USEPA financial assurance requirements, which are from the October 26, 1988 Federal Register. These regulations require that owners or operators obtain "private insurance", as defined below and establish a standby trust fund to receive the proceeds of the financial assurance. 40 CFR 280.100 and 280.101 allow the use of state funds under certain conditions. The Board adopted no equivalent of 40 CFR 280.100 or 280.101 because, at the time R89-4 was under consideration, there appeared to be no State fund in Illinois which met the conditions.

At about the same time R89-4 was adopted, S.B. 64 was signed into law as P.A. 86-125. S.B. 64 created a State fund. However, S.B. 64 did not state that it was intended to create a State Fund meeting the USEPA requirements; did not provide that persons qualifying under the Fund met the federal financial assurance requirement; did not direct the Board to amend its rules to allow the use of the Fund in lieu of private insurance; and, did not permit the Board to use the "identical in substance" rulemaking mechanism to so amend its rules.

The problem was resolved in S.B. 752 (P.A. 86-0958), which added Section 22.13(d) to the Act. This section provides as follows:

The Fund is intended to be a State Fund by which persons who qualify for access to the Fund in the event of a release may satisfy the financial responsibility requirements under

applicable federal law and regulations. The Board shall implement this intent by adopting regulations pursuant to subsection (d) of Section 22.4 of this Act.

"IDENTICAL IN SUBSTANCE" MANDATE

Section 22.4(d) requires the Board to adopt regulations which are "identical in substance". Section 7.2 of the Act provides that:

...[R]egulations that are "identical in substance" means State regulations which require the same actions with respect to protection of the environment, by the same group of affected persons, as would federal regulations if USEPA administered the subject program in Illinois. After consideration of comments ..., the Board shall adopt the verbatim text of such USEPA regulations as are necessary and appropriate for authorization of the program...

The "identical in substance" mandate in this rulemaking ordinarily would pose a difficulty in that the federal regulations allow, but do not require creation of a state fund. Also, the USEPA rules prescribe the form of a state fund which qualifies under federal law, not a verbatim text. In such situations Section 7.2(a)(3) would require the Board to "adopt a regulation as prescribed, to the extent possible consistent with other relevant USEPA regulations and existing State law." The Board construes the legislative directive in Section 22.13(d) as superseding any requirements the Board might otherwise have to make an "identical in substance" review as regards to the statute.

The Board construes Section 22.13(d) as a legislative pre-determination that the UST State Fund statutory provisions satisfy the identical in substance mandate and that no separate Board consideration is required, except to reference the statute and identify the appeal procedure. However, there are a few USEPA requirements discussed below. In addition, the Board has proposed regulatory language to address two of them, certificates of coverage and nature of private insurance.

PRIVATE INSURANCE REQUIREMENT

35 Ill. Adm. Code 731.195, and 40 CFR 280.95 specify certain methods by which an operator demonstrates financial responsibility. Mechanisms include private insurance, bonds, letters of credit, trust funds, self-insurance for operators which meet a financial test and guarantees from related

corporations which meet the financial test. Operators* are allowed to use these mechanisms in combinations to meet the total amount of required financial assurance. Operators must establish a standby trust fund to receive the proceeds of any mechanism in the event of a release.

In this Opinion the Board will use the term "private insurance" to refer to the mechanisms under the USEPA rules, exclusive of state funds, by which an operator can meet the financial assurance requirement. It is to be understood that this refers to mechanisms other than insurance, including self-insurance and guarantees.

40 CFR 280.100 AND 280.101

State funds are governed by 40 CFR 280.100 and 280.101. Section 280.100 applies to UST's in states without an approved program where the state requires a financial assurance mechanism. USEPA may accept the mechanism if it meets a certain standard. There may be a USEPA Drafting ambiguity which merits further consideration.

Section 280.101 applies to UST's located states where USEPA is administering the financial responsibility requirements in a state "which assures that monies will be available from a state fund". USEPA will accept the state fund in lieu of private insurance if a certain standard is met.

Which Section applies? Clearly Section 280.101 is directed at state funds. However, in Illinois, the UST fund is also a "state-required mechanism", since its use is mandatory. Arguably the UST fund could be approvable under either Section. However, the applicability question has deeper levels.

Both Section 280.100 and 280.101 are "USEPA-only Sections", which apply only to USEPA approval of alternative mechanisms and state funds when USEPA is administering the program. They are silent as to these mechanisms when the State is administering the program. As the Board understands the process, any State mechanisms in the final program will be approved under the general language on program approval in 40 CFR 281, 281.39. However, the Board solicits comment on this.

APPROVABILITY OF THE FUND

40 CFR 280.101 allows the use of a "state fund" if the Regional Administrator determines that it is "at least equivalent to the financial mechanisms specified" in the regulations. The Regional Administrator is to evaluate equivalency principally in terms of:

* As used in this Opinion, "operators" means "owners or operators".

... Certainty of the availability of funds for taking corrective action and/or for compensating third parties; the amount of funds which will be made available; and the types of costs covered. 40 CFR 280.101(b).

40 CFR 280.100(a) and 280.101(a) allow the use of State funds to meet federal requirements only if approved by the Regional Administrator of USEPA. Section 22.4(d) of the Act requires the Board to maintain an "identical in substance" program. There is a potential conflict between the mandates of Section 22.4(d) and 22.13, if USEPA were to fail to approve the Fund. However, in that the General Assembly has provided for immediate use of the Fund to satisfy the financial assurance requirement in the Board rules, the Board will not condition use of the Fund on USEPA approval.

S.B. 752 mandates that the Board adopt regulations to implement the UST Fund. The Board has therefore developed a proposal without conducting an evaluation as to whether the UST Fund is indeed approvable.

As the Board understands the process, approval of state funds will be a procedure separate from the authorization application process. USEPA may be able to approve the use of the State fund prior to authorization of the Illinois UST program.

As noted earlier, under 40 CFR 280.101(b), approvability of the State fund depends on: the amount of coverage; the types of costs covered; and, the certainty of availability of funds.

AMOUNT OF COVERAGE

40 CFR 280.93, and 35 Ill. Adm. Code 731.193, specify the amounts of required financial assurance. For most operators this is \$1 million per occurrence, with an annual aggregate of \$1 million, with alternative amounts specified for small or large throughput tanks.

TYPES OF COSTS COVERED

35 Ill. Adm. Code 731.193, as adopted in R89-4, and federal law, require owners or operators of UST's to:

... demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from operation of petroleum underground storage tanks... 35 Ill. Adm. Code 731.193 and 40 CFR 280.93.

CERTAINTY OF AVAILABILITY OF FUNDS

Coverage under the State UST Fund is subject to conditions, including private insurance coverage for the deductible, registration of the tank, compliance with Board regulations, adequacy of the Fund, prepayment by the operator of corrective action costs and claims, and prepayment of the deductible.

Regarding the pre-payment of the deductible, for example, the USEPA requirements for private insurance provide:

The [Insurer] is liable for the payment of any amounts within any deductible applicable to the policy to the provider of corrective action or a damaged third-party, with a right of reimbursement by the insured for any such payment made by the [Insurer]. (40 CFR 280.97(b)(1), paragraph (2)(b) of the required private insurance form.) (Incorporated by reference in 35 Ill. Adm. Code 731.197)

CERTIFICATE OF COVERAGE

40 CFR 280.101 has requirements for an approvable fund which do not appear to be clearly addressed in the legislation regarding a certificate of coverage. 40 CFR 280.101(d) requires the State to issue "a letter or certificate describing the nature of the state's assumption of responsibility". The certificate must identify the facility and the "amount of funds for corrective action and/or for compensating third parties that is assured by the State." The Board has below proposed to include these requirements in the proposal. The USEPA rule requires in addition that the operator keep the certificate at the facility. However, the Board has not required this, consistent with the approach taken in R89-4 in Section 731.206 and 731.207.

40 CFR 280.101(d) requires the State to issue, within 60 days after USEPA approval of the use of a State fund, letters or certificates of coverage to operators covered by the fund. However, access to the UST fund under S.B. 64 appears to be subject to many conditions which, if S.B. 64 is taken literally, would prevent the Fire Marshal from issuing certificates of coverage until after a release has occurred. If the Fire Marshal could not issue certificates of coverage in advance, the Bills would fail in their central purpose of releasing the operator from the requirement to maintain private insurance. In the proposal below, the Board has reconciled this potential conflict by construing the conditions of S.B. 64 as conditions under which the Fire Marshal issues the certificate of coverage, rather than as post-hoc conditions for payment.

Also, there is a very real possibility that an operator will qualify for a certificate, and later fail to meet the conditions. For example, one condition is that the operator have

private insurance for the deductible. The operator could obtain the certificate, and then allow the private insurance to lapse by failing to pay premiums when due. For this reason the Board has proposed to limit certificates of coverage to one year. Annual renewal will tend to limit the number of operators with certificates who subsequently "fall off the wagon".

The Board **solicits comment** as to whether there might be an alternative way to reconcile these provisions, or whether these provisions need to be reconciled at all.

NATURE OF PRIVATE INSURANCE

S.B. 64 requires that the operator have private insurance for the deductible which is not covered by the Fund. The Bill is not otherwise more specific as to the nature of this insurance. The Board has proposed to allow the use of any of the private mechanisms allowed under Board rules, which are derived from the USEPA rules. The mechanisms include insurance, bonds, letters of credit and trust funds. In addition, they include self insurance for operators which meet a financial test, and guarantees from parent corporations which meet the financial test. The Board **solicits comment** as to whether this is consistent with the statutes, and as to whether use of these mechanisms to meet the deductible ought to be compulsory.

STANDBY TRUST FUND

As noted above, 40 CFR 280.103 and 35 Ill. Adm. Code 731.203 require the operator to establish a standby trust fund to receive the proceeds of private insurance. The rules would be simpler if the UST Fund functioned the same as private insurance: i.e. if it were payable into the standby trust fund. However, 35 Ill. Adm. Code 731.208 (40 CFR 280.108) governs the details of how the Agency draws on the standby trust. These provisions are not compatible with the provisions in the Bills. Therefore, the Board has not directly proposed to require operators to establish standby trusts, or to require the State Fund proceeds to be paid into such a trust. However, if operators have to have private insurance meeting USEPA requirements for the deductible, as discussed above, they will be required to establish standby trusts anyway.

CONCLUSION

The Board proposes to adopt the Section set forth below. The Board will receive written public comment for 45 days after the date of publication of the proposal in the Illinois Register.

ORDER

The Board proposes to add the following Section as 35 Ill. Adm. Code 731.200:

Section 731.200 UST State Fund

- a) Section 22.13 of the Act creates the Underground Storage Tank Fund (Fund). THE FUND IS INTENDED TO BE A STATE FUND BY WHICH PERSONS WHO QUALIFY FOR ACCESS TO THE FUND IN THE EVENT OF A RELEASE MAY SATISFY THE FINANCIAL RESPONSIBILITY REQUIREMENTS UNDER THIS PART. (Section 22.13 of the Act.)
- b) An owner or operator may apply to the Fire Marshal for a certificate of coverage, on forms provided by the Fire Marshal.
- c) If the Fire Marshal determines that the owner or operator would be entitled to receive funds from the Fund in the event of a release, it shall issue a certificate of coverage. The certificate must specify:
 - 1) Name of the owner or operator;
 - 2) Name and address of the facility;
 - 3) The amount of funds for corrective action or compensating third parties which is assured by the Fund;
 - 4) The effective date and expiration date of the certificate;
- d) Certificates are valid for no longer than one year.
- e) The owner or operator shall reapply for a new certificate no less than 60 days prior to expiration of the old certificate.
- f) An owner or operator with a certificate is deemed in compliance with the requirements of this Subpart with respect to the facility listed in the certificate.
- g) Owners or operators may use any financial assurance mechanism or combination of mechanisms meeting the requirements of the other Sections of this Subpart to meet the Fund requirement that they have insurance for the deductible.
- h) The owner or operator may appeal the refusal to issue a certificate or the issuance of a certificate subject to conditions pursuant to 35 Ill. Adm. Code 105.
- i) IF THE AGENCY REFUSES TO REIMBURSE OR AUTHORIZES ONLY A PARTIAL REIMBURSEMENT, THE AFFECTED OWNER OR OPERATOR MAY PETITION THE BOARD FOR A HEARING pursuant to 35 Ill. Adm. Code 105. (Section 22.18b(g) of the Act).

(Source: Added 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 Proposal for Public Comment, Proposed Opinion and Order was adopted on the _____ day of _____, 1990, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board