

ILLINOIS POLLUTION CONTROL BOARD
May 13, 1982

In the matter of:)
) R81-32
UNDERGROUND INJECTION CONTROL (UIC))

FINAL ORDER. ADOPTED RULES

OPINION OF THE BOARD (by D. Anderson):

Public Act 82-380 was enacted in September, 1981. As amended, Sections 13 and 22.4 of the Environmental Protection Act (Act) require the Board to adopt regulations which are identical in substance to federal regulations pursuant to the Resource Conservation and Recovery Act (RCRA or RCRA Act) and the Safe Drinking Water Act (SDWA) in order for Illinois to obtain primacy from United States Environmental Protection Agency (USEPA) for the RCRA and Underground Injection Control (UIC) permit programs. The Phase I RCRA regulations were adopted by the Board on September 16, 1981 and amended on February 4, 1982 and March 19, 1982 (R81-22, 6 Ill. Reg. 4828, April 23, 1982).

On December 23, 1981 the Illinois Environmental Protection Agency (Agency) proposed that the Board adopt regulations establishing an underground injection control program. The proposal included operating standards for wells and a UIC permit program. The proposal was similar to 40 CFR 122, 124 and 146.

P.A. 82-380 allows the Board to adopt "identical in substance" regulations without complying with hearing and economic impact study provisions of the Act or the first notice provisions of Section 5 of the Administrative Procedure Act (APA). The Board nevertheless published the Agency proposal in the Illinois Register and solicited comments for 45 days (Order of January 7, 1982; 6 Ill. Reg. 1005, 1011, January 29, 1982).

The Board received three comments. These were from the Illinois Manufacturers' Association, a joint comment from five steel companies (Granite City Steel Division of National Steel Corporation, Interlake, Inc., Northwestern Steel and Wire Company, Republic Steel Corporation and United States Steel Corporation) and the Illinois State Library. These are discussed below.

CODIFICATION REQUIREMENTS

The Agency proposal included three Parts: 702, 705 and 730, which corresponded to 40 CFR 122, 124 and 146. Part 702 included three Subparts, the first dealing with rules in common for RCRA and UIC permits, the second and third with special rules for RCRA and UIC permits, respectively. Federal material dealing with NPDES permits was eliminated from the federal rules.

As proposed Part 702 was 76 pages long. With addition of the RCRA permit rules to Subpart B, Part 702 would be about 140 pages long. This would be grossly in excess of the 50-page limit on Parts. Also, many sections were over the 3-page limit on sections (1 Ill. Admin. Code 120.700).

The Board has split proposed Part 702 into three Parts, 702, 703 and 704, which correspond with the proposed Subparts. The larger sections have been split up by making sections of the first level of subdivision. Subparts have been added to indicate the major features of each Part.

Proposed Part 705 has been split into six subparts, with the larger sections broken up as in Part 702. Part 730 has been left in the form proposed. The one-to-one relationship with 40 CFR 146 will allow easier modification to reflect future federal amendments.

PART 700 OUTLINE OF WASTE REGULATIONS

Section 700.103 Organization

Part 700 was adopted with the Phase I RCRA regulations (R81-21). Section 700.103 contains the intended ultimate organization of the waste regulations. This has been amended to reflect the UIC proposal, as well as developments in the other waste proposals (R80-20, R81-18, R81-25 and R81-31).

Section 700.104 Intent and Purpose

This has been amended to add UIC provisions. Many of the changes proposed by the Agency have already been adopted by the Board with the February 4, 1982 amendments to the RCRA rules.

Section 700.106 Effective Dates

The UIC permit rules will become effective on the date of USEPA approval of the program. The proposed rule establishing an effective date for the RCRA program will not be adopted at this time.

CORRESPONDING FEDERAL REGULATIONS

Parts 702, 703 and 704 correspond to 40 CFR 122, Part 705 to 40 CFR 124 and Part 730 to 40 CFR 146. The text adopted is the 1981 Code of Federal Regulations with the following amendments:

- 46 FR 35,249 (July 7, 1981)
- 46 FR 40,897 (August 13, 1981)
- 46 FR 51,410 (October 20, 1981)
- 46 FR 55,112 (November 6, 1981)
- 46 FR 57,284 (November 23, 1981)

PART 702 RCRA AND UIC PERMITS

Section 702.101 Applicability

Section 702.101 has been rewritten to reflect the reorganization and codification of the Agency's proposal.

As proposed, Section 702.101(c)(2) stated that the operating requirements of Parts 720 through 726 would be used to determine "what types of information must be submitted by a permit applicant" as well as requirements to be placed in permits. The quoted language is not found in 40 CFR 122.1(c)(2) and will be stricken. However, the Board intends that the Agency promulgate permit application forms. Clearly these should reflect the requirements of Parts 720 through 730. Furthermore, it is the applicant's duty to demonstrate compliance with these rules. The Agency may request additional information if the application fails to demonstrate compliance with all applicable provisions.

Section 702.103 Confidentiality of Information

Confidentiality will be handled in accordance with Illinois law (Sections 7 and 7.1 of the Act, Procedural Rule 107). A proposal for additional procedural rules is pending (R81-30).

The steel companies objected to proposed Section 702.119(c). They indicated that USEPA has agreed to delete the corresponding 40 CFR 122.19(d). This proved a special procedure for substantiation of RCRA confidentiality claims. This will be stricken from the proposal because it is inconsistent with Section 7 of the Act and Procedural Rule 107.

Section 702.104 References

Section 702.104 gives an address of a USEPA office which has been closed. This has been replaced with the Washington address and the hazardous waste hotline number.

The publication referenced is currently unavailable from USEPA. The hotline indicates it is taking orders for a future publication. A copy will be placed in the Board office.

Section 702.105 Rulemaking

Section 704.123(b) provides for identification of "exempted aquifers" by the Board. This will be by rulemaking. Section 702.105 establishes procedures leading into Part II of the Procedural Rules. These will be adopted pursuant to Section 13(d) of the Act.

The steel companies noted that Sections 13(c) and 22.4(a) of the Act appear to allow continued adoption of new USEPA rules by the abbreviated method. The Board has added to Section 702.105(a) a pass through provision similar to Section 720.120.

Section 702.106 Agency Criteria

The Board has added a section governing Agency criteria. The Agency proposal contained references to Agency identification of USDW's and approval of alternative equipment in wells [Sections 704.123 and 730.112(c)]. Section 702.106 establishes procedures to be followed.

Most Board chapters contain criteria provisions. These have produced problems in the past in that they have been construed as a delegation of the Board's rulemaking authority. Section 702.106 addresses problems which have arisen in these other contexts. For related discussion, see R76-20, R77-10, 39 PCB 196, July 24, 1980.

The criteria are intended to be an adjunct to the Agency's permit issuance authority. For example, in permit review the Agency may approve certain equipment or require the use of certain equipment in a given facility. If the Agency determines that it will routinely approve or require certain equipment in permits, or reject certain equipment, it has made a "rule" within the meaning of the Administrative Procedure Act (APA). This rule must be published in the Illinois Register.

The criteria are useful in that they allow the Agency to indicate to the public in advance what it expects in a permit application and what it will require of permittees. This should reduce the cost of the application process, and make for more uniform interpretation of the law by the Agency.

These "rules" differ from Board rules in several respects: violation of criteria cannot form the basis of an enforcement action; variances from criteria are unnecessary; violation of criteria is not grounds for permit denial; and any person can

question whether criteria are appropriate in the context of a case.

There is a natural tendency for the Agency to utilize criteria as a substitute for Board rules. Accordingly, the Board has specified that the Agency must put certain material into any criteria adopted: references to related provisions in the Acts and Board rules; a statement that the criteria are not Board rules and apply only in permit review; and, procedures which applicants may follow if they wish to deviate from criteria.

Section 702.110 Definitions

"Disposal": The proposal added to the definition of disposal the discharge of hazardous waste "into any well". This is not in 40 CFR 122.3 and has been deleted from the proposed rules.

Whereas the scope of the Section 704.121 UIC permit requirement is fixed by the definition of "Underground Injection" and "Well Injection", "Disposal" relates to the RCRA permit requirement. The deleted language would appear to require RCRA permits for some UIC wells, a result which is not intended. Disposal of hazardous waste by underground injection requires only a UIC permit. However, associated above-ground storage and treatment facilities will require a RCRA permit at some time in the future [See Sections 704.201 and 40 CFR 122.21(d)(1)(i)].

"Draft Permit": The Board definition omits the phrase "notice of intent to terminate" from the definition in 40 CFR 122.3. The Board intends to reserve to itself authority to revoke or terminate permits pursuant to Section 33(b) of the Environmental Protection Act [See also Sections 702.161(b) and 705.128(d)].

"Manifest": The Agency proposal defined manifest as a document containing the information required by Part 722 and Chapter 9. Commenters objected to this modification of the federal definitions. The language has been changed to: "Part 722 or Part 706", where Part 706 is the intended assignment for codified Chapter 9. The alternative language will allow use of Chapter 9 manifests in appropriate cases.

"Phase I" and "Phase II": The definitions in the Agency proposal were taken directly from 40 CFR 122.3. These are not appropriate in the Illinois context. Phase I will begin with the effective date of the State interim status standards (Part 725, Section 700.106). Phase II will commence no earlier than the effective date of standards in Part 724. References to the federal time frames have also been left in the Illinois definitions.

"RCRA Permit": The definition has been changed to correspond with Section 700.103. A RCRA permit is the permit required under Section 21(f)(1) of the Illinois Act.

"SIC Code": The Board has added a definition of SIC Code. This is used in Section 702.123. The definition will avoid a lengthy reference in the section.

"Treatment": An apparent typographical error has been corrected in the last sentence of the Agency's proposed definition of "Treatment".

Section 702.120 Application for Permit

Persons with UIC permits by rule must submit an application when "required by the Agency". Section 704.161 specifies, for the time to apply, 180 days after notification by the Agency.

The steel companies noted that the Agency proposal omitted a provision that persons with RCRA permits by rule need not apply [40 CFR 122.4(a)]. This has been added, along with a note that the RCRA permit rules will be added later.

The steel companies also asked that Section 702.123(g) be changed to require topographic maps extending only one-fourth mile beyond the property boundary rather than one mile. They indicate that USEPA has agreed to change 40 CFR 122.4(d)(7) to so provide (National Resources Defense Council, Inc. v. USEPA, et al., D.C. Cir. No. 80-1607). The Board will wait until the corresponding federal rule is actually changed.

Section 702.140 Conditions Applicable to all Permits

As proposed, Section 702.148 imposed a duty to provide the Agency with "any information" which it may request to determine whether cause exists for modifying or revoking the permit, or to determine compliance. The steel companies object that this is overly broad, and indicate that USEPA has agreed to change this. The proposal as stated is clearly beyond the Agency's authority under Section 4 of the Illinois Act. The permittee will be required to furnish only "relevant" information.

Section 702.149(a) appears to allow the Agency to enter at any time to inspect. The steel companies indicate that USEPA has agreed to change this. The proposal appears to be beyond the Agency's Section 4 authority. The authority to enter will be limited to "reasonable times".

Section 702.160 Establishing Permit Conditions

This section and Sections 39(c) and 39(d), as amended by P.A. 82-380, authorize the Agency to consider the RCRA Act, SDWA and related federal regulations in writing permit conditions. The Agency may therefore react to changes in the federal regulations before they are adopted as Board rules.

Section 702.161 Duration of Permits

As proposed, Section 702.161(b) tracked 40 CFR 122.9(c). This provides for life of the facility permits for Class III wells, subject to review for modification or revocation once every five years. This conflicts with Section 33(b) of the Illinois Act, which gives the Board exclusive authority to revoke permits. Periodic enforcement actions would clearly be unworkable and burdensome on the regulated public. The Board has therefore modified Section 702.161(b) to provide five year permits which are renewable by the Agency without reapplication. If the Agency finds a need for modification or revocation, it may require a new application. This is intended to accomplish the same result as the federal rule, without conferring revocation authority on the Agency.

Section 702.181 Effect of Permit

40 CFR 122.13 provides that the compliance with the RCRA or UIC permit constitutes compliance with the RCRA Act or SDWA. As the Board understands federal practice, this includes the regulations promulgated under those acts. The Board equivalents, Parts 724, 725 and 730, are promulgated under State authority, rather than the RCRA Act or SDWA. The Board has therefore added an express statement that compliance with the permit is compliance with Parts 724, 725 and 730. However, the Agency may specifically incorporate by reference into permits provisions of the operating standards.

Section 702.181(c) as adopted provides that the RCRA or UIC permit does not authorize any infringement of State or local law or regulations, except for Parts 724, 725 and 730. 40 CFR 122.13(c) appears to give states the option of determining the effect of permits on local law. Except as noted above, the Board will follow the general Illinois approach of continued application of all regulations and state laws (See Rule 208 of Chapter 7 and Landfill, Inc. v. Pollution Control Board (1978), 74 Ill. 2d 541, 387 N.E. 2d 258).

Sections 702.183 et seq. Modification, Revocation and Minor Modification

40 CFR 122.15, 122.16 and 122.17 provide procedures for revocation and reissuance of permits by USEPA. The Agency

proposal modified the federal language on revocation to provide for revocation only pursuant to a Board action. This is necessary because the Board has exclusive authority to revoke permits [Section 33(b) of the Illinois Act]. The steel companies oppose this, although it is not clear how they could be prejudiced. The Board will adopt the language as proposed by the Agency.

PART 703 RCRA PERMIT PROGRAM

The Board will adopt a RCRA permit program at some time in the future. Part 703 will contain language corresponding to Subpart B of 40 CFR 122. The Board has added language stating that the Board has not adopted a RCRA permit program and that references to Part 703 are inoperative.

Commenters objected to adoption of any language relating to the RCRA permit program at this time. In Parts 702, 704, 705 and 730, the Board has generally adopted language in the corresponding federal text which refers to the RCRA permit rules. Notes have been added explaining that Part 703 will be adopted later and a disclaimer has been placed in Part 702 and, as noted above, in Part 703.

An alternative would be to edit out all references to the RCRA rules. However, this would involve renumbering subsections and writing bridging material to fill the gaps. On adoption of the RCRA permit program it would be necessary to do a line-by-line comparison with the federal text again, renumber subsections again and strike the bridging material. This would be far more effort than filling in blanks and removing the disclaimers. It also avoids renumbering rules. The references to RCRA permit rules will be subject to comment at the time they are readopted without the notes.

PART 704 UIC PERMIT PROGRAM

Part 704 contains rules on UIC permit issuance. These are derived from 40 CFR 122, Subpart C. Part 704 is cumulative with the general permit rules of Part 702. In the event of conflict, Part 704 controls [Sections 702.101(b)(1)(C) and 704.101].

Section 704.106 Classification of Injection Wells

Injection wells are classified as follows:

- Class I Hazardous waste wells, other than Class IV, and other disposal wells within 1/4 mile of a USDW (Underground Source of Drinking Water)
- Class II Injection for enhanced recovery of hydrocarbons
- Class III Injection for extraction of minerals and for in situ combustion of fossil fuel or recovery of geothermal energy
- Class IV Hazardous or radioactive waste wells within 1/4 mile of USDW
- Class V Other wells (see Section 730.105)

Class II will be regulated by the Illinois Department of Mines and Minerals (Section 730.121).

Existing Class I and III wells are authorized by rule (Section 704.141). Existing Class IV wells other than those injecting directly into a USDW are also authorized by rule (Section 704.142). Permits will be required by notice from the Agency over a five year period (Section 704.147). Class V wells are authorized indefinitely (Section 704.146).

Existing Class IV wells injecting into a USDW are authorized for six months (Section 704.145). An immediate permit application is required.

Section 704.122 prohibits movement into USDW, although Section 704.123 could be used to "exempt" an aquifer from the definition of USDW.

Section 704.123 Identification of USDW and Exempted Aquifers

The UIC regulations provide procedures for designation of underground water which are subject to greater or lesser protection. The Agency may identify USDW's which are subject to greater protection. The Board may identify "exempted aquifers" which are subject to lesser protection.

As proposed, Section 704.123(a) was vague as to the procedural steps to be followed by the Agency in identifying USDW. The Board has added a reference to Section 702.106 governing Agency criteria. Likewise, the Board has added to Section 704.123(b) a reference to Section 702.105 governing rulemaking. Identification of exempted aquifers will be by rulemaking.

Section 704.141 et seq. Authorization by Rule

Section 704.147 allows the Agency to "require" applications from persons who have permits by rule. Section 704.161 requires 180 days notice.

Section 704.181 et seq. UIC Permit Conditions

The Agency proposal requires by way of permit condition "performance bonds or other equivalent form of financial reassurance" (Section 704.189). There is similar language relating to variances in Section 36(b) of the Act. In the past the Agency has construed Section 36(b) as limited to performance bonds with a corporate surety. Experience has shown that such bonds are not available at any price. The Board has therefore provided a list of alternative forms of security which may be provided with a bond.

Section 704.192 Waiver of Requirements by Agency

Section 704.192(a) allows the Agency to authorize wells with less stringent conditions than required by Part 730 and Sections 704.182 through 704.191 when injection does not occur into, through or above a USDW. Section 704.192(b) allows a similar relaxation when the "radius of endangering influence" is smaller or equal to the radius of the well. This language reflects a recent amendment to 40 CFR 122.43 (Federal Register, February 3, 1982).

The radius of endangering influence is calculated under Section 730.106(a). This is a pressure-based formula. The small radius would occur for injection into a very permeable formation under low pressure.

Section 704.201 et seq. Hazardous Waste Wells

Subpart F applies to generators of hazardous waste using injection wells and to HWM (Hazardous Waste Management site) owners and operators using injection wells for manifested hazardous waste. This raises questions as to the relationship to the Phase I and II RCRA operating standards and permit requirement.

Section 725.101(b)(2) provides that the interim status standards do not apply to UIC wells and associated storage

and treatment facilities. 40 CFR 264.1(d), which will be adopted by the Board as Section 724.101(d), provides that the final operating standards will apply in part after termination of authorization of injection by rule. Section 702.203 contains a listing of portions of Part 724 which will apply.

The Agency proposal listed expected section numbers in Part 724. However, Section 704.203 may become fully effective and applicable to some well before the Board adopts Part 724. The Board has therefore replaced these with references to the corresponding sections in 40 CFR 264.

The federal regulations defining the scope of the RCRA permit requirement appear to require a RCRA permit for associated storage and treatment facilities [40 CFR 122.21(d)(1)(i)]. However, the operator has a "RCRA permit by rule" for the well itself [40 CFR 122.26(b)].

PART 705

AUTHORITY FOR PART 705

Part 705 specifies procedures which the Agency must follow in reviewing applications for RCRA and UIC permits. This is similar to Subpart A of Part 309 of Subtitle C: Water Pollution, which specifies Agency procedures for NPDES permit issuance.

Agency procedures are to be distinguished from Board procedures which are to be followed on appeal of an Agency permit decision. Part 705 contains provisions which lead into the Board's Procedural Rules (Sections 705.101, 705.183, 705.202 and 705.212).

Agency procedures are generally substantive regulations from the Board's perspective. They are adopted pursuant to Sections 13 and 27 of the Act rather than Section 26 which authorizes Board procedural rules.

It is not necessary for the Board to make a precise division of authority between itself and the Agency in Part 705. Section 13(c) of the Act requires the Board to adopt regulations identical in substance with federal regulations implementing the federal SDWA Act. Part 705 is identical in substance with 40 CFR 124 and hence has a statutory basis apart from the general grants of authority to the Board and Agency.

ADMINISTRATIVE PROCEDURE ACT

P.A. 82-380 exempts the Board from compliance with Section 5 of the APA in adopting rules pursuant to RCRA or SDWA. However, there is no express mention of the applicability of the APA contested case provisions to Agency procedures in issuing permits. This depends on whether the Agency had "existing procedures on July 1, 1977" (Section 2 of the APA). If not, a second question arises as to whether the "licensing" is required by law to be preceded by notice and an opportunity for hearing [Section 16(a) of the APA] (Borg Warner v. IEPA, 3rd District, October 8, 1981). The answers to these questions are somewhat different for UIC and RCRA permits.

The Agency proposal stated expressly that the contested case provisions of the APA were applicable (Section 702.105). However, these regulations are intended to be applicable both to RCRA and UIC permits. Since the result appears to be different for each permit, the Board has deleted the references to the APA. This will avoid any unintended impact on the status of the RCRA permit with respect to the APA.

NATURE OF AGENCY HEARING

The Agency proposal lacked a section corresponding to 40 CFR 124.1. The Board has added a general introduction which, among other things, differentiates Board and Agency procedures.

Section 705.101(c) addresses the nature of the Agency and Board hearings. There is a question as to whether the Agency hearing is to be informational or adjudicatory.

The purpose of the public hearing and comment period are to obtain input from the applicant and public, either leading to review of the tentative decision or framing the issues for a later adjudicatory hearing on appeal to the Board. Thus, if the applicant wishes to contest the truth of a fact relied upon in a denial letter or statement of basis of a condition, he need only outline his position at the Agency hearing or during the comment period. Likewise, members of the public who oppose issuance of a permit need only outline their position, raising all issues as provided in Section 705.183.

The history and wording of Section 39 clearly indicate that it is also an informational hearing: among other things, the Section 39 hearing must be held only "prior to issuance", not denial. It is not the adjudicatory hearing referred to by the APA that must be held before the applicant's rights are

cut off. As noted below, the Board has effectuated Section 39(e) of P.A. 82-380 by adding a requirement that the Agency conduct a Section 705.182 hearing before issuing a RCRA permit.*

The Board's role is primarily appellate review of the Agency's action in issuing or denying a permit. In third party appeals, Section 40(b) of the Act specifically limits the Board to consideration of the record which was before the Agency. In appeals by the applicant, the Board has long held that Section 40(a) requires a similar restriction (Oscar Mayer & Co. v. IEPA, PCB 78-14, 30 PCB 397). This is fully consistent with Section 705.183 which imposes an obligation to raise issues during the Agency proceeding.

The Board has provided an up-front reference to Section 705.183 in order to avoid future recurrence of recent cases in which landfill opponents have ignored Agency proceedings and then attempted to introduce evidence at a Board hearing.

OUTLINE OF PROCEDURES

Initial permit issuance or renewal proceeds in five major steps:

1. The application process, in which the completeness of the application is determined;
2. The application review process, in which the Agency makes a tentative decision to grant or deny the permit;
3. The public comment process, in which the Agency receives input from the applicant and public, and possibly returns to the application review stage;
4. Permit issuance or denial;
5. Board review, if an appeal is filed.

Permit modification feeds into steps 1, 2, 4 or 5. A detailed discussion appears below in connection with Section 705.128.

*P.A. 82-380 continued the Section 39 public hearing requirement, amending it to specify a public hearing before a "RCRA permit" is issued. However, Section 39 was also amended by P.A. 82-682. This deleted the Section 39 public hearing, establishing an extensive procedure before the County Board. It is likely that the legislature intended to remove the Section 39(e) public hearing. However the Board will assume the contrary until the legislation is reconciled.

Section 705.121 et seq. Permit Applications

The application process is initiated by the filing of an application (Sections 705.121 and 704.101). The Agency first reviews it for completeness (Section 705.122). If it is complete, the Agency gives notice of a complete application and, for major facilities, prepares a decision schedule (Sections 705.125 and 705.126).

Section 39(e) of the Act as amended by P.A. 82-380 requires certain public notice of "receipt of a request for a permit or supplemental permit for a refuse disposal facility."* A UIC facility could be construed as a "refuse disposal facility". Although it may be possible to give this language a more limited construction, the Board has added to Section 705.125 a requirement of full public notice of all applications pursuant to Section 705.161(a)(1).

If the application is incomplete, the Agency gives notice specifying a date for more information (Section 705.122). If more information is received, the Agency again reviews for completeness. If none is received by the date specified, the Agency gives public notice and proceeds with application review on the basis of the incomplete application (Section 705.123). A public notice requirement has been added to insure compliance with Section 39(e). The applicant is not entitled to a decision schedule or notice if the incomplete application is reviewed.

Section 705.128 Modification or Revocation

Modification is different from the regular application process, although the Agency may require an application to be filed. Modification may be initiated by the applicant through a request to modify or by the Agency through a review of its files [Section 705.128(a)]. Minor modifications, as defined in Section 702.187, result immediately in a modified permit [Section 705.128(c)]. Notice of issuance of the (minor) modified permit must be given and it is subject to Board review in the same manner as all permits (Sections 705.201 and 705.212). The Board has added to Section 705.128(c)(3) a provision requiring a statement of reasons for a minor modification.

If the Agency determines that the modification would not be minor, it must make a tentative decision on whether to modify [Section 705.128(c)(1)]. It may give notice of a summary refusal to modify [Section 705.128(b)], or it may make a tentative decision to modify.

*As noted above, Section 39(e) may have been repealed by P.A. 82-682.

Section 705.128(b) follows 40 CFR 124.5(b) which contains provisions for informal appeal to the Administrator of USEPA and judicial review of summary refusal to modify. The Agency proposal omitted any reference to appeal of this. A sentence has been added providing for appeal to the Board. Summary refusal to modify is to be distinguished from Board review of minor modification, or a permit or denial following full Agency review of the request to modify. These are discussed below.

Once the Agency tentatively decides to modify, it must review its files and the request to determine whether more information is needed [Section 705.128(c)(1)]. If it has adequate information, it should prepare a draft permit; otherwise it may request more information. This leads into the application process, although the Board does not intend to require a full application in all cases.

The Board has added to Section 705.128(c)(1) a requirement that the Agency give public notice before preparing a draft permit in response to a request to modify. Otherwise, the Agency would be acting on what may be an application for which public notice may not have been given pursuant to Section 39(e) of the Act.* The Board will not however require public notice of receipt of all requests to modify: the Agency will be allowed to make minor modifications, to refuse to modify or to request more information without giving public notice of receipt of an application.

Revocation of permits may be sought only through an enforcement action filed with the Board [Section 705.128(d)].

Section 705.141 et seq. Application Review

After reviewing the application, the Agency makes a tentative decision to prepare either a draft permit or a notice of intent to deny (Section 705.141). In either case it prepares a fact sheet for major facilities or if there is widespread public interest (Section 705.143), or a shorter statement of basis in all other cases (Section 705.142). The administrative record is prepared supporting the tentative decision (Section 705.144). Public notice is given initiating the public comment period.

Section 705.141(b) contains a sentence to the effect that the Agency may withdraw a notice of intent to deny if its final decision is to reverse its tentative decision to deny. This really belongs in Section 705.184. A cross reference has been added in that Section.

*As noted above, Section 39(e) may have been repealed by P.A. 82-682.

Section 705.161 et seq. Public Notice

Public notice must be given when an application is received, after the Agency makes a tentative decision to grant or deny, and when a hearing is scheduled. Other sections specify the contents and identities of persons receiving public notice.

As noted above, Section 39(e) of the Act requires certain public notice on receipt of an application.* The Board has added Section 705.161(a)(1), requiring public notice when an application is filed or when the Agency makes a tentative decision to modify without requesting a new application. The Board has added the public officials listed in Section 39(e) to the list in Section 705.163(a)(5). This goes slightly beyond Section 39(e) in that the listed officials will get notice of other actions as well as the application and other people will get notice of the application. This is arguably required by reading Section 39(e) with 40 CFR 124.10(c).

Section 705.181 et seq. Public Comment Period

The public notice solicits comments and explains the procedures to request a hearing [Section 705.164(a)(5)]. The comment period is automatically extended if a public hearing is scheduled.

The Agency may schedule a public hearing before initiating the comment period. It must do so under Section 39(e) of the Act in the case of a hazardous waste disposal site [Section 705.182(b)]. It must give public notice again if it schedules a hearing after the comment period starts. Such a hearing is to be scheduled if the Agency finds a significant degree of public interest [Section 705.182(a)].

Section 705.184 provides for reopening of the public comment period. The Agency proposal, drawn from 40 CFR 124.14, did not contain a full list of options available to the Agency. Section 705.184(b) has been added to reference Section 705.141(b) which allows the Agency to reverse its tentative decision. This results in a new draft permit or notice of intent to deny and restarts the process from the application review phase.

Short of reversal, if the information submitted during the public comment period raises "substantial new questions", the Agency can prepare a new draft permit, statement of basis, fact sheet and/or reopen the comment period [Section 705.184(a)].

*As noted above, Section 39(e) may have been repealed by P.A. 82-682.

40 CFR 124.14 also seems to require the process to loop until the draft permit agrees exactly with the final permit. However, 40 CFR 124.17(a)(1) requires USEPA to specify which provisions have been changed in the final permit decision. Section 124.17(b) allows USEPA to supplement the record to respond to comments. Section 124.19(a) limits persons who fail to file comments to an appeal of differences between the draft and the final permit. These provisions have been adopted by the Board as Sections 705.210(a)(1), 705.210(b) and 705.212(a). These sections clearly contemplate that the Agency may modify the draft without looping back. The Board has therefore added Section 705.184(c) to expressly state this alternative.

Thus a complete statement of the Agency's alternatives following the comment period are as follows: If the Agency is persuaded to reverse its tentative decision, it must loop back to the draft permit/notice of intent to deny provisions of Section 705.141. If not, it decides whether the comments raise "substantial new questions." If so, it loops back to a new draft permit, fact sheet, statement of basis, and/or comment period. If not, it may still revise the draft in response to comments and issue it as a final permit.

The federal regulations seem to allow an infinite loop. There is a possibility that a decision period may be imposed on the Agency by new legislation or court decision. The Board has therefore added Section 705.141(f) which allows the Agency to issue a final permit decision based on such record as is before it on the final day allowed for action by any applicable statutory decision period.

As proposed, Section 705.182(b) specified a public hearing in the "geographical area" of the facility. This has been changed to specify "county", as required by Section 39(e) of the Act as amended by P.A. 82-380.

Section 705.201 Final Action by Agency

As adopted, Section 705.201 is different from the Agency proposal and 40 CFR 124.15. Paragraph (a) has been modified to make RCRA and UIC permit practice fully consistent with Section 39 of the Act. The final sentence of 40 CFR 124.15(a) has been expanded into a full paragraph. The "final permit decision" is either the issuance of a permit or a denial letter. There is no possibility of a "final decision" before one document or the other is mailed.

The federal rules seem to contemplate a final decision within USEPA in which further review may be had before issuance of an actual permit (40 CFR 124, Appendix A). This is unworkable in the Illinois context. The Board must have an actual permit or reasons for denial in order to review the Agency's decision.

The Board has further specified that the denial letter include a statement of reasons similar to that specified in Section 39(a) of the Act.

The provisions on effective date are essentially the same as USEPA's. An appeal generally stays the effective date of the permit. The permittee is not generally entitled to take any action in reliance on the permit before its effective date.

Section 705.201(d)(2) has been modified to reflect changes in the provisions on stays which are discussed below. Section 705.201(d)(3) of the proposal has been deleted. This provided an immediate effective date for permits if no comments requested a change in the draft permit.

Section 705.202 et seq. Stays of Contested Permits

The provisions on stays have been modified to make them fully consistent with Section 16(b) of the Administrative Procedure Act, which provides:

When a licensee has made a timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.

Section 705.202 states the Board's intention that the old permit expire at the same time the new permit becomes effective. The following are related rules on timing of applications and continuation of permits, permits by rule and interim status:

40 CFR 122.22	Part A and Part B RCRA permit applications
Section 700.105(e)	Termination of interim status
Section 702.125	Continuation of expiring RCRA and UIC permits
Section 704.147	Requiring UIC permits for wells authorized by rule

Sections 705.203 through 705.205 set out rules on stays at length for new applications, reapplications and interim status/permit by rule situations. It should be noted that "new" and "existing" facility are defined with respect to November 19, 1980 for HWM facilities and with respect to the date of UIC permit program approval for new injection wells

[Section 702.110). There is thus a possibility of "new" HWM facility which would be existing and continuing on the date of RCRA approval. After both programs are running, it would be possible to have a "new" facility or well with an expired permit. These sections are somewhat complicated by the necessity of providing for these eventualities.

The provisions on stays may be summarized as follows: those with interim status or permits by rule who file timely applications continue under the interim status or permit by rule conditions; those who file timely reapplications or requests to modify comply with the old permit; new "new" facilities and wells, existing ones which fail to file applications on time, and those who lost interim status or permits by rule without filing a timely first application have no permit pending completion of Board review.

PART 730 UIC OPERATING REQUIREMENTS

Part 730 contains the operating standards applicable to injection wells. These are derived from 40 CFR 146. The federal section number can be found by subtracting 584.100 and deleting all zeros to the immediate right of the decimal point.

Section 730.104 Exempted Aquifers

This contains criteria by which the Board may move through rulemaking to designate "exempted aquifers". These are USDW which are subject to a lesser degree of protection under the rules (see Sections 704.101, 704.123 and 702.105).

Section 730.106 Area of Review

A typographical error in the formula of Section 730(a)(2) has been corrected from the Agency proposal. The square root of the entire expression is taken, rather than just the numerator. To make it easier to type, the Board version shows this as the square root of both numerator and denominator, rather than the entire expression.

Section 730.108 Mechanical Integrity

Section 730.108(a) defines mechanical integrity. This involves a demonstration of no significant leak and no significant fluid movement. As proposed, Section 730.108(b) requires either of two tests to demonstrate no significant leaks: monitoring of annulus pressure; or, a pressure test with liquid or gas. Section 730.108(c) requires either a temperature or noise log to demonstrate the absence of significant movement. Section 730.108(d) allows the Agency to approve other tests which will reliably demonstrate mechanical integrity.

The Agency proposal allowed approval of other tests only for absence of significant leaks, not for fluid movement. 40 CFR 146.8 allows USEPA to approve other tests for either. The Board construes this as a typographical error in the proposal. Alternative demonstrations will be allowed for either criterion of mechanical integrity.

As worded the proposal appears to set an absolute requirement which may be adjusted by the Agency. The Board has modified this to avoid any interpretation that the rule subdelegates variance authority. Paragraph (a) will require the applicant or permittee to demonstrate mechanical integrity. Paragraphs (b) and (c) will allow, but not require, the four tests. Paragraph (d) will allow other tests at the Agency's discretion.

Section 730.109 Permitting Priorities

Section 730.109(h) refers to expiration dates of existing Illinois permits. The Board requires NPDES or state permits under Part 309 of Subtitle C: Water Pollution. The Board will propose to drop this permit requirement as soon as UIC permits become available.

Section 730.112 Construction Requirements

As proposed, Section 730.112(c) requires a packer set immediately above the injection zone, or an approved fluid seal as an alternative. The Agency is to approve alternatives which reliably provide a comparable level of protection to USDW's.

As proposed, Section 730.112(c) poses problems in that it appears to allow Agency variances from Board requirements and to allow the Agency to promulgate alternatives for general use. The Board has reworded 40 CFR 146.12(c) to accomplish its result within the Illinois system.

As modified, under Section 730.112(c) Class I wells will be required to protect USDW's. They may do this through a packer. The Agency may approve alternatives. This approach sets a standard and one approved method of meeting the standard. The Agency may approve other methods subject to the limitations stated.

This Opinion supports the Board's Order of this date adopting Parts 702, 703, 704, 705 and 730, and amending Part 700.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 13th day of May, 1982 by a vote of 5-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board