

ILLINOIS POLLUTION CONTROL BOARD
March 5, 1987

IN THE MATTER OF:)
)
PRETREATMENT REGULATIONS) R86-44

PROPOSAL FOR PUBLIC COMMENT

PROPOSED OPINION OF THE BOARD (by J. Marlin):

On October 9, 1986, the Board opened this Docket for the purpose of promulgating regulations establishing a pretreatment program pursuant to Section 13.3 of the Environmental Protection Act (Act), as amended by P.A. 84-1320. In a separate Order the Board is proposing for public comment amendments to 35 Ill. Adm. Code 307, and a new 35 Ill. Adm. Code 310. This Proposed Opinion supports the Board's Proposed Order of this same day.

Section 13.3 of the Act requires the Board to adopt regulations which are "identical in substance" with federal regulations promulgated by the United States Environmental Protection Agency (USEPA) to implement the pretreatment requirements of Sections 307 and 402 of the Clean Water Act (CWA), which was previously known as the Federal Water Pollution Control Act. Section 13.3 creates an abbreviated procedure similar to that provided by Sections 13(c), 22.4(a), and 22.7(a) of the Act for the UIC, RCRA and State CERCLA programs. Title VII of the Act and Sections 5 and 6.02 of the Administrative Procedure Act (APA) do not apply to "identical in substance" regulations adopted to establish the pretreatment program. However, the Board is required to provide for notice and public comment before rules are filed with the Secretary of State. Because Section 5 of the APA does not apply, the proposed rules will not be subject to second notice review by the Joint Committee on Administrative Rules (JCAR). The Department of Energy and Natural Resources (DENR) is allowed to conduct an economic impact study (EcIS) on the rules, but the study and hearings are not required before the rules are filed.

Section 13.3 requires the Board to "provide for" public notice and comment. In order to avoid delay in instituting the pretreatment program, the Board will not at this time adopt generally applicable procedural rules to be followed for maintenance of the pretreatment program rules. For now the Board will "provide for" notice and comment by way of this Opinion and Order.

Prior to opening the Docket, the Board staff conducted discussions with the Agency concerning how to proceed. The result was the Board's decision to develop a proposal as indicated in the October 9 Order. At that time the Board entered

various documents as PC1 through PC6. PC1 was a draft proposal which the Agency had prepared, but which the Agency was not prepared to file as a formal proposal. On November 12, 1986 the Agency filed a revised draft proposal which the Board docketed as PC7.

The Agency also transmitted the text of its draft proposal to the Board electronically in the hope that it could form the basis of the Board's proposal, saving typing time. However, because of technical difficulties and the necessity of revising the format to meet codification requirements, it was simpler to start over, rather than to utilize the Agency's draft as a starting point.

The Board intends to publish its proposal in the Illinois Register utilizing the "first notice" procedures, under the APA, even though these are not applicable under Section 13.3 of the Act. The Board will allow 45 days for public comment, starting with the date of publication in the Illinois Register. The Board urges the Agency, USEPA and the Attorney General to submit comments during this period. After the comment period the Board will move to a final Order, without going through the JCAR second notice procedures.

The Board has placed the Agency, Attorney General and USEPA on the mailing list to receive copies of the Proposed Opinion and Order, as well as other persons who have requested to be on the list. The Board's practice with the RCRA and UIC rules is to wait up to 30 days after its final Order before filing rules, in order to allow those agencies involved with the authorization process to review the rules as modified in response to comment. If necessary, the Board will reconsider its final Order to meet any objections which might prevent authorization of the program. The Board solicits comment from the agencies as to whether they believe it desirable for the Board to utilize this procedure.

FEDERAL TEXT USED

The federal pretreatment program is contained in 40 CFR 401 through 471. The proposal should be consistent with the 1986 edition of the Code of Federal Regulations, Title 40 of which is current through June 30, 1986. The Board has incorporated amendments through September 30, 1986. These include:

- 51 Fed. Reg. 23759, July 1, 1986
- 51 Fed. Reg. 30816, August 28, 1986

The proposal was actually prepared utilizing the 1985 edition and Federal Registers, since the 1986 edition was not available until the proposal was substantially complete. Commenters should therefore pay special attention to provisions which were amended during 1985-1986, since there is a much greater chance for error in these provisions.

The July 1 amendments affect the procedural aspects of the proposal reflected in Part 310. The August 28 amendments modify the categorical pretreatment standards for lead battery manufacturers (Section 307.7103).

The Board does not presently intend to incorporate USEPA amendments after September 30, 1986 into this proposal. Rather, the Board will propose to update the text shortly after final adoption of this proposal. The Board will reconsider this if there are amendments which are especially important to the authorization process. Establishing a cut-off date for the proposal avoids what could be an infinite race to keep up with USEPA without ever getting a proposal out for public comment, and assures that the public is able to comment on all amendments prior to Board adoption.

OVERVIEW OF PROPOSAL

The following is a general discussion of the pretreatment program. A detailed discussion appears after this portion of the Opinion.

Board regulations protecting water quality presently focus on discharges to surface waters. These are regulated through the NPDES permit program under Section 12(f) of the Act and 35 Ill. Adm. Code 309. Surface dischargers include industries which discharge directly to surface waters, and publicly-owned treatment plants (POTW's) which receive wastewater from households, businesses and industry, treat the wastewater and discharge it to surface waters. The pretreatment program greatly expands Board regulation of industries which discharge to a POTW rather than directly to surface waters.

POTW's are generally designed to provide biological treatment of household wastewater. They can also treat much industrial wastewater. However, some industrial wastewater is of a nature such that it should not be discharged to the POTW without pretreatment. Some wastewater, such as strong acids, would damage physical structures such as iron and concrete sewers. Flammable solvents pose dangers to persons working on sewers or in the treatment plant. Toxic materials may kill bacteria in the treatment works so that biological treatment ceases, allowing household wastewater to be discharged without adequate treatment. Toxic materials may accumulate in sludge, preventing its use or disposal as a soil additive. Other industrial pollutants may pass through the treatment works and cause water quality violations in the receiving stream. The pretreatment rules are designed to prevent interference with or pass-through at the POTW.

The Board already has some general pretreatment rules in 35 Ill. Adm. Code 307. However, there is no overall statewide pretreatment permit program. The proposal would establish such a program.

The proposal requires that the larger POTW's serving industrial users prepare a pretreatment program proposal for submission to the Agency. The approved program will become a part of the POTW's NPDES surface discharge permit. Following approval of the program the POTW will administer the pretreatment program at the local level. Industrial users will be required to obtain approval from the POTW before discharging wastewater to sewers.

The proposal also involves incorporation by reference of detailed USEPA pretreatment regulations for several hundred types of industrial dischargers. Through the pretreatment program the POTW will require that industrial users comply with these detailed pretreatment requirements.

The Board proposes to set up the pretreatment program in a manner parallel with the NPDES program. The requirements for program approval and permit issuance will be placed in a new Part 310, which will follow the similar Part 309 NPDES rules. The sewer discharge standards will be added to the existing requirements in Part 307.

PART 307: PRETREATMENT STANDARDS

The Board's existing pretreatment regulations have been renumbered and incorporated into the framework of the proposal.

Section 307.1001 Preamble

The existing language of Section 307.101 is preserved in paragraph (a). The Board's pretreatment rules have been merged with the general USEPA pretreatment rules from Part 403 and placed in Subpart B. While existing Section 307.102 and the USEPA pretreatment rules apply to discharges to publicly owned treatment works (POTW's), the Board's mercury and cyanide rules have a broader scope.

The general standards of Subpart B will function as back-up standards for the categorical standards. Except where the contrary is indicated, a categorical discharger will have to comply with any more stringent general requirement. Dischargers which do not fit into any of the categories will also have to comply with the general standards.

The Illinois Administrative Procedure Act prohibits incorporation by reference of future amendments to federal rules ("forward incorporation"). Also, it requires the Board to so state each time it makes an incorporation by reference, and requires prior approval of incorporated material by the Joint Committee on Administrative Rules. Section 13.3 generally exempts the Board from compliance with the incorporation by reference procedures. The Board construes this as exempting only the JCAR prior approval, but not as allowing forward incorporations by reference.

The USEPA standards usually contain references to other USEPA rules. USEPA intends to refer to future amendments of the referenced Sections. The Board's incorporation of these Sections raises a possibility of an "imbedded forward incorporation:" the indirect incorporation of future amendments to the Section referred to in the reference. These imbedded forward incorporations are mostly procedural requirements which the Board will adopt in Part 310. Section 307.1001(c)(2) provides that these are to be construed as references to the comparable Board procedures. The Board intends to adopt complete procedural rules, utilizing incorporation only for standards, requirements and definitions. In no instance does the Board intend to make a forward incorporation.

Section 307.1002 Definitions

The Board will utilize a separate definition set for the pretreatment rules rather than the Part 301 definitions. Alteration of the general definitions would require a review to ascertain whether the changes were modifying the other water rules. The preferable course is to utilize the USEPA definition sets associated with the pretreatment program.

The 40 CFR 401 definitions include terms which relate only to the surface water program. It is not necessary to include these. The Board has identified the definitions which are relevant to pretreatment, and set them out in the Part 310 definitions. The Board will utilize the same definition set for Part 307.

Section 307.1003 Test Procedures

This Section is drawn from 40 CFR 401.13, which in turn references 40 CFR 136, which establishes test procedures for measurement of pollutant concentrations. 40 CFR 401.13 contains an imbedded forward incorporation by reference. Simply incorporating this provision would be open to the interpretation that the Board was indirectly making a forward incorporation. As noted above, the Board believes this would violate the APA. For this reason the Board has incorporated the 1986 edition of 40 CFR 136 as well as 401.13. It will be necessary to amend this Section to update the incorporation to include future amendments to Part 136.

Section 307.1005 and 307.1006

These Sections incorporate 40 CFR 401.15 and 401.16, which list toxic and conventional pollutants. The Board solicits comment as to the necessity of this in the Illinois pretreatment program.

Section 307.1007 pH Monitoring

40 CFR 401.17 includes an averaging rule for pH under continuous monitoring. It is stated as an effluent rule only. Because it seems to be necessary for the pretreatment standards also, the Board has adopted an equivalent which has been reworded so it applies to the pretreatment standards.

Section 307.1101 General Requirements

Subpart B contains the generic pretreatment standards. These are derived from existing Part 307 and from 40 CFR 403. They function as back-ups to the categorical standards.

Existing Section 307.102 includes general pretreatment requirements which are similar to 40 CFR 403.5(b). The Board has proposed to merge these provisions. The language is mainly drawn from 40 CFR 403.5. The Section 307.102 language which is not fully present in Section 403.5 has been inserted at the appropriate places. The additional requirements are included in the following subsections:

- (b)(2) Pollutants which would cause safety hazards other than fire or explosion.
- (b)(5) Pollutants other than low pH which would be injurious to structures.
- (b)(10) Pollutants which would cause the effluent to violate NPDES permit conditions.

Section 307.1102 Mercury

This Section has been moved more or less verbatim from Section 307.103. It applies to publicly regulated sewers, as well as POTW's. Categorical discharges would have to meet this standard even if there is no mercury standard specified in the categorical standards. The generic standard would override any less stringent categorical standard, unless the Board in adopting the categorical standard expressly stated that it was to be applied in lieu of the generic standard.

Section 307.1103 Cyanide

This Section has been moved more or less verbatim from Section 307.104. It applies to publicly regulated sewers, as well as POTW's. It would function like the mercury standards with the categorical standards.

Section 307.1501 et seq. Categorical Standards

What follows in the rules is the Board's equivalent of the USEPA categorical pretreatment rules. The text is around 250 pages long. These will be discussed in summary only.

The USEPA pretreatment standards are contained in 40 CFR 405 et seq. They are arranged by industry category and subcategory, which follow the scheme established by the federal SIC Codes. The USEPA rules devote a Subpart to each industry subcategory, with individual Sections typically used to state the scope of the Subpart, special definitions, surface effluent standards and pretreatment standards for existing and new sources. The Board has proposed to incorporate the necessary material by reference.

The proposal is arranged in the same order as the USEPA rules. However, the levels of subdivision in the proposal are one step lower than in the USEPA rules: Categories are addressed in Subparts and subcategories in Sections, with incorporations of USEPA Sections at the subsection level.

GENERAL OUTLINE OF CATEGORICAL PRETREATMENT STANDARDS

In the Board proposal, one Subpart is devoted to each regulated industry category, and one Section is devoted to each regulated industry subcategory. Most Sections follow the following outline:

1. The subcategory is defined in an applicability statement.
2. Specialized definitions are incorporated by reference.
3. The pretreatment standards for existing sources (PSES) are incorporated by reference, and existing sources are required to comply with the standards.
4. The pretreatment standards for new sources (PSNS) are incorporated by reference, and new sources are required to comply with the standards.
5. The cut-off date for new sources for the subcategory is specified.

There are a few isolated instances in which the incorporations do not follow the above outline. These should be self-explanatory.

A few of the USEPA Parts have applicability statements defining the entire category, along with specialized definitions and rules affecting the entire category. These USEPA provisions are reflected in Sections with two zeros at the end. For example, Section 307.2000 is drawn from the introductory material 40 CFR 410.

Some of these introductory provisions include Sections on "compliance dates." These have generally been incorporated by reference. (For example, 40 CFR 415.01/Section 307.2500.) These "compliance dates" should not be confused with the "new source"

dates in item 5 above. Dischargers generally have 3 years after a standard is promulgated to come into compliance with it. Which standard they comply with depends on whether they are a "new source," which relates back to the date the standard was proposed.

Compliance dates have been incorporated by reference where they are found in the CFR, but have not been set out in full. For the older pretreatment standards, they have passed and are no longer of any prospective interest. For the newer standards they have been set out in the text of the CFR so that they are readily available to the public. In any event, since the compliance dates would be within three years after publication in the Federal Register, they should be readily available to the public. Compliance dates are discussed further in connection with Section 310.222 below.

ALTERNATIVE APPROACHES

It takes nearly a full page to handle each subcategory according to the above outline. This results in a proposal which is several hundred pages long. The Board has considered some shorter methods.

The shortest approach would be to incorporate the pretreatment standards en masse in a few lines. This would have the effect of also incorporating the effluent discharge limits which are not related to the pretreatment program.

Another approach would be to adopt in a single Section a table listing all of the pretreatment provisions. Such a table would be itself quite lengthy. A practical problem would arise in attempting to update such a table: The Board would be continuously republishing the entire table as it was updated. Errors would certainly creep into the table as it was republished. It is difficult to detect errors in a table of numbers, especially if they occur away from the areas being changed. Under the proposal the Board would republish only the Sections relating to the subcategories being amended.

There are more fundamental problems with these approaches. For one thing, there is a question as to whether simple publication of USEPA numbers in the Illinois Register adequately informs the public. Under the system proposed, the Board would publish the name of the subcategory and a description of the subcategory each time it updated an incorporation affecting the subcategory. Persons who fit within a subcategory could then tell from the Illinois Register publication whether there had been a USEPA amendment which affected them.

Another problem has to do with the definitions of "new" and "existing" sources. As noted above, the USEPA rules define these in terms of the date USEPA first published a proposal to regulate the subcategory. This date is not generally found with the

pretreatment standards, but must be determined from a search of old Federal Registers. Therefore a member of the public could not determine whether the new or existing source standard applied to his or her situation simply by reading the incorporated material. It would therefore be necessary also to incorporate the Federal Register proposal. However, it is doubtful whether very old Federal Registers are readily available to the public. Anyway, it is simpler to just specify the new source date. The proposal includes this date with the incorporations.

The shorter methods would place a much greater burden on small businesses by forcing them to keep up with USEPA rulemaking in general. Under the proposal the Board undertakes much of the research effort.

INCORPORATION BY REFERENCE OF STANDARDS

The APA requires that each time the Board makes an incorporation by reference it repeat a disclaimer to the effect that it is not incorporating any future amendments or editions. As noted elsewhere, the Board construes Section 13.3 of the Act as exempting it from the procedures involved with prior review of incorporated material, but not from the prohibition of forward incorporations. It is tempting to classify the disclaimer as a procedural requirement which the Board need not comply with. However, the incorporation by reference provisions of the APA have been amended several times in recent years. At one time the APA simply prohibited forward incorporations; now it requires the disclaimer as well. Apparently the General Assembly added the disclaimer in response to abuses of the simple prohibition on forward incorporations. The Board concludes that, from the attention the General Assembly has given this matter, the disclaimer is an important, fundamental protection of due process, as is the prohibition on forward incorporations.

It is possible that a single disclaimer in Part 307 would satisfy the APA requirement. Other possibilities include a disclaimer with each Subpart or with each Section. The Board has opted to repeat the disclaimer with each incorporation by reference, which means that the disclaimer is often repeated several times within a single Section. This adds around 30 pages to the proposal, against the minimal option of a single disclaimer for the Part.

Section 13.3 of the Act requires that the Board continue to update these rules to maintain consistency with USEPA rules. If the Board were to adopt a single disclaimer for the Part, or one for each Subpart, there would be no assurance that a disclaimer would appear with the materials published in the Illinois Register during such subsequent amendments. There is a possibility that this could be held to violate the APA requirement.

If each Section included a single disclaimer, the disclaimer would certainly appear with each subsequent amendment. However, the mechanics of this option wind up consuming almost as much space as the option chosen: repeating the disclaimer with each incorporation. This option has the added advantage of being the least likely to be subject to attack for failure to comply with the APA.

APPLICABILITY STATEMENT

Each Section starts with an applicability statement which defines the subcategory. Because the USEPA equivalent also functions to define the applicability of the surface discharge standards, and in order to provide notice to dischargers in Illinois, the Board has set the applicability statement out in full rather than incorporating it by reference. Since some rewording is always necessary, the Board has gone on to put these as nearly as possible into a consistent format. No substantive changes are intended. Interested persons are urged to review these and to comment if they believe any substantive changes have been made.

The USEPA applicability statements contain what appears to be a consistent error which the Board has corrected. An example occurs in 40 CFR 415.60, which provides that the chlor-alkali subcategory applies "to discharges resulting from the production of chlorine ... by the diaphragm cell process and the mercury cell process." Since the diaphragm and mercury cell processes are mutually exclusive, alternative ways of manufacturing chlorine, the subcategory seems to reduce to the null set.

The USEPA rules also include similar errors which, while not destroying the meaning of a Section, severely limit applicability in an unlikely way. For example, the iron and steel alkaline cleaning subcategory seems limited to cleaning baths used to remove "mineral and animal fats or oils" from steel. (40 CFR 420.110/Section 307.3011). The Board assumes that USEPA intends to regulate persons who use either pure lard or mineral oil as well as those who use a mixture.

These "and/or" errors occur in around 30% of the subcategories in some Parts of the pretreatment standards. They have generally been corrected and will not be discussed further. Interested persons are invited to comment on any instances in which the proposal may not accurately reflect USEPA's intent.

There are a few Sections in which USEPA appears to use "and" to mean "and." For example, Sections 307.2901 et seq. seem to be intended to apply only where a petroleum refinery carries out a series of processes. Other examples are found in Sections 307.3501 et seq.

Some of the subcategories by their definition would be impossible, or virtually impossible, to conduct in Illinois. Examples are Alaska King Crab Processing and Puerto Rican Sugar Cane Processing. Some of these standards apply only if the process is conducted in a certain region which does not include Illinois. These clearly do not need to be incorporated. Others involve processing of materials taken in specified regions which do not include Illinois. In these situations there is a possibility that in the absence of the standard someone might ship the material to Illinois for processing to avoid the standard. The Board has attempted to judge whether this would be economically feasible. If someone actually does this, the general standards would apply until the Board would be able to adopt the categorical standard. A third situation arises in which a subcategory is processing a material which is not found in Illinois, but with no regional specification in the rule. An example would be vanadium ore, which is not found in Illinois, but the processing of which would be the subject of an effluent rule if it were. The Board has generally included these subcategories, but invites suggestions as to any possibilities which are too remote for inclusion.

DEFINITIONS

A "definitions" subsection follows "applicability" in the outline of each subcategory. The Board has incorporated by reference any special definitions applicable to the subcategory. If there is no special definitions Section in the USEPA rules for the subcategory, the Board has inserted "none" after the heading for definitions. In many cases there is a special definitions Section for the subcategory which merely recites that the general definitions for the pretreatment rules apply. (For example, 40 CFR 406.51/ Section 307.1605.) Where such Sections exist, the Board has incorporated them by reference, even though the same result could be more easily reached by saying "none." The Board solicits comment as to which approach is preferable.

Some of the special definitions reference the special definitions used for another subcategory. This raises the possibility of an imbedded forward incorporation by reference. For example, see 40 CFR 419.31/ Section 307.2903, which reference 40 CFR 419.11/ Section 307.2901. In these situations, as provided by Section 307.1001, the Board's incorporation of the USEPA reference is to be construed as a reference to the equivalent Board rule, rather than the imbedded USEPA reference. In the example, Section 307.2903 references 40 CFR 419.31, which in turn references 40 CFR 419.11. This is to be construed as a reference to the equivalent Section 307.2901. Therefore, any USEPA amendment to 40 CFR 419.11 will not be referenced until Section 307.2901 is amended, thus avoiding a forward incorporation.

An alternative way of avoiding the imbedded forward incorporation would be to reference both USEPA Sections in the Board rule. In the example, the Board would reference both 40 CFR 419.31 and 419.11 in Section 307.2903. This reference would have to be updated to incorporate any amendments to 40 CFR 419.11. However, it would be very difficult to find these references during maintenance of the rules, since nothing in the USEPA materials would necessarily suggest that the definitions in 40 CFR 419.11 were also used in other Sections. The Board solicits comment on these alternatives.

PRETREATMENT STANDARDS

The next portion of the general outline is the incorporation by reference of the pretreatment standards for existing sources ("PSES") and for new sources ("PSNS"). There are five possibilities, all of which exist in the proposal:

1. There are no pretreatment standards for any subcategory in a category, but only surface discharge standards.
2. There are pretreatment standards for at least one subcategory within a category, but another subcategory has no pretreatment standards.
3. There is a PSNS, but no PSES for a subcategory.
4. There are both a PSNS and a PSES for a subcategory.
5. There is a PSES, but no PSNS for a subcategory.

In the first case, the Board has completely excluded those industry categories for which there are no pretreatment standards in any subcategory. An example is the coal mining category, for which there are surface discharge standards only. An alternative would be to define these categories and/or subcategories, and to require them to comply with the general pretreatment standards of Subpart B (which is required anyway).

In the second case, in which there are pretreatment standards for some, but not all subcategories, the Board has proposed a Section for each USEPA subcategory. If there is no pretreatment standard for a subcategory, the Board has provided a reference to the general pretreatment standards of Subpart B. Providing a Section for each subcategory assures that each is defined, avoiding problems which could arise if some subcategory definitions were omitted altogether: operations which should be in the omitted categories might then appear to fit in the included categories, some of which are catch-all in nature.

In the third case, where there is a PSNS but no PSES, the Board has incorporated the PSNS by reference, and provided a reference to the general pretreatment standards of Subpart B for existing sources.

Many of the industry subcategories have pretreatment standards which simply require compliance with the general pretreatment requirements reflected in the Board's rules in Subpart B. The rules could be simplified, and maybe shortened, if, instead of incorporating the USEPA rule by reference, the Board were to state for these subcategories that only the general requirements of Subpart B apply. Under this approach the Board would handle them the same way as the missing standards in cases two and three. Examples are found in 40 CFR 405/ Section 307.1501 et seq. The Board solicits comment on this possibility.

The first three cases, and the subcategories for which the USEPA rule references the general rule, raise a question as to the effect of inclusion in the regulated subcategories. Section 310.301 requires a POTW to develop a pretreatment program if it receives discharges "which are otherwise subject to pretreatment standards." Does this include the Subpart B standards? If not, does the approach taken change the scope of the pretreatment program requirement?

In the fourth case the Board has incorporated the PSES and PSNS by reference.

In the fifth case USEPA has promulgated a standard for existing sources, but none for new sources. It seems strange to regulate existing sources before new sources. However, the definition of "new source" in 40 CFR 403 is keyed to the date USEPA proposes standards which would be applicable to "such source." The best interpretation of this seems to be that, where USEPA has proposed no new source rule, all sources are "existing sources," including those built after the existing source standard is adopted. Consistent with this interpretation, the Board has proposed to state for this case that the existing source standards apply. In these cases the heading remains "new sources," even though, strictly speaking, there are no new sources. The Board solicits comment on its interpretation of these rules.

The above interpretation implies that there is a difference in the USEPA rules between the absence of a PSNS and a PSNS rule which says the general standards or PSES apply. In the complete absence of a PSNS rule there is no new source date. However, by adopting a PSNS which references the general standards or the PSES, USEPA has established a new source date. If USEPA subsequently adopts more stringent new source rules, they will apply to sources which were in existence as of this date. The Board solicits comment as to whether this interpretation is intended by USEPA.

Some of the USEPA standards reference other standards. This carries a risk of an imbedded forward incorporation by reference similar to that discussed in connection with the definitions above. Where the reference is to another pretreatment standard which the Board is incorporating elsewhere, the Board will

construe these as referencing the related Board standard. However, many of these involve a reference to surface discharge standards which the Board will not be proposing to incorporate at any foreseeable time. An approach to preventing the imbedded forward incorporation would be to cite both USEPA sections in the Board rule. However, this would pose extreme problems in maintenance of the rules. Not only would there be no way to find these references in the rules, but the USEPA amendments would likely occur in connection with the surface water program, without apparent connection to pretreatment. Where these situations occur, the Board will construe the reference to include only the surface discharge standard as it exists at the time the Board references it.

NEW SOURCE DATES

As noted above, the USEPA rules define "new source" in terms of the date the proposal to regulate the subcategory appeared in the Federal Register. Since these dates are not readily available to the public, the Board has proposed to adopt for each subcategory a definition of "new source" containing the actual date.

For the reasons noted above, the Board has decided that it must include these dates in the rules to have an enforceable program. The fact that it is difficult to determine these dates with certainty raises the possibility that the Board might adopt a date which is different than the correct interpretation of the USEPA rule. However, the difficulty the Board faces is the same as that which would confront the public in attempting to comply with rules an essential part of which would not be readily available. It is better to have an enforceable program with a few wrong new source dates than to have an unenforceable program. Therefore, the agencies and the public are urged to review these carefully and to comment on any errors. The Board will correct any errors on final adoption. Thereafter, the Board will amend the rules if necessary to correct any additional errors which may come to light.

To determine the new source dates the Board has relied in part on PC #8: Summaries of Categorical Pretreatment Standards, IEPA, prepared by Angela Tin and Joe Subsits, Third Edition, August, 1986. This document addresses only categories for which there are pretreatment standards other than the generic standards. For the categories contained in the document, the Board has accepted the date of the proposed USEPA regulation of the category as the new source date, unless some inconsistency is apparent between the document and the CFR. For other categories the date is based on researching back from the Federal Registers cited in the CFR source notes.

Apart from simply miscopying these dates, there are several possible sources of error. Two of these are noted above in connection with the discussion of point number five under

"pretreatment standards:" Is there a new source date if there is a PSES but no PSNS? Does USEPA define a new source date when it adopts a rule which references the general standards or the PSES? Other questions include the following: What happens if USEPA enlarges a subcategory after it is proposed? Can there be separate new source dates for sub-subcategories? What is the new source date if a proposal is withdrawn and repropoed?

The Board has followed the following conventions in drafting the proposal:

1. The new source date is the date of the first proposal of standards for a subcategory if the subcategory includes a PSNS Section in the CFR, even if it is merely a reference to the general standards.
2. No new source date is specified if there is no PSES or PSNS Section in the CFR, in which case "new" sources are required by Board rules to comply with Subpart B.
3. No new source date is specified if there is a PSES, but no PSNS Section in the CFR, in which case "new" sources are required by Board rules to comply with the PSES.

No date is specified in the second or third cases, because the standard is the same whether the source is "new" or existing. As is discussed above, there is a possibility that at the USEPA level there may actually be a new source date in some of these cases, but it is irrelevant at the present time. If USEPA in the future adopts a "real" PSNS for these, the new source date may relate back to this date. Hopefully this will be made clear in the Federal Register materials so the Board specifies the right date in amending the rules. If this has already happened, it would fall into case 1, and the Board has hopefully proposed the right date.

PART 310: PRETREATMENT PROGRAMS

Part 310 establishes the pretreatment program. It specifies how POTW's set up pretreatment programs, and sets requirements which users must meet to get pretreatment permits from the POTW, or from the Agency in some cases.

Part 310 is drawn from 40 CFR 403. Immediately following is a general discussion of how Part 403 was modified to form Part 310. Following on this is a detailed discussion of the Sections involved.

40 CFR 403 serves a larger function than Part 310: In addition to the functions noted above for Part 310, Part 403 specifies how a state obtains approval of its pretreatment program from USEPA, specifies certain minimal requirements which must be present in state law for program approval, specifies how USEPA acts in certain situations with an approved state program

and how USEPA acts in the absence of an approved program. Part 403 also includes broad introductory material and statements of purpose relating to the national program. This type of material has generally been deleted. In particular, Part 310:

1. Assumes that the Agency will administer an approved program. (See 40 CFR 403.3(c))
2. Does not purport to regulate actions to be taken by USEPA. (See 40 CFR 403.6(a)(4))
3. Does not purport to specify which offices within USEPA approve various aspects of the pretreatment program. (See 40 CFR 403.6(a)(4))
4. Does not include introductory material or statements of intent broader than the Illinois program. (See 40 CFR 403.13(b))
5. Specifies what State law is to be applied in pretreatment permits. (See 40 CFR 403.4)
6. Specifies procedures to be followed in situations in which USEPA allows a range of procedures within an approved program. (See 40 CFR 403.6(a)(1))
7. Adopts substantive requirements in situations in which USEPA requires that a rule be adopted, but allows a range of options. (See 40 CFR 403.12(b))
8. Translates general directives into specific State requirements. (See 40 CFR 403.9(g))
9. Specifies procedural steps which must be taken under State law. (See 40 CFR 403.13)
10. Modifies Part 403 to the extent necessary to comport with Illinois constitutional, statutory and administrative law. (See 40 CFR 403.8(e))
11. Rewords provisions for clarity.

The text of Part 310 is drawn from Part 403 as nearly verbatim as possible. The text is in nearly the same order as in Part 403. However, in order to comply with codification requirements, the first level of subdivision of USEPA sections has been promoted to Sections in Part 310. USEPA Sections generally correspond with Subparts in Part 310. The Board has added notes to each proposed Section referencing the Part 403 subsection from which it is drawn.

Section 310.101

Part 310 serves two functions: it governs the approval by the Agency of pretreatment programs for POTWs; and, it governs the issuance of pretreatment permits by the POTW to industrial users. This Section has no close USEPA counterpart.

Section 310.102

This Section is drawn from 40 CFR 403.2. Unnecessary USEPA introductory material has been deleted. Some of the provisions have been reworded for clarity.

Section 310.104

This Section is drawn from 40 CFR 403.4. The USEPA rule has been applied to the Illinois situation, but is not repeated.

The USEPA rule governs conflicts between State, and local, law and USEPA rules. USEPA allows more stringent State or local law to override its requirements. With respect to State requirements, the Board has identified the more stringent requirements.

Section 5 of the Act requires the Board to "determine, define and implement the environmental control standards applicable in the State." The Board cannot subdelegate this authority to local government. The POTW must apply the Board rules in the issuance of pretreatment permits. However, as is discussed below in connection with Sections 310.210 and 310.211, the POTW must evaluate its system and develop more stringent standards based on its capacity to treat discharges, from the cumulative effect of actual dischargers, so as to avoid interference or pass-through.

The pretreatment program should not be construed as in any way superseding any existing powers of a municipality to charge a user fee or to refuse to accept discharges which it does not believe the treatment plant can handle.

As discussed above, there are three types of prohibitions and standards. In Section 307.1101 the Board combined the USEPA general pretreatment requirements with the existing Board general requirements. POTWs and users will be able to refer to this rule without further consideration of stringency, unless there is a local requirement. Sections 307.1102 and 307.1103 contain concentration based standards for mercury and cyanide which will apply to all POTWs. Sections 307.1501 et seq. include the USEPA categorical standards, which are often expressed as mass discharge limits dependent on production rates. Because of the different method of expressing the standards, the POTW will have to apply each set of rules to a given situation to decide which type of standard is more stringent. For example, it may be necessary to determine a production rate, calculate an allowable

mass discharge limit and divide by flow to obtain a concentration limit to compare with the Board standards.

Section 310.105

This Section is drawn from 40 CFR 403.14. The USEPA rule has been applied, rather than repeated. For information in the hands of the Board or Agency, confidentiality is governed by Part 120. The Board sees no need to modify these rules at this time. POTWs will need to adopt procedures to protect confidentiality before pretreatment programs are approved. The Agency will review these procedures to assure that they meet the minimum requirements specified by this Section and 40 CFR 403.14.

Section 310.105(a) is drawn from 40 CFR 403.14(b). It provides that "effluent data shall be available to the public without restriction." The Board solicits comment as to how this should be interpreted in the context of the pretreatment program.

Section 310.107

This Section will include all materials which must be incorporated by reference for use in the later Sections. The Board has incorporated the Standard Industrial Classification Manual in that SIC Codes are requested in a subsequent Section.

Section 310.110

The 40 CFR 401 definitions have been consolidated with the Part 403 definitions for inclusion in Section 310.110. Definitions which seem to apply only to NPDES discharges have been omitted. The Board has added a number of definitions appropriate to the Illinois program.

The definition of "approval authority" has been modified on the assumption that the Agency will administer an approved program in Illinois. Therefore, "approval authority" is equivalent to "Agency".

"Approved POTW pretreatment program" is drawn from 40 CFR 403.3(d). It has been modified on the assumption that the Agency will be the approval authority. The USEPA rule includes a condition that the program meet the criteria for approval, as well as having been approved. This has been omitted as redundant. The Agency cannot approve a program unless it meets the criteria. Once approved, a program will remain "approved" until the Agency takes steps to cancel the approval.

At first sight the term "discharge of pollutants" appears to belong with the pretreatment rules. (40 CFR 401.11(h)) However, on closer examination, it applies only to effluent discharges.

The definition of "interference" is drawn from 40 CFR 401.3(i). The Board has specified the Part 309 sludge application permits, RCRA permits and Part 807 solid waste permits as those, which if violated, would result in interference.

The definition of "municipality" is drawn from 40 CFR 401.11(m), which references the CWA. The definition has been modified to use the term "unit of local government," an all-inclusive term defined by Art. 7, Sec. 1 of the Illinois Constitution.

The term "new source" is drawn from 40 CFR 401.11(c). The USEPA definition references the date a proposal for a categorical standard appeared in the Federal Register. As is discussed above, the Board has proposed to specify these dates in Part 307.

The definition of "pass-through" is drawn from 40 CFR 403.3(n).

The definition of "person" is drawn from 40 CFR 401.11(m) and the CWA. The CWA definition does not include the U.S. Government. However, the definition in 40 CFR 122.2, applicable to the NPDES program, which seems to be based on the same CWA definition, specifically includes the U.S. Government. Since there is no positive intent expressed by USEPA to exclude federal agencies the Board has proposed to include the U.S. Government in the State program, but solicits comment.

Section 13(h) of the Act provides that no person shall discharge to a sewer except in compliance with Board rules. Section 13.3 requires the Board to adopt identical in substance rules. The Board construes this to mean that it is to adopt a definition of "person" consistent with the USEPA program, and that that definition will control the the scope of Section 13(h). If the definition of "person" found in the Act were to control Section 13(h), the scope of the pretreatment program might be different than the program mandated by USEPA, violating Section 13.3.

The definition of "pollutant" is drawn from 40 CFR 401.11(f). That definition specifies discharges into "water", and as such seems to be inapplicable to the pretreatment program. However, in that the term is essential, the Board has proposed to modify the definition to include discharges to "sewers." The Board has also proposed to omit the exclusion of injections to facilitate oil production and sewage from vessels. These seem to be relevant only to the surface discharge program. It would not be physically possible to facilitate oil production by injecting water or other material into a sewer. Also, it would seem appropriate to apply the pretreatment rules if sewage from a vessel were somehow discharged to a sewer.

The definition of "pretreatment standard" is drawn from 40 CFR 403.3(j). The Board has dropped the equivalent term "national pretreatment standard." As these terms are used in the proposal, more stringent Board standards would also be "national," which would be confusing. There is no need in the proposal for terms distinguishing the USEPA standards from the Board standards, since their function does not depend on their origin.

The Board has conditioned this definition on adoption of USEPA standards by the Board. Therefore additional categorical standards will not become "pretreatment standards" until the Board adopts them as State rules.

The definition of "POTW" is drawn from 40 CFR 403.3(o). It has been made more specific so it applies in Illinois. It has been simplified through the addition of definitions for "treatment works" and "municipality."

The definition of "schedule of compliance" is referenced in 40 CFR 401.11(m). It has been set out in the proposal. A sentence has been added referencing the sources of schedules of compliance. The traditional methods of establishing such schedules in Illinois have been temporary hardship variances and Board enforcement Orders. The proposal would also allow the Agency and POTW to establish compliance schedules in permits within certain bounds.

The Board has added a definition of "SIC Code", a term which is used in the rules.

The definition of "submission" has been narrowed from that of 40 CFR 403.3(t). As defined, it will include only the request from the POTW to the Agency for approval of a pretreatment program. The references to removal credits have been dropped throughout the proposal. The submission from the Agency to USEPA for approval of the State program is not the subject of these rules.

The USEPA rules use "submittal" as a substitute for "submission" in several places. The Board has used the defined term throughout. Also, it should be noted that the USEPA rules actually use "submission" in contexts other than those listed.

The Board has added a definition for "treatment works", a term that is essential to the applicability of the pretreatment program. The definition is implied by the definition of "POTW," which references Section 212 of the CWA. The Board has proposed to define the term by reference to the CWA, with the first sentence of the CWA definition set out in full for clarity. The rest of the definition in Section 212 seems to be specifying what is or is not eligible for the grants program, and is not particularly appropriate for inclusion.

Section 310.201

This Section includes the general prohibition against introduction of pollutants which pass through or interfere with the operation of the POTW. This Section is drawn from 40 CFR 403.5(a). Some of the provisions have been reworded for clarity.

Section 310.202

The "specific" prohibitions of 40 CFR 403.5(b) have been combined with the similar existing Board requirements in Section 307.1102. These are part of the "general" pretreatment requirements of Subpart B of Part 307.

Section 310.210

This Section is drawn from 40 CFR 403.5(c). It has been reworded for clarity. POTW's which are required to develop pretreatment programs have to evaluate their system with respect to the cumulative effect of discharges upon it. They may have to develop and enforce more stringent specific limits based on this evaluation. The Board has modified the language to make it clear that this evaluation and the more stringent limits are to be a part of the pretreatment program submission. As such, the limits will be reviewed by the Agency and subject to appeal to the Board.

As is discussed above in connection with Section 310.104, only the Board has authority to adopt environmental control standards. The Board has therefore added Section 310.210(d) to the USEPA text. Specific limits developed by the POTW are to be based on the characteristics of the treatment plant and discharges to it.

There is an important distinction between environmental control standards and standards based on evaluation of a given system. New categorical pretreatment standards would be based on evaluation, or reevaluation, of treatment technology similar to that done by USEPA in adopting the categorical standards. On the other hand, treatment technology would be a secondary consideration for the POTW after evaluation of its system. The Board considered adding to paragraph (d) a sentence stating that this Section does not authorize POTW's to develop additional categorical standards. However, this seems to go too far, in that a POTW would probably in fact address categories of dischargers after evaluating its system. The Board has been unable to find better negative language to insert into the rule at this point, but solicits comment.

Section 310.211

This Section is drawn from 40 CFR 403.5(d). The additional pretreatment standards which the POTW develops from the

characteristics of the treatment plant and discharges will function the same as categorical pretreatment standards.

Section 310.212

This Section is drawn from 40 CFR 403.5(e). It requires a 30 day notice before the Agency can assume enforcement responsibility if a POTW fails to take action. The Board solicits comment as to whether this limitation is consistent with the Agency's enforcement powers under the Act.

This Section has been edited so that it does not purport to regulate actions by USEPA.

40 CFR 403.5(f) sets a compliance date for the USEPA rules. This has been omitted, since it is long since past. These rules will become effective when filed.

Section 310.220

This Section is drawn from 40 CFR 403.6. The Board solicits comment as to whether this general introductory material is necessary.

Section 310.221

This Section is drawn from 40 CFR 403.6(a). A user can request a category determination within 60 days after a new categorical standard is adopted. The Board has edited this Section on the assumption that the Agency will be delegated the authority to make these determinations.

Some of the provisions have been reworded for clarity. Paragraph (d)(1) has been edited to allow for the possibility that the Agency might determine that a submission is not complete. Paragraph (d)(2) has been edited so that it does not purport to regulate actions by USEPA.

USEPA will retain a case-by-case oversight authority on category determinations, unless it waives this authority. If USEPA does not waive its oversight authority, there will be a problem of finality and appeal. If the Agency refuses or fails to make a determination, the action can be appealed to the Board. Agency determinations, however, are subject to review by USEPA. If USEPA accepts the Agency determination, the determination is appealable to the Board for 35 days after notification of the Agency decision to the user. To avoid confusion, the Agency should not notify the user of a determination until USEPA review is complete. If USEPA modifies the Agency determination, the user must utilize USEPA procedures to challenge USEPA's decision. The user cannot appeal the USEPA action to the Board, or appeal the Agency's action to the Board if modified by USEPA.

Section 310.222

This Section is related to 40 CFR 403.6(b). Compliance dates were discussed above in connection with the general discussion of the categorical pretreatment standards. For the earlier standards, USEPA was silent as to the compliance date. 40 CFR 403.6(b) operated to give three years for existing sources to come into compliance with new standards. For the more recent standards, USEPA has specified the compliance dates with the categorical standards.

Compliance dates at the State level are somewhat more complex. The standards are not enforceable as State law until the Board has adopted them or incorporated them by reference, and until USEPA has approved the Illinois pretreatment program.

The Board cannot adopt the text of the USEPA rule. First, it would not adequately state the situation with respect to compliance dates at the State level. Second, since USEPA now specifies the dates with the standards, there would be a possibility of a conflict between this Section and the date specified by USEPA. Indeed, 40 CFR 403.6(b) is best interpreted as a formula used by USEPA to decide what dates to include with the standards. The Board cannot adopt a rule which purports to regulate USEPA. For these reasons the Board has drafted a State rule with no close federal counterpart.

There are basically three situations with respect to compliance dates. Where compliance is already required at the federal level, compliance will be required at the State level as soon as USEPA approves the Illinois program. For standards which are adopted after program approval, the Board will adopt or incorporate the USEPA compliance date with the standard. The intermediate case is the most complex: categories for which compliance will be required at the USEPA level during the pendency of program approval. For these sources compliance will be required as of the latest of the following dates: USEPA compliance date; Board adoption or incorporation; and program approval.

This scheme assumes that USEPA will continue to specify the compliance date with the standards, as is its current practice. If USEPA stops doing this, it will be necessary for the Board to determine the date and specify it when it incorporates the standard. In the absence of a specified date, immediate compliance will be required upon adoption or incorporation by the Board.

Section 310.230

This Section is drawn from 40 CFR 403.6(c). The Board has proposed to drop introductory language reflecting USEPA's intentions in adopting categorical standards. The Board has also edited "effluent" to "discharge" in the last sentence.

The Board solicits comment as to whether this Section serves any purpose in the Board rules.

Section 310.232

This Section is drawn from 40 CFR 403.6(d). This contains the anti-dilution rule. The USEPA rule is limited to "categorical" pretreatment standards. The Board has proposed to make this applicable to all the pretreatment standards, including the concentration-based standards for mercury and cyanide.

Section 310.233

This Section is drawn from 40 CFR 403.6(e). It specifies the methods for deriving discharge limits where wastewater from more than one source is combined prior to discharge.

Most of the changes to this Section involve format. The symbols in the formulas have been modified to avoid the use of subscripts and superscripts, which inevitably cause problems in the printed version of Board rules. For similar reasons, the sigma sign for summation has been replaced with the "SUM" function, which is defined in the rule. The formula has been written in a one line format, also to avoid proofreading problems.

40 CFR 403.6(e) contains two large asides in the definitions of the terms used in each of the formulas. It is impossible to meet codification requirements with this format. The asides have been moved to Section 310.233(d) and (e). This also avoids unnecessary repetition of the asides.

Section 310.233(d) has been modified to remove discretionary language. The control authority will have to make the dilution determination if the user asks for one.

Section 310.241

The following Sections govern issuance of pretreatment permits by the Agency. These permits will be required of dischargers unless and until the Agency approves a pretreatment program. These rules are based on 40 CFR 403.10(e) and (f). However, they do not follow the text of the USEPA rule, which specifies the contents of the program submission which IEPA will give to USEPA. The Board rules will be a portion of this submission, which will also include things out of the Board's jurisdiction, such as the adequacy of funding for inspections.

Section 310.241(a) prohibits discharges from "non-domestic sources" to POTW's unless the POTW has an approved pretreatment program. Section 310.241(b) requires compliance with the conditions of the permit.

The limitation to "non-domestic sources" is taken from Section 310.201 and 40 CFR 403.5(a), which require compliance with pretreatment standards. This could also be phrased in terms of "industrial user." The Board solicits comment on this.

There are six possibilities:

1. The discharge is to a POTW with an approved program.
2. The discharge is to a POTW whose program has not yet been approved.
3. The discharge is to a POTW which refuses or fails to file a program application.
4. The discharge is to a POTW whose application has been denied, or whose program has been cancelled through modification of its NPDES permit.
5. The discharge is to a POTW which is not required to have an approved program.
6. The discharge is not to a POTW.

Discharges to a POTW with an approved plan are exempt from the pretreatment permit requirement. (Case 1) The Agency will issue permits temporarily to dischargers during the pendency of a POTW application. (Case 2). The Agency will issue permits indefinitely where there is no local program. This will not excuse the POTW from the requirement to have an approved program. (Cases 3 and 4). Under Section 310.301 it appears that POTW's receiving less than 5 mgd may be exempt from the pretreatment program requirement under certain circumstances. The Board has proposed to require pretreatment permits issued by the Agency for any non-domestic sources discharging to such small POTW's, but solicits comment. (Case 5)

The proposal is worded in such a manner that discharges to treatment plants which are not POTW's would not be subject to the pretreatment permit requirement. There is at least one privately owned wastewater treatment plant serving a municipality in Illinois. The Board is not aware of anything in the federal or Illinois law which requires pretreatment permits for discharges to non-POTW's, but solicits comment. (Case 6).

Section 310.242

The Board has proposed to require the Agency to promulgate application forms pursuant to Section 39(a) of the Act. The Board could also specify the minimum contents of the application in the rule.

Section 310.243

The Agency is to issue a pretreatment permit if the discharger demonstrates that the discharge will meet the requirements of Parts 307 and 310.

Section 310.244

The Agency is to impose such conditions as are necessary to assure that the discharge complies with Parts 307 and 310. Specific conditions are listed. The Agency is to include discharge limitations based on Part 307, and more stringent limitations based on the ability of the POTW to treat the discharge without interference or pass through. The permit must also include monitoring, reporting and inspection conditions.

Section 310.245

The Board has proposed to allow the discharger, the POTW or a member of the public to appeal the issuance or denial of a pretreatment permit to the Board. The Board construes the discharger's pretreatment permit to be a part of the POTW's NPDES permit. However, the Board solicits comment on its authority to allow third party appeals in this situation.

Section 310.301

This Section is drawn from 40 CFR 403.8(a). This Section determines which POTW's are required to develop pretreatment programs: those above 5 mgd which receive from industrial users pollutants which pass through or interfere with the POTW, or which receive discharges from users which are subject to pretreatment standards. The Agency can also require smaller POTW's to develop programs under certain stated circumstances.

This Section has been reworded from the comparable federal language. The USEPA language is worded as a directive to the State to adopt a requirement; the Board has met the directive by adopting the requirement. The USEPA rule is very confusing, including several misplaced modifiers. The Board has adopted a rule which seems clear, and which appears to meet the USEPA directive. However, the Board solicits comment on whether the proposal captures the intent of the USEPA rule.

40 CFR 403.8(a) exempts POTW's if the State assumes direct responsibility for pretreatment permits. The Board has proposed not to exercise this option, but solicits comment. The Agency will issue certain pretreatment permits directly under Section 310.241, but these will not excuse the POTW from the obligation to prepare a program.

Section 310.302

This Section is drawn from 40 CFR 403.8(b). The USEPA rule

requires POTW's to develop pretreatment programs no later than July 1, 1983, which has already passed. The Board has proposed to substitute July 1, 1988, as the Illinois deadline. This date is chosen for consistency with important compliance dates in the CWA. The Board solicits comment as to whether this allows adequate time for POTW's to develop programs.

Section 310.303

This Section is drawn from 40 CFR 403.8(c). The USEPA rule treats modification of the POTW's NPDES permit to incorporate an approved pretreatment program as a "minor modification." As such it is not subject to the detailed procedures for permit issuance of 40 CFR 122. However, the Board has never adopted the minor modification procedures as part of the NPDES procedures of Part 309. The Board has therefore simply provided that this type of permit modification is not subject to Part 309.

Section 310.304

This Section is drawn from 40 CFR 403.8(d). If the Agency issues an NPDES permit for a POTW required to establish a pretreatment program, but which has not done so, the Agency is to include a compliance schedule in the permit. The compliance schedule is to lead to an approved program at the latest by July 1, 1988, a date chosen for consistency with Section 310.302.

Section 310.305

This Section is drawn from 40 CFR 403.8(e). It requires the Agency to modify or reissue permits to incorporate an approved pretreatment program or to place the POTW on a compliance schedule leading to an approved program.

The USEPA rule uses the phrase "revoke and reissue" instead of "reissue" to describe the process by which the Agency replaces an earlier permit with a new permit. The Board has modified the term to avoid confusion with permit revocation as a penalty for violation of the Act. This modification is consistent with the terminology adopted in the RCRA rules in R86-1 (Opinion and Order of June 20 and July 11, 1986.)

Subsection (b) authorizes the Agency to coordinate construction grants with the compliance schedules for pretreatment programs. The Board does not generally regulate the grants process, and solicits comment as to the necessity and propriety of the provision.

Section 310.310

This Section is drawn from 40 CFR 403.8(f). This Section establishes the requirements for an approvable pretreatment program.

40 CFR 403.8(f)(1) establishes the legal authority which a POTW must have for program approval. Generally the POTW has to have legal authority to enforce Parts 307 and 310. The Board has specified in Section 310.310(a) only its own rules, without requiring the POTW to have the authority to enforce the USEPA rules or CWA directly.

40 CFR 403.8(f)(1)(v) requires that the POTW have authority to enter any place where records are required to be kept under 40 CFR 403.12(m). The correct reference should be to Section 403.12(1), whose equivalent is Section 310.434.

40 CFR 403.8(f)(1)(vi) requires that POTW's have authority to seek civil or criminal penalties against dischargers which do not comply with pretreatment requirements if the state has laws which allow POTW's to seek such penalties. If the state does not allow actual penalties, POTW's have to contract with dischargers specifying penalties. P.A. 84-1320 does not include a specific grant of authority to municipalities to adopt ordinances containing these penalties. The Board solicits comment concerning any limitations on the authority of POTW's or associated municipalities to exact penalties in Illinois. The Board notes, in particular, its concerns about the limitations, both Constitutional and statutory, on the powers of units of local government to impose criminal penalties. For purposes of soliciting public comment, the Board has proposed in Section 310.310(a)(6)(A) to require both federal options in the Illinois program. That is, each POTW would have to pass ordinances and contract with each industrial user.

"Municipality" is defined above to be the equivalent of "unit of local government" under the Illinois Constitution.

The Board will ask specific questions to be answered by commenters, especially the Attorney General. What is the authority of municipalities, as defined in the proposal, to adopt ordinances with criminal penalties? Would civil penalties be sufficient under federal law? What is the authority of municipalities to adopt civil penalties? Does this depend on the type of municipality? What is the authority of municipalities to enter into contracts involving liquidated damages of this sort? Is the practice of requiring individual contracts with industrial dischargers widespread? Or, would a requirement of individual contracts impose burdensome costs on municipalities?

40 CFR 403.8(f)(1)(vi)(B) requires the POTW to have authority to immediately halt discharge of pollutants which "reasonably appears to present an imminent endangerment..." The Board has proposed to change this to "presents an imminent endangerment..." (Section 310.310(a)(6)(B)).

40 CFR 403.8(f)(2) contains several provisions requiring the POTW to share information with USEPA or the State agency. The Board has proposed in Section 310.310(b) to require the POTW to

share information only with the Agency. USEPA and the Agency will presumably share information pursuant to the delegation agreement.

40 CFR 403.8(f)(2)(vii) requires notices to be published in the largest daily newspaper "published" in the municipality in which the POTW is located. The Board has proposed in Section 310.310(b)(7) to change this to "circulated," recognizing that many municipalities depend primarily on newspapers published elsewhere, and that there may be cases in which a newspaper actually published in a given town may not be the largest circulation paper in the town. For example, the Wall Street Journal is published in Naperville, but is probably not an appropriate newspaper for a notice of local importance.

Section 310.333

This Section implements 40 CFR 403.9(g). The Section is simple because the Agency is the water quality management agency in Illinois.

The Board has proposed no equivalent of 40 CFR 403.10, which governs the IEPA's submission of the State program to USEPA. These rules should be submitted to USEPA as a part of the program submission under this Section.

Section 310.341

This Section is drawn from 40 CFR 403.11(a). This and the following Sections set up the procedures which the Agency follows in approving pretreatment programs. As provided above, this results in a modification of the POTW's NPDES permit, although the Part 309 procedures will not be followed.

40 CFR 403.11 includes provisions governing the granting of removal credits by POTW's. The Board has not proposed to adopt the provisions regarding removal credits.

Section 310.342

This Section is drawn from 40 CFR 403.11(b). The Board has implemented the USEPA rule by specifying certain agencies which are to receive public notice of the pretreatment program. The Board has specified that regional planning agencies responsible for water quality management plans are to receive notice. This recognizes the interest of the regional planning agencies, such as NIPC, in water quality management plans.

Section 310.344

This Section leads into 40 CFR 403.11(d). The Board has not adopted the USEPA text, since it specifies only procedures to be followed by USEPA.

USEPA has the right to object to a proposed pretreatment program. The program proposal has to be modified to meet this objection. The POTW can contest the objection in accordance with USEPA rules, but cannot appeal the USEPA objection to the Board.

Section 310.347

Since approval of pretreatment programs does not proceed through the Part 309 procedures, the Board has specified that the decision is appealable pursuant to this Section.

Section 310.401

This and the following Sections specify reporting requirements. Section 310.401 is drawn from 40 CFR 403.12(a). It contains a definition of "control authority:" the POTW after the pretreatment program has been approved, and the Agency before. The Board has proposed to adopt this as a global definition in Section 310.110, since the term is used throughout the Part.

Section 310.402

This Section is drawn from 40 CFR 403.12(b). It requires industrial users to prepare a "baseline report" within 180 days after the Board adopts a pretreatment standard, or within 180 days after a category determination is made. The Board has proposed to key the report to the Board adoption rather than the USEPA adoption.

Section 310.402(e)(6) governs sampling and analysis. 40 CFR 403.12(b)(5)(vi) appears to contain a reference to future amendments to 40 CFR 136. The Board believes these are precluded by the APA. The Board has incorporated the current version of Part 136 in Section 307.1003, which will be referenced at this point. That Section will be periodically updated as these rules are maintained.

The USEPA rules allow the Administrator to approve alternative sampling and analysis methods. The Board has proposed to allow the Agency to make this determination, on the assumption that USEPA does not intend to retain this authority. The Board solicits comment on this.

Section 310.405

This Section is drawn from 40 CFR 403.12(e), which allows the control authority to "agree" to alter the requirement of reports in June and December at its discretion, in consideration of such things as budget cycles. It is not clear with whom the agreement is to be made. The Board has simplified and clarified the language, to provide that the control authority "may alter" the due months. The reports will still be due every six months,

except for the initial period in which an alternative schedule is established.

Section 310.410

This Section is drawn from 40 CFR 403.12(g). The first sentence of the USEPA rule contains a "therein" which has been rendered as "in the discharge" for clarity. For the reasons noted above, the Section has been edited on the assumption that the Agency will be delegated authority to approve alternate sampling and analysis methods. Forward incorporations of 40 CFR 136 will be handled by way of Section 307.1003.

Section 310.431

This Section is drawn from 40 CFR 403.12(i). The introductory language has been modified to replace "may be" with "is" in the definition of "authorized representative."

Section 310.434

This Section is drawn from 40 CFR 403.12(l). Paragraph (c) has been modified so that the Agency will control retention of documents by the POTW. If USEPA wants reports retained for a longer period, it would instruct the Agency to request longer retention. This can be dealt with in the delegation agreement rather than the rules.

Section 310.501

This Section is drawn from 40 CFR 403.13(a). This and the following Sections deal with "fundamentally different factors" ("FDF") variances. The Board has modified the rules to avoid describing these as "variances," a term which would be confusing in light of Board variances granted pursuant to Title IX of the Act. The Board has instead used "determination" to describe the fundamentally different factors process.

Board variances grant temporary relief from a rule when a petitioner demonstrates arbitrary and unreasonable hardship. The petitioner must have a plan for eventual compliance. On the other hand an FDF determination results in a permanent limitation, with no plan for eventual compliance. The variance procedures are clearly inappropriate. There is still a question as to whether the FDF determination is the equivalent of determining an environmental control standard, and hence an action reserved to the Board by Sections 5(c) and 13(a)(2) of the Act, or whether it is implementation of a Board rule as a part of permit issuance, and hence an action reserved to the Agency by Sections 4(g), 4(1) and 39 of the Act. If the decision is reserved to the Board, the appropriate procedure would be the adjusted standards of Section 28.1 of the Act.

The pretreatment program differs from the NPDES program in that, with respect to NPDES permits for surface discharges, USEPA retains the authority to make FDF determinations. The surface discharger directs to USEPA requests for FDF determinations with respect to USEPA's categorical effluent limitations, and directs to the Board petitions for variances or site-specific rules with respect to the Board's effluent standards. The Agency sorts this all out and issues an NPDES permit based on the most stringent limitations. This process cannot serve as a model for the pretreatment program because it is so different.

As is explained in the introductory material to 40 CFR 403.13(b), the need for FDF determinations arises because of the method USEPA chose to establish pretreatment standards. USEPA chose to regulate by industry categories, rather than by pollutant. Industry categories, established by SIC codes, are mainly defined by products, without consideration of pollution potential. This raises the possibility that a discharger may meet the definition for inclusion in an industry category, yet have little in common with the industries which USEPA sampled in establishing the pretreatment standards for the category. USEPA has provided a mechanism by way of the FDF determination for arriving at permit limitations for users which fit into a regulated category, but which have factors fundamentally different than those looked at by USEPA in arriving at the categorical pretreatment standards.

Sections 310.503 et seq. spell out in great detail the factors to be considered by the Agency in making an FDF determination. Section 310.522 allows the requester to appeal a denial to the Board. The specified factors appear to be sufficiently detailed to allow the Board to review the Agency's decision in a meaningful way. The Board therefore concludes that the FDF determination is in the nature of a permit review action which is within the Agency's authority.

The Board retains the authority to issue variances pursuant to the Act for arbitrary or unreasonable hardship. These would have to be consistent with federal law. A variance would have to meet the requirements of a delayed compliance plan, as well as the requirements specified under the Act and Part 104.

Section 310.502

This Section is drawn from 40 CFR 403.13(b). Much of the basic introductory material, which was referenced above, has been dropped. This relates to the rationale of USEPA in adopting the categorical standards, and is not appropriate in the Board rule, since the Board has merely incorporated the standards by reference.

Section 310.506

This Section is drawn from 40 CFR 403.13(f), which allows

more stringent State and local requirements to override FDF determinations. Rather than repeat the directive of the USEPA rule, the Board has implemented it by stating the Illinois law on this. The Agency cannot grant an FDF determination with respect to the more stringent requirements established pursuant to independent Board authority. This presently consists of the cyanide and mercury standards discussed above. Also, the FDF determination could not be used to override any more stringent local limitations based on an evaluation of the system and discharges to it.

Section 310.513

This Section is drawn from 40 CFR 403.13(i). It has been reworded for clarity.

Section 310.514

This Section is drawn from 40 CFR 403.13(j). For the reasons noted above, the Board has implemented the USEPA notice requirements with a more specific list of entities to be notified.

Section 310.522

This Section is drawn from 40 CFR 403.13(l). The preceding Section requires the Agency to notify the requester if it denies an FDF determination, or to otherwise forward the request to USEPA with an approval recommendation. Section 310.522(a) references the USEPA procedures for review of FDF determinations, but does not purport to specify them. Section 310.522(b) prohibits the Agency from granting any FDF approval unless USEPA approves.

Section 310.522(c)(1) allows the requester to appeal to the Board any finding of the Agency that FDF do not exist. Section 310.522(c)(2) provides that the requester may contest USEPA decisions only as allowed by USEPA.

Section 310.601

This Section references the USEPA procedures of 40 CFR 403.15 for adjusting categorical standards to reflect the presence of pollutants in intake waters.


Section 310.701 et seq.

These provisions are drawn from 40 CFR 403.16, governing "upsets." An upset is an affirmative defense in the event of an enforcement action. However, to claim an upset, the discharger has to notify the POTW within 24 hours after the upset, and provide certain specified information. If the discharger fails to notify the POTW within 24 hours, the discharger is barred from later claiming that non-compliance resulted from an upset.

Section 310.705 provides that the Agency is to review upset claims, although any determinations are not final actions subject to review. The only review would come in the event of an enforcement action, at which time the Board would decide whether an upset occurred.

This Proposed Opinion supports the Board's Proposed Order for public comment of this same day.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 5th day of March, 1987, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board