

ILLINOIS POLLUTION CONTROL BOARD
August 30, 1990

IN THE MATTER OF:)
)
RCRA UPDATE, USEPA REGULATIONS) R90-10
TCLP (1-1-90 THROUGH 3-30-90)) Rulemaking

FINAL ORDER. ADOPTED RULE.

OPINION OF THE BOARD (by J. Anderson):

By a separate Order, pursuant to Section 22.4(a) of the Environmental Protection Act (Act), the Board is amending the RCRA hazardous waste regulations, including the March 29, 1990, USEPA toxicity characteristic leaching procedure (TCLP). The Board will allow post-adoption comments through September 11, 1990.

Section 22.4 of the Act governs adoption of regulations establishing the RCRA program in Illinois. Section 22.4(a) provides for quick adoption of regulations which are "identical in substance" to federal regulations; Section 22.4(a) provides that Title VII of the Act and Section 5 of the Administrative Procedure Act shall not apply. Because this rulemaking is not subject to Section 5 of the Administrative Procedure Act, it is not subject to first notice or to second notice review by the Joint Committee on Administrative Rules (JCAR). The federal RCRA regulations are found at 40 CFR 260 through 270. This rulemaking updates Illinois' RCRA rules to correspond with federal amendments during the period January 1 through March 30, 1990. The Federal Registers utilized are as follows:

55 Fed. Reg. 2354	January 23, 1990
55 Fed. Reg. 5340	February 14, 1990
55 Fed. Reg. 6640	February 26, 1990
55 Fed. Reg. 8948	March 9, 1990
55 Fed. Reg. 11798	March 29 1990

The USEPA amendments include several site-specific delistings. As provided in 35 Ill. Adm. Code 720.122(d), the Board will not adopt site-specific delistings unless and until someone files a proposal showing why the delisting needs to be adopted as part of the Illinois program.

Subsequent to this batching period, USEPA published two corrections, which are discussed below in connection with Section 721.124. On June 29, 1990, USEPA corrected an entry to the TCLP listings. (55 Fed. Reg. 26987) In addition, on August 2, 1990, USEPA published a correction to the effective dates. (55 Fed. Reg. 31387)

On March 1, 1990, USEPA delegated delisting authority to Illinois. The Board has proposed to revise its delisting rules in R90-17. The Board has also opened two Dockets, R90-18 and 19, to receive USEPA's files on pending

The Board acknowledges the contributions of Morton Dorothy and Anne Manly in drafting the Opinion and Order.

delistings.

In accordance with Section 7.2(b) of the Act, the Board normally "batches" USEPA actions into six-month periods for adoption as State rules. In this Docket the Board has departed from its normal practice, and has taken a three-month batch. The Board has done this in order to quickly adopt the new Toxicity Characteristic Leaching Procedure (TCLP) rules from the March 29 Federal Register. This is changes to the definition of "hazardous waste" which will become effective as federal rules on September 25, 1990. Since they are adopted pursuant to the Hazardous and Solid Waste Amendments (HSWA) to the RCRA Act, they will supersede State law prior to adoption by the State. The result would be an unsatisfactory situation in which the definition of "hazardous waste" would be substantially different in State and federal law, pending State action.

PUBLIC COMMENT

The proposal appeared on June 22, 1990, at 14 Ill. Reg. 9706. The Board has received the following public comment:

- PC 1 Metal Finishing Research Corporation, July 5, 1990
- PC 2 United States Environmental Protection Agency (USEPA), July 17, 1990
- PC 3 Chemical Waste Management, Inc., August 6, 1990
- PC 4 Administrative Code Division, August 8, 1990
- PC 5 Small Business Office, Department of Commerce and Community Affairs (DCCA), August 8, 1990
- PC 6 Illinois Environmental Regulatory Group (IERG), August 13, 1990
- PC 7 Illinois Environmental Protection Agency (Agency), August 20, 1990
- PC 8 Agency, second set of comments, August 22, 1990
- PC 9 Joint Committee on Administrative Rules (JCAR), July 31 through August 3, 1990
- PC 10 IERG, supplemental comments, August 27, 1990
- PC 11 Small Business Office, DCCA, revised comments, August 29, 1990.

Public comment in this matter was due August 6, 1990. IERG and the Agency filed motions to file instanter. The motions are granted.

The Administrative Code Division reviewed the proposal for compliance with rule formats. (PC 4) The DCCA Small Business Office determined that there is no small business impact, since these rules adopt federal standards. (PC 5)

However, in its revised comments, DCCA suggested that the failure to adopt the delayed effective date for the TCLP test for small quantity generators, discussed below, would have a negative impact on small business. (PC 11)

JCAR sent a collection of letters addressing each Part, which have been grouped into a single public comment. (PC 9) JCAR determined that it had no comments.

Most of the remaining comments addressed the phase-in of the TCLP test.

EXTENSION OF TIME ORDERS

Section 7.2(b) of the Act requires that identical in substance rulemakings be completed within one year after the first USEPA action in the batch period. If the Board is unable to do so it must enter an "extension of time" Order. The Board anticipates filing these rules significantly in advance of January 1, 1991, the nominal due date of this batch.

HISTORY OF RCRA, UST and UIC ADOPTION

The Illinois RCRA, UST (Underground Storage Tanks) and UIC (Underground Injection Control) regulations, together with more stringent State regulations particularly applicable to hazardous waste, include the following:

702	RCRA and UIC Permit Programs
703	RCRA Permit Program
704	UIC Permit Program
705	Procedures for Permit Issuance
709	Wastestream Authorizations
720	General
721	Identification and Listing
722	Generator Standards
723	Transporter Standards
724	Final TSD Standards
725	Interim Status TSD Standards
726	Specific Wastes and Management Facilities
728	USEPA Land Disposal Restrictions
729	Landfills: Prohibited Wastes
730	UIC Operating Requirements
731	Underground Storage Tanks
738	Injection Restrictions

Special procedures for RCRA cases are included in Parts 102, 103, 104 and 106.

Adoption of these regulations has proceeded in several stages. The Phase I RCRA regulations were adopted and amended as follows:

R81-22 45 PCB 317, February 4, 1982, 6 Ill. Reg. 4828, April 23, 1982.

R82-18 51 PCB 31, January 13, 1983, 7 Ill. Reg. 2518, March 4, 1983.

Illinois received Phase I interim authorization on May 17, 1982 (47 Fed. Reg. 21043).

The UIC regulations were adopted as follows:

R81-32 47 PCB 93, May 13, 1982; October 15, 1982, 6 Ill. Reg. 12479.

The UIC regulations were amended in R82-18, which is referenced above. The UIC regulations were also amended in R83-39:

R83-39 55 PCB 319, December 15, 1983; 7 Ill. Reg. 17338, December 20, 1983.

Illinois received UIC authorization February 1, 1984. The Board has updated the UIC regulations:

R85-23 70 PCB 311, June 20, 1986; 10 Ill. Reg. 13274, August 8, 1986.

R86-27 Dismissed at 77 PCB 234, April 16, 1987 (No USEPA amendments through 12/31/86).

R87-29 January 21, 1988; 12 Ill. Reg. 6673, April 8, 1988; (1/1/87 through 6/30/87).

R88-2 June 16, 1988; 12 Ill. Reg. 13700, August 26, 1988. (7/1/87 through 12/31/87).

R88-17 December 15, 1988; 13 Ill. Reg. 478, effective December 30, 1988. (1/1/88 through 6/30/88).

R89-2 January 25, 1990; 14 Ill. Reg. 3059, effective February 20, 1990 (7/1/88 through 12/31/88).

R89-11 May 24, 1990; (1/1/89 through 11/30/89).

R90-5 Dismissed March 22, 1990 (12/1/89 through 12/31/89)

R90-14 Next UIC Docket (1/1/90 through 6/30/90)

The Phase II RCRA regulations included adoption of Parts 703 and 724, which established the permit program and final TSD standards. The Phase II regulations were adopted and amended as follows:

R82-19 53 PCB 131, July 26, 1983, 7 Ill. Reg. 13999, October 28, 1983.

R83-24 55 PCB 31, December 15, 1983, 8 Ill. Reg. 200, January 6, 1984.

On September 6, 1984, the Third District Appellate Court upheld the Board's actions in adopting R82-19 and R83-24. (Commonwealth Edison et al. v. IPCB, 127 Ill. App. 3d 446; 468 NE 2d 1339 (Third Dist. 1984).)

The Board updated the RCRA regulations to correspond with USEPA amendments in several dockets. The period of the USEPA regulations covered by the update is indicated in parentheses:

R84-9 64 PCB 427, June 13, 1985; 9 Ill. Reg. 11964, effective July 24, 1985. (through 4/24/84)

- R85-22 67 PCB 175, 479, December 20, 1985 and January 9, 1986; 10 Ill. Reg. 1968, effective January 2, 1986. (4/25/84 -- 6/30/85)
- R86-1 71 PCB 110, July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986. (7/1/85 -- 1/31/86)
- R86-19 73 PCB 467, October 23, 1986; 10 Ill. Reg. 20630, December 12, 1986. (2/1/86 -- 3/31/86)
- R86-28 75 PCB 306, February 5, 1987; and 76 PCB 195, March 5, 1987; 11 Ill. Reg. 6017, April 3, 1987. Correction at 77 PCB 235, April 16, 1987; 11 Ill. Reg. 8684, May 1, 1987. (4/1/86 -- 6/30/86)
- R86-46 July 16, 1987; August 14, 1987; 11 Ill. Reg. 13435. (7/1/86 -- 9/30/86)
- R87-5 82 PCB 391, October 15, 1987; 11 Ill. Reg. 19280, November 30, 1987. (10/1/86 -- 12/31/86)
- R87-26 December 3, 1987; 12 Ill. Reg. 2450, January 29, 1988. (1/1/87 -- 6/30/87)
- R87-32 Correction to R86-1; September 4, 1987; 11 Ill. Reg. 16698, October 16, 1987.
- R87-39 Adopted June 14, 1988; 12 Ill. Reg. 12999, August 12, 1988. (7/1/87 -- 12/31/87)
- R88-16 November 17, 1988; 13 Ill. Reg. 447, effective December 28, 1988 (1/1/88 -- 7/31/88)
- R89-1 September 13, October 18 and November 16, 1989; 13 Ill. Reg. 18278, effective November 13, 1989 (8/1/88 -- 12/31/88)
- R89-9 March 8, 1990; 14 Ill. Reg. 6225, effective April 16, 1990 (1/1/89 through 6/30/89)
- R90-2 Adopted July 3 and August 9, 1990 (7/1/89 through 12/31/89)
- R90-10 This Docket (1/1/90 through 3/31/90)
- R90-11 Next RCRA Docket (4/1/90 through 6/30/90)
- R90-17 Proposed July 19, 1990; RCRA Delistings (3/1/90)

Illinois received final authorization for the RCRA program effective January 31, 1986. Additional components were authorized on March 1, 1990.

The Underground Storage Tank rules were adopted in R86-1 and R86-28, which were RCRA update Dockets discussed above. They are currently being handled in their own Dockets:

- R88-27 April 27, 1989; 13 Ill. Reg. 9519, effective June 12, 1989

(Technical standards, September 23, 1989)

- R89-4 July 27, 1989; 13 Ill. Reg. 15010, effective September 12, 1989 (Financial assurance, October 26, 1989)
- R89-10 February 22, 1990; 14 Ill. Reg. 5797, effective April 10, 1990 (Initial update, through 6/30/89)
- R89-19 April 26, 1990; 14 Ill. Reg. 9454, effective June 4, 1990 (UST State Fund)
- R90-3 June 7, 1990; (7/1/89 - 12/31/89)
- R90-12 Next UST Docket (1/1/90 - 6/30/90)

The Board added to the federal listings of hazardous waste by listing dioxins pursuant to Section 22.4(d) of the Act:

- R84-34 61 PCB 247, November 21, 1984; 8 Ill. Reg. 24562, effective December 11, 1984.

This was repealed by R85-22, which included adoption of USEPA's dioxin listings. Section 22.4(d) was repealed by S.B. 1834.

The Board has adopted USEPA delistings at the request of Amoco and Envirite:

- R85-2 69 PCB 314, April 24, 1986; 10 Ill. Reg. 8112, effective May 2, 1986.
- R87-30 June 30, 1988; 12 Ill. Reg. 12070, effective July 12, 1988.

As noted above, R90-17 is pending to address delisting procedures before the Board. The Board has opened two Dockets to address delistings pending before USEPA:

- R90-18 USX Corporation, Southworks
- R90-19 Woodyard Governor

The Board has procedures to be followed in cases before it involving the RCRA regulations:

- R84-10 62 PCB 87, 349, December 20, 1984 and January 10, 1985; 9 Ill. Reg. 1383, effective January 16, 1985.

The Board also adopted in Part 106 special procedures to be followed in certain determinations. Part 106 was adopted in R85-22 and amended in R86-46, listed above.

The Board has also adopted requirements limiting and restricting the landfilling of liquid hazardous waste, hazardous wastes containing halogenated compounds and hazardous wastes generally:

- R81-25 60 PCB 381, October 25, 1984; 8 Ill. Reg. 24124, December 4, 1984;
- R83-28 February 26, 1986; 10 Ill. Reg. 4875, effective March 7, 1986.
- R86-9 Emergency regulations adopted at 73 PCB 427, October 23, 1986; 10 Ill. Reg. 19787, effective November 5, 1986.

The Board's action in adopting emergency regulations in R86-9 was reversed (CBE and IEPA v. IPCB et al., First District, January 26, 1987). Economic Impact hearings have recently been completed.

AGENCY OR BOARD ACTION?

In the formulating the State rules, the Board has almost always changed "Regional Administrator" to "Agency". However, in some situations "Regional Administrator" has been changed to "USEPA" or "Board". Section 7.2(a)(5) of the Act requires the Board to specify which decisions USEPA will retain. In addition, the Board is to specify which State agency is to make decisions, based on the general division of functions within the Act and other Illinois statutes.

In situations in which the Board has determined that USEPA will retain decision-making authority, the Board has replaced "Regional Administrator" with "USEPA", so as to avoid specifying which office within USEPA is to make a decision.

The regulations will eventually require a RCRA permit for each HWM facility. However, many "existing units" are still in "interim status". Decisions involving interim status are often more ambiguous as to whether they are permit actions.

In a few instances in identical in substance rules decisions are not appropriate for Agency action pursuant to a permit application. Among the considerations in determining the general division of authority between the Agency and the Board are the following:

1. Is the person making the decision applying a Board regulation, or taking action contrary to ("waiving") a Board regulation? It generally takes some form of Board action to "waive" a Board regulation. For example, the Agency clearly has authority to apply a regulation which says "If A, do X; if not A, do Y". On the other hand, regulations which say "If not A, the state shall waive X" are more troubling.
2. Is there a clear standard for action such that the Board can give meaningful review to an Agency decision?
3. Is there a right to appeal? Agency actions are generally appealable to the Board.
4. Does this action concern a person who is required to have a permit anyway? If so there is a pre-existing permit relationship which can easily be used as a context for Agency decision. If the action

concerns a person who does not have a permit, it is more difficult to place the decision into a procedural context which would be within the Agency's jurisdiction.

- 5. Does the action result in exemption from the permit requirement itself? If so, Board action is generally required.
- 6. Does the decision amount to "determining, defining or implementing environmental control standards" within the meaning of Section 5(b) of the Act? If so, it must be made by the Board.

Once it is determined that a decision must be made by the Board, rather than the Agency, it is necessary to determine what procedural context is best suited for that decision. There are four common classes of Board decision: variance, adjusted standard, site specific rulemaking and enforcement. The first three are methods by which a regulation can be temporarily postponed (variance) or adjusted to meet specific situations (adjusted standard or site specific rulemaking). Note that there are differences in the nomenclature for these decisions between the USEPA and Board regulations. These differences have caused past misunderstandings with USEPA.

A variance is initiated by the operator filing a petition pursuant to Title IX of the Act and 35 Ill. Adm. Code 104. The Agency files a recommendation as to what action the Board should take. The Board may conduct a public hearing, and must do so if there is an objection to the variance.

Board variances are: temporary; based on arbitrary or unreasonable hardship; and, require a plan for eventual compliance with the general regulation. To the extent a USEPA decision involves these factors, a Board variance is an appropriate mechanism.

A variance is not an appropriate mechanism for a decision which is not based on arbitrary or unreasonable hardship, or which grants permanent relief without eventual compliance. To grant permanent relief, the Board needs to grant a site specific regulation or an adjusted standard pursuant to Sections 27 or 28.1 of the Act, and 35 Ill. Adm. Code 102 or 106.

GENERAL SUMMARY OF USEPA ACTIONS

The following is a general description of the USEPA actions during this update period:

January 23, 1990	Mineral Processing Wastes
February 14, 1990	Delisting of Zirconium Phosphate Sludges
February 26, 1990	Response to remand on BDAT preference
March 9, 1990	Additions to Analytical Testing Methods
March 29, 1990	TCLP

EFFECTIVE DATE FOR TCLP

The issues raised in the public comment focus on the effective date of the TCLP test. These comments will be addressed in this portion of the Opinion, rather than in the Section-by-Section discussion.

The regulatory definition of "hazardous waste" has two basic components. A waste can be hazardous if: the waste is "listed" by its name or the name of the process which produces it; or, if the waste exhibits a hazardous "characteristic". There are presently four "characteristics": ignitability, reactivity, corrosivity and "EP toxicity". This rulemaking replaces the "EP toxicity" ("extraction procedure") characteristic with the "toxicity characteristic", which is measured by the "TCLP" ("toxicity characteristic leaching procedure") test.

The EP toxicity and TCLP tests are similar in their basic concept: they are measures of the tendency of a waste to leach toxic constituents under conditions likely to exist in a landfill. The TCLP test differs in part in that, while the EP toxicity test examined 14 toxic constituents, the TCLP test examines 40 constituents. While the EP toxicity test looked mainly at heavy metals and pesticides, the TCLP test adds many organic constituents, including commonly used industrial solvents and chemicals. The TCLP test is expected to expand the definition of hazardous waste to include more wastes than was the case using the EP toxicity test.

The USEPA rules specifying the TCLP test become effective on September 25, 1990. (55 Fed. Reg. 11850, March 29, 1990)

The TCLP test is mandated by the 1986 Hazardous and Solid Wastes Amendments to the federal RCRA Act ("HSWA"). A HSWA-driven amendment to the USEPA rules becomes effective in authorized states upon the effective date of the USEPA rule. (55 Fed. Reg. 11646, March 29, 1990) The effect of this is that the additional hazardous wastes brought in by the TCLP test will be regulated in Illinois by USEPA pending adoption of the TCLP test by Illinois, and authorization by USEPA. Obviously this has the potential to produce confusion.

Immediate Board action on these rules is not required by either State or federal law. Section 7.2 of the Act gives the Board until March 29, 1991, to adopt these rules. Moreover, 40 CFR 271.21(e)(2)(iv) gives the State until June 30, 1991, to adopt these amendments. However, neither provision prohibits earlier action.

If the Board rules become effective on September 25, 1990, the split between the State and federal rules could be avoided.

We are not addressing the question of whether adoption of the TCLP test may have ramifications regarding additional Illinois hazardous waste programs which utilized the USEPA definition of "hazardous waste" at the time of their adoption.

At the USEPA level the additional persons who enter the hazardous waste program by reason of the TCLP test face minimal additional paperwork. 40 CFR 262.12 requires the generator to obtain a USEPA identification number. 40 CFR 263.13 similarly requires a transporter to obtain an identification number. 40 CFR 270.1(b) requires hazardous waste management (HWM) facilities to file an amended Part A application within 90 days. On the other hand, the additional State provisions mostly require an application and Agency action before the person is allowed to take action. Two commenters question whether the Agency will be able to act quickly enough to avoid a situation in which

generators would be forced to store hazardous waste. (PC 3 and 6)

On the other hand, the Agency urges the Board not to delay the effective date beyond September 25, 1990. The Agency states as follows:

Also, the Agency notes that much of the liquid waste that is expected to be hazardous under the TCLP test is presently addressed under "generic" waste stream authorizations at non-land disposal facilities. The "generic" waste stream authorization allows a specific type of waste to be accepted from a number of different generators instead of requiring a specific waste stream authorization for each individual generator. Since much of the liquid waste that is expected to be hazardous under the TCLP test is presently addressed under "generic" authorizations, fewer authorizations will need to be modified than would otherwise be the case if specific waste stream authorizations existed from each individual generator. Also, most existing "generic" waste stream authorizations to accept waste that is hazardous by characteristic will not require modification to accept wastes that fail the TCLP test for existing waste codes. Of course, non-liquid hazardous waste destined for RCRA landfills would still have to receive an individual waste stream authorization under Section 39(h) of the Act. (PC 7, p. 5; PC 8)

In addition, since the USEPA rules were promulgated on March 29, 1990, the regulated community will have had six months to apply the TCLP test and seek any new or modified State authorizations.

Based largely on the assurances of the Agency that it is prepared to administer the State aspects of this program, the Board sees no need to delay the effective date beyond September 25, 1990. In addition, the Board notes that there is still nearly a month left for generators to get the necessary applications on file before these rules become effective.

The Board will seek to file these rules a few days in advance of September 25, 1990, but with a delayed effective date.

SMALL QUANTITY GENERATORS

The Preamble to the March 29 rules includes a statement that there are delayed compliance dates for the TCLP. (55 Fed. Reg. 11850, March 29, 1990) While large quantity generators are required to comply by September 25, 1990, small quantity generators (SQGs) have until March 29, 1991. The latter provision does not appear to be contained in the body of the rules, and indeed appears to be contradicted by 40 CFR 271.1. The Board requested comment as to whether it ought to add a rule with a delayed compliance date for SQGs.

The USEPA delayed effective date applies to SQGs of 100 to 1000 kg/month (55 Fed. Reg. 11850, March 29, 1990)

On August 2, 1990, USEPA published a correction to the delayed effective date. (55 Fed. Reg. 31387) This indicates that SQGs who became subject to regulations as a result of the TCLP had, we are uncertain, until October 31, 1990 (See dates), or until three months after the August 2, 1990 publication (See Correction Notice), to notify USEPA. It also advised generators wishing to continue using the EP toxicity test that, although the test was removed from the regulations, it was available as Method 1310 in SW 846, "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods". Note that we are not including in the regulations any provision concerning the time for SQG notification. Generator notification is governed by Section 722.112, which is not involved in this Docket. That Section requires generators to apply to USEPA for a generator identification number. Since USEPA has retained this authority, the Board has deferred to USEPA for the time requirements.

IERG has asked the Board to write a rule with the delayed compliance date for SQGs. (PC 6) On the other hand, the Agency opposes this action. The Agency claims that the Board must adopt regulations which are identical in substance with the USEPA regulations. The Agency believes that, while the preamble is helpful in interpreting the federal regulations, the preamble is not itself a regulation. (PC 7) The Board notes, however, that the Agency is maintaining a position which is contradictory to its position in a recent identical in substance rulemaking. In R88-26, the Agency requested many modifications to the verbatim text of the USEPA rules, based on language in USEPA preambles. (R88-26, Opinion of August 9, 1990, p. 30, 31) The Board believes, contrary to the Agency's position, that, whenever it learns, based on the preamble, that USEPA has omitted a provision which would be a "rule" within the meaning of the Illinois APA, it must include the rule within the Board rules. Accordingly, the Board has added the following note to Section 721.124:

BOARD NOTE: Generators are required to use the TCLP test for the hazardous waste determination under 35 Ill. Adm. Code 722.120 as of September 25, 1990. Provided, however, that, as specified at 55 Fed. Reg. 11850, March 29, 1990, small quantity generators of 100 to 1000 kg/ month, as defined in 35 Ill. Adm. Code 721.105, may continue to use the EP toxicity test until March 29, 1991. The EP toxicity test is Method 1310 in SW 846, "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods", incorporated by reference in 35 Ill. Adm. Code 720.111.

STATUTORY REFERENCES

The Board has generally changed references to the 1987 and 1988 Supplement to the Illinois Revised Statutes to the 1989 Edition, which is now available.

SECTION BY SECTION DISCUSSION

Section 720.110

The definition of "designated facility" in 40 CFR 260.10 was amended at 55 Fed. Reg. 2353. This correlates with the amendments to Section 722.123,

discussed below.

The main purpose of this amendment is to establish a rule dealing with a situation in which a waste is listed in the generator's state, but has not yet been listed in the disposal facility's state. The rule requires the generator to sign a contract with the transporters and disposers, requiring them to return manifest copies to the generator.

There are problems with the format of the USEPA definition, in that it has numbered subsections, without indentation, and then has a "hanging paragraph" following the numbered subsections. These are both prohibited by the Code Unit. Note that it is impossible to give a unique citation to the hanging paragraph, and the definition is ambiguous as to which of the numbered provisions relate to the hanging paragraph. The Board has fixed this by indentation.

The Board notes that this USEPA definition is really a substantive provision. The "designated facility" ought to be defined simply as the facility which the generator designates. The limitations ought to be stated in Part 722. Note that, as the USEPA rule is structured, if the generator designates an unpermitted facility, it is not a "designated facility", so the generator can only be charged with failing to designate a facility, not with designating an unpermitted facility.

Section 720.111

This Section is drawn from 40 CFR 260.11, which was amended at 55 Fed. Reg. 8999. The Section has been amended to update the incorporation by reference of "Test Methods for Evaluating Solid Wastes".

The USEPA amendment specifies methods within the document. This is not necessary in the incorporation by reference Section. The entire document is incorporated at this point. Certain methods are used in later Sections.

Section 721.104

This Section is drawn from 40 CFR 261.4, which was amended at 55 Fed. Reg. 2353 and 11798. The latter amendment concerns the TCLP. The former concerns the exclusion from the definition of "hazardous waste" of certain mining wastes, which is in Section 721.104(b)(7). This amends language which was recently amended in R90-2. The striking and underlining has been reformulated to show the new base text. Because of the extensive format changes in the USEPA rules, it is too confusing to attempt to show the changes in a detailed strike and underline format. Rather, the entire text adopted in R90-2 is shown as struck, and the entire new text underlined. However, in spite of the major format change, there is little substantive difference between the text adopted in R90-2 and this Docket.

The major change to the exclusions is the elimination of the separate lists for wastes which are definitely excluded, versus conditionally excluded. All of the wastestreams listed are excluded, subject to the same proviso that they are under review.

The proviso actually has no regulatory function. The wastes are excluded

pending a report to Congress and a regulatory determination of their status. I.e., they are excluded until the Section is amended. The Board has therefore omitted this language.

Another change is that several wastes have been dropped and/or consolidated on the list. Subsections (b)(7)(B)(i), (vi), (xi), (xii), (xvii) and (xviii) in the R90-2 are missing and/or consolidated.

In R90-2, at the request of Big River Zinc Company, the Board added Section 721.104(b)(7)(A)(vi), which excludes certain primary zinc wastestreams until June 30, 1991, pending USEPA action on a mandate from a federal Court of Appeals. (Order of August 9, 1990) The substance of this provision has been carried over into the revised base text in this Docket. However, it has been renumbered to Section 104(b)(7)(U), to be consistent with the new USEPA numbering scheme.

There are some minor changes in wording, mainly changing such terms as "smelting" to the more general "processing".

The TCLP amendments mainly change references to the new test. Also, Section 721.104(b)(10) has been added to exclude wastes from petroleum UST corrective action. The Board has referenced its UST rules in 35 Ill. Adm. Code 731.

There was a typo in the proposal at Section 721.104(b)(9): the omission of "solely for arsenic". (PC 3)

Section 721.108

This new Section is drawn from 55 Fed. Reg. 11862. It adds an exclusion for PCB wastes regulated under TSCA, under 40 CFR 761, which is already incorporated by reference in Section 721.111. This is apparently needed since the TCLP test will show parameters which are associated with PCBs. Note, however, that PCBs themselves are not in the TCLP list.

The USEPA Section has a number of grammatical problems which obscure the meaning:

The disposal of PCB-containing dielectric fluid and electric equipment containing such fluid authorized for use and regulated under part 761 of this chapter and that are hazardous only because they fail the test for Toxicity Characteristic (Hazardous Waste Codes D018 through D043 only) are exempt from regulation under parts 261 through 265, and parts 268, 270, and 124 of this chapter, and from the notification requirements of Section 3010 of RCRA. (40 CFR 261.8) (Emphasis added)

There appear to be two grammatical problems with this. First, the subject and verb need to agree in number. Second, a participial phrase ("authorized for use") appears to be in parallel with an adjective clause ("that are hazardous"). Also, there are not nearly enough commas. The Board needs to fix these pursuant to Section 7.2(a)(7) of the Act. However, it's

not altogether clear what USEPA intends. The Board solicited comment as to how to correct this Section. Chemical Waste Management provided useful suggestions. (PC 3)

Regulations governing "The disposal of" really don't belong in Part 261, which is the definition of "hazardous waste." Rather, they belong in Parts 264 and 265. The entire provision would make more sense if "PCB fluid and electric equipment" were the subject, in which case "are" would be correct. This appears to be consistent with USEPA's intent. (55 Fed. Reg. 11841, March 29, 1990) (PC 3)

The Board has fixed these so the provision reads as follows:

Polychlorinatedbiphenyl-(PCB-)containing dielectric fluid and electric equipment containing such fluid, which are authorized for use and regulated under 40 CFR 761, incorporated by reference in 35 Ill. Adm. Code 720.111, and which are hazardous only because they fail the test for toxicity characteristic (hazardous waste codes D018 through D043 only), are exempt from regulation under 35 Ill. Adm. Code 702, 703, 705, 721 through 725, and 728, and from the notification requirements of Section 3010 of the Resource Conservation and Recovery Act.

Section 721.124

This Section is drawn from 40 CFR 261.24, which was amended at 55 Fed. Reg. 11798. The former EP toxicity characteristic has been replaced with the "toxicity characteristic", measured by the TCLP. Contaminants D018 through D043 have been added. These are mainly organic contaminants.

D031 is the entry for "Heptachlor (and its hydroxide)". 40 CFR 261, Appendix VIII includes an entry for "Heptachlor epoxide", but not the hydroxide. USEPA published a correction at 55 Fed. Reg. 26987, June 29, 1990, which the Board has followed. (PC 3)

Section 721.130

This Section is drawn from 40 CFR 261.30, which was amended at 55 Fed. Reg. 11798. The amendments change the terminology to reflect the TCLP.

40 CFR 261.30 is worded as "The Administrator will indicate his basis for listing..." In original adoption of this Section, this was placed into passive voice appropriate to the Board's role in the listing process.

Section 721.131

This Section is drawn from 40 CFR 261.31, which was amended at 55 Fed. Reg. 5342. The amendment changes listing F019 to exclude zirconium phosphating in aluminum can washing.

This Section was amended in R90-2. The proposal has been reformulated to show R90-2 as the base.

The 1989 Edition of the CFR has the F019 entry out of numerical order. This situation has existed for several years, and is reflected in the current version of the Board rule. The Board has moved this entry to its correct place, and left a note for any reader who might be expecting the entry to be out of order.

Section 721.Appendix B

This Section is drawn from 40 CFR 261, Appendix II, which was amended at 55 Fed. Reg. 11798. This is the TCLP test.

The Board has incorporated this Appendix by reference, as it did for the EP toxics test. Section 7.2(a)(4) of the Act authorizes the Board to incorporate USEPA rules by reference where it will not cause confusion to the affected public. The Board has generally utilized incorporation by reference for detailed laboratory methods. This portion of the rules is likely to be used only by specialists who work from the CFR anyway. It does not involve applicability statements or cross references, which, if not changed to State references, would leave the rule incomplete.

Section 721.Appendix C.

This Section is drawn from 40 CFR 261, Appendix III, which was amended at 55 Fed. Reg. 8948. This is the Appendix which specifies analytical methods for solid waste. As is discussed above, this correlates with the incorporation by reference of the new edition of "Test Methods for Solid Waste."

Section 722.123

This Section is drawn from 40 CFR 262.23, which was amended at 55 Fed. Reg. 2354. It adds Section 722.123(e), concerning manifest copies for waste which is listed in the generator's state, but has not yet been listed in the disposer's state. The generator is required to sign a contract with disposers and transporters providing for return of manifest copies pending listing in the disposer's state.

Section 724.401

This Section is drawn from 40 CFR 264.301, which was amended at 55 Fed. Reg. 11798. This Section changes the terminology to correspond with the TCLP. Note that monofills may take waste which is hazardous only because of the original D004 through D017, not hazardous wastes under the new designations: i.e. solvents.

Section 725.321

This Section is drawn from 40 CFR 265.221, which was amended at 55 Fed. Reg. 11798. This amendment changes the terminology to correspond with TCLP.

The Board has corrected two typos, in Section 725.321(d)(2)(A)(i), "in" to "is", and "it is" to "is". Both of these typos were copied from the Federal Register, and are still present in 40 CFR 265.221(d)(2)(i)(A) and (B).

Section 725.373

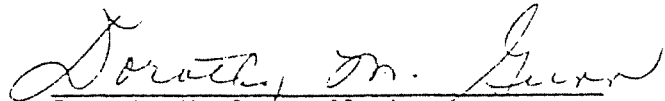
This Section is drawn from 40 CFR 265.273, which was amended at 55 Fed. Reg. 11798. It has been amended to use TCLP terminology.

Section 728.Appendix A

This Section is drawn from 40 CFR 268, Appendix I, which was amended at 55 Fed. Reg. 11798. The TCLP procedure has been moved to Part 721.

This Opinion supports the Board's Order of this same day. The Board will allow post-adoption comments through September 11, 1990.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 30th day of August, 1990, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board