

ILLINOIS POLLUTION CONTROL BOARD
May 24, 1990

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

PROPOSAL FOR PUBLIC COMMENT

PROPOSED 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 proposing to amend the RCRA hazardous waste regulations.

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.

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. The Board anticipates that it will be able to adopt and file these rules by September 25, but cautions that it may be necessary to omit the post-adoption comment period to do so.

The Preamble to the March 29 rules includes a statement that there are delayed compliance dates for the TCLP. While large quantity generators are required to comply by September 25, 1990, small generators have until March 29, 1991. This does not appear to be contained in the body of the rules. The Board solicits comment as to whether it ought to add a rule with a delayed compliance date for small quantity generators.

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.

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 Adopted May 24, 1990 (1/1/89 through 11/30/89).

R90-5 Dismissed March 22, 1990.

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. 968, 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 October 15, 1987; 11 Ill. Reg. 19230, 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 Proposed April 12, 1990, 14 Ill. Reg. 6528 (7/1/89 through 12/31/89)
- R90-10 This Docket (1/1/90 through 3/30/90)

Illinois received final authorization for the RCRA program effective January 31, 1986.

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 (Initial update, through 6/30/89)
- R89-19 Adopted April 26, 1990 (UST State Fund)

R90-3 Proposed March 8, 1990; proposed on March 23, 1990 at 14 Ill. Reg. 4406 (7/1/89 - 12/31/89)

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 Envirote:

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.

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 on the permanent rules were recently completed.

AGENCY OR BOARD ACTION?

In the proposal, 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

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 proposed to fix this by artful 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 is out for public comment in R90-2. In order to present the amendments, the Board has to repropose what is pending in R90-2. However, the striking and underlining is shown with respect to the current filed version of the rule, not the R90-2 proposal. Assuming R90-2 is adopted prior to this proposal, it will be necessary to reformulate the striking and underlining to show the new base text.

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 proposed to omit 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 proposal are missing and/or consolidated.

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 proposed to reference its UST rules in 35 Ill. Adm. Code 731.

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 has fixed these so the provision reads as follows:

The disposal of 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), is 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.

There are other possible readings of this provision. First, the phrase "The disposal of" really doesn't belong in Part 261, which is the definition of "hazardous waste." The entire provision would make more sense if "PCB fluid and electric equipment" were the subject, in which case "are" would be correct. Provisions governing "the disposal of" belong in Parts 264 and 265. Does this mean that these PCB's are hazardous waste in the hands of generators and transporters, but that the disposal is subject only to Part 761? The Board **solicits comment**.

Second, it is possible that the phrase "authorized... under part 761" is intended to modify only "electric equipment", in which case it would make sense to shift to an adjective clause for the second modifier. However, the "and" in front of the "that" would then be wrong, since the phrase and clause would be modifying different words.

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. The Board **solicits comment** as to whether this might be an error.

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 is subject to amendment in R90-2. The amendments in that Docket are shown as proposed in this Docket also. However, the Board will probably adopt R90-2 before this Docket, in which case this proposal will have to be reformulated with R90-2 as the base text.

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 proposed to incorporate 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 proposed to correct two typos, in Section 725.321(d)(2)(A)(i), "in" to "is", and in (ii), "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

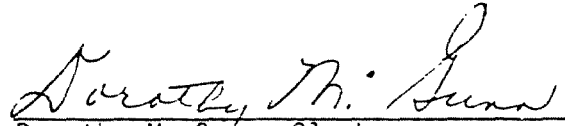
This Section is drawn from 40 CFR 265.273, which was amended at 55 Fed. Reg. 11798. It has been amended to use TCLP terminology.

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 Proposed Opinion supports the Board's Proposed Order of this same day. The Board will receive written public comment for 45 days after the date the proposal is published in the Illinois Register.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 24~~7~~ day of May, 1990, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board