ILLINOIS POLLUTION CONTROL BOARD
March 28, 1991

IN THE MATTER OF:	)	
	)	R91-1
RCRA UPDATE, USEPA REGULATIONS)	)	Identical in Substance Rules)
(7-1-90 THROUGH 12-31-90)	)	

PROPOSAL FOR PUBLIC COMMENT

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

By a separate Order, pursuant to Section 7.2 and 22.4(a) of the Environmental Protection Act (Act), the Board is proposing to amend the RCRA hazardous waste regulations. The amendments involve 35 Ill. Adm. Code 703, 720, 721, 722, 724 and 725. The Board will receive public comment for 45 days after the date of publication of the proposed rules in the Illinois Register. At various points in this Opinion, the Board alerts the reviewer to concerns we have identified early-on by including a **"solicits comment"** in boldface type. We strongly caution, however, that the reviewer should not rely on our identifying, at this stage all the areas that may need special attention.

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 July 1 through December 31, 1990. The Federal Registers utilized are as follows:

55 Fed. Reg. 31387	August 2, 1990
55 Fed. Reg. 32733	August 10, 1990
55 Fed. Reg. 39409	September 27, 1990
55 Fed. Reg. 40834	October 5, 1990
55 Fed. Reg. 46354	November 2, 1990
55 Fed. Reg. 50450	December 6, 1990
55 Fed. Reg. 51707	December 17, 1990

The August 2, August 10 and September 27, 1990, actions are all "clarifications" of the TCLP rules which were the main subject of R90-10. These result in no changes to the rules. The first two appeared prior to and were addressed in the Opinion in R90-10.

The USEPA amendments include several site-specific delistings. As provided in 35 Ill. Adm. Code 720.122(p), as amended in R90-17, the Board will

not adopt site-specific delistings as determined by the USEPA unless and until someone files a proposal showing that the waste will be generated or managed in Illinois.

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 May 24, 1990; 14 Ill. Reg. 11948, July 20, 1990, effective July 9, 1990. (1/1/89 through 11/30/89)

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

R90-14 Proposed November 8, 1990; November 26, 1990; 14 Ill. Reg. 18681 (1/1/90 through 6/30/90)

R91-4 Dismissed February 28, 1991 (7/1 through 12/31/90)

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. 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. 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 July 3 and August 9, 1990; 14 Ill. Reg. 14401, effective August 22, 1990 (7/1/89 through 12/31/89)

R90-10 August 30 and September 13, 1990; 14 Ill. Reg. 16450, effective September 25, 1990 (TCLP Test) (1/1/90 through 3/31/90)

R90-11 Proposed December 20, 1990 (Third Third) (4/1/90 through 6/30/90)

R90-17 Delisting Procedures (See below)

R91-1 This Docket (7/1 through 12/31/90)

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; 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 Adopted February 28, 1991 (1/1/90 - 6/30/90)

R91-2 Proposed Februrary 28, 1991 (7/1 through 12/31/90)

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.

The Board has pending a proposal to modify the delisting procedures to allow the use of adjusted standards in lieu of site-specific rulemakings:

R90-17 Adopted February 28, 1991

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?

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 conducts 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.

As a final note, the rules have been edited to establish a uniform usage with respect to "shall", "must", "will", and "may". "Shall" is used when the subject of a sentence has to do something. "Must" is used when someone has to do something, but that someone is not the subject of the sentence. "Will" is used when the Board obliges itself to do something. "May" is used when a

provision is optional. Some of the USEPA rules appear to say something other than what was intended. Others do not read correctly when "Board" or "Agency" is substituted into the federal rule. The Board does not intend to make any substantive change in the rules by way of these edits.

DETAILED DISCUSSION

A Section-by-Section discussion of the proposed amendments appears below. The federal actions involved in this rulemaking are summarized as follows:

August 2, 1990	TCLP Correction
August 10, 1990	TCLP Correction
September 27, 1990	TCLP Correction
October 5, 1990	Reinjection of wastes from hydrocarbon recovery
November 2, 1990	Refinery sludges
December 6, 1990	Wood preserving wastes
December 17, 1990	Corrections to refinery sludges

The first three actions are "clarifications" to the TCLP rules, which were the main topic of R90-10. These result in no changes to the rules.

Most of the changes derive from the December 6 Federal Register, concerning wood preserving wastes. These involve new Subparts in Parts 724 and 725.

BASE TEXT FOR R91-1 PROPOSAL

This R91-1 proposal has some unusual aspects to it because of the need to shift the base text during the course of the proceeding. In order to try to keep confusion to a minimum, we are including a somewhat detailed explanation of the base text problem.

R90-11, the RCRA update for 3/1 through 6/30/90, is still pending as of the date of this R91-1 proposal. Moreover, many of the Sections being amended in the R90-11 update are also being amended in this R91-1 proposal. We normally try to avoid this kind of "overlapping" situation because of the potential confusion that can result. Here, however, we need to play "catch-up" in order to get back on our statutorily required timetable in Section 7.2 of the Act for identical in substance rulemakings.

The Board is behind its schedule for adoption of R90-11 for two reasons. First, as is discussed above, the Board adopted R90-10 on an accelerated schedule based on only a three month update period. Although this hastened adoption of R90-10, it delayed the overall adoption of the USEPA rules for the remaining three months in the six-month "batch" period allowed by Section 7.2 timeframes. Second, R90-11 involved a very large amount of text which was difficult to edit.

In spite of the delays, we are hoping that R90-11 will be adopted by the timetable specified in the Act, in this case by May 2, 1991. However, until R90-11 is filed with the Secretary of State, we cannot use it as a base text

for the "striking and underlining" amendments we are proposing at the Public Comment stage here in R91-1. The Administrative Code does not allow this. But by the time R91-1 gets to the adoption stage, R90-11 will have been filed, so at that point R90-11 will become the base text. This then will require us to reformulate the proposal. We are placed in a situation of having to "change horses in the middle of the stream".

We have concluded that the best course of action is to in effect "re-propose" the R90-11 amendments with its striking and underlinings, and use that format as the "base text" for the Public Comment period for R91-1. We caution that, where R91-1 is amending the same section as R90-11, the striking and underlining does not distinguish between the two Dockets. Although this could be cured by double underlining, this is unacceptable to the Administrative Code Division.

We also again caution that, after R90-11 has been filed, the base text for R91-1 will be reformulated after the public comment period to show only the striking and underlinings attributable to R90-1. We note that this reformulation is potentially more complex and time-consuming than the original drafting of the proposal.

We recognize that this strategy presents some inconvenience to a reviewer. We do feel, however, that in this instance it is an appropriate course of action.

SECTION-BY-SECTION DISCUSSION
Part 703: RCRA Permits

This Part governs applications for RCRA permits. It is closely coordinated with the HWM facility standards in Part 724, below.

Section 703.208

This new Section is derived from 40 CFR 270.22, which was added at 55 Fed. Reg. 50489. This specifies the RCRA permit application requirements for drip pads at wood preserving plants, which are governed by new 35 Ill. Adm. Code 724.Subpart W.

40 CFR 270.22(c)(9) has two related requirements that the application set forth provisions for cleaning pads and provisions for documenting cleanings. These are set forth in a single sentence, each requirement with subordinate lists. In Section 703.208(c)(9), the Board has broken these out into separate subsections to improve readability.

Part 720: General Provisions

Section 720.110

This Section is derived from 40 CFR 260.10, which was amended at 55 Fed. Reg. 50482, to add a new definition of "drip pad", a term used in connection with the wood preserving wastes rules in 35 Ill. Adm. Code 724 and 725.Subpart W.

This definition starts with "Drip pad is..." All of the other definitions start with "ABC means..." The Board has proposed to follow the latter format.

Part 721: Definition of "Hazardous Waste"

Section 721.104

This Section is derived from 40 CFR 261.4, which was amended at 55 Fed. Reg. 40837 and 50482, to add a temporary exclusion for groundwater which is reinjected pursuant to certain petroleum recovery operations, and an exclusion for certain wood preserving solutions which are reused. This Section is subject to amendment in R90-11 prior to the adoption of this proposal.

Section 721.104(a)(9) excludes from the definition of hazardous waste spent wood preserving solutions which are reclaimed and reused for their original intended purpose.

The petroleum recovery exclusion is in Section 721.104(b)(11). This concerns the recovery of petroleum products from groundwater following a release. This can be done by pumping contaminated groundwater to the surface, removing petroleum and reinjecting the water. For free product recovery purposes, the process is most efficient if the reinjected fluid is saturated with dissolved petroleum products. (After the product recovery phase is completed, the dissolved product is removed to complete the clean-up.) The saturated reinjection fluid became a hazardous waste under the TCLP test adopted in R90-10. USEPA has added this temporary exclusion to keep the reinjection out of the RCRA and hazardous waste UIC rules, in order to keep these groundwater cleanups going.

This is a temporary exclusion through January 25, 1991. However, on February 1, 1991, USEPA extended it through March 25, 1991. The Board has proposed to adopt the latter date, even though it is, strictly speaking, outside the scope of this update.

The March 25 date will have passed before this rulemaking is adopted. The Board usually does not adopt provisions which expire before Board adoption. However, the Board has proposed to adopt this exclusion to give retroactive recognition of the delayed effective date of this aspect of the TCLP test.

There are a number of editorial problems with this Section. First, the subsection applies to groundwater which is "reinjected or infiltrated". USEPA probably means "reinjected or reinfiltrated", or "injected or infiltrated". The Board has proposed the former alternative.

Second, the USEPA subsection applies to operations "at refineries and marketing terminals or bulk plants handling crude petroleum and intermediate products..." USEPA probably means "or" in each case, so that the provision should read: "at refineries, marketing terminals or bulk plants handling crude petroleum or intermediate products..." As worded, the USEPA provision would apply only to something which is both a refinery and a terminal or bulk

plant, and handling both crude and intermediate products, a very restrictive condition which USEPA probably did not intend.

Section 721.131

This Section is derived from 40 CFR 261.31, which was amended at 55 Fed. Reg. 46395, 50482 and 51707. The first and last of these add and correct listings F037 and F038, concerning petroleum refinery sludges. The second adds listings F032, F034 and F035, concerning wood preserving wastes.

This Section is subject to amendments pending in R90-11, mainly the addition of listing F039. These amendments are shown again in this proposal, but will probably be adopted in R90-11 before this Proposal.

New listings F037 and F038 concern certain petroleum refinery wastes. The amendments also add a new subsection (b), with speciallized definitions for use with the listings. There are a large number of editorial problems with these provisions.

The final lines of F037 and F038 were corrected at 55 Fed. Reg. 51707 to change "exempted from" to "not included in". Also, in Section 721.131(b)(2)(B)(ii), "actually treated" was changed to read "actually generated". The Board has included these USEPA corrections. The Board has also proposed to make additional editorial corrections.

Most of the additional corrections concern the use of "and/or" and "and". USEPA has used "and/or" and "and" to mean "or" at many points in the text. As used in the Administrative Code, "A or B" means "A or B or both". The Board has therefore proposed to change "and/or" to "or".

An example of this occurs in the first line of of F038. The USEPA includes any "sludge and/or float". The Board has rendered this as "sludge or float", with the understanding that, as used in the Code, this means "sludge or float or both".

"And/or" is also used in 40 CFR 261.21(b)(1), which provides: "For the purpose of the F037 and F038 listings, oil / water / solids is defined as oil and/or water and/or solids." Consistent with the above discussion, the Board has proposed to render this as: "For the purpose of the F037 and F038 listings, oil / water / solids is defined as oil or water or solids." Although this says the same thing as the USEPA rule, it seems to include pure oil as an F037 or F038 waste. It may be that the USEPA really means "oil and (water or solids)", or some other combination. The Board **solicits comment.**

The USEPA rule also uses "and" where "or" was apparently intended. For example, 40 CFR 261.31(b)(2)(ii) provides that "Generators and (owners or operators of) treatment, storage and disposal facilities" have the burden of proving exemption. USEPA probably means that this should apply also to the operator of facilities which are strictly treatment or storage. The Board has proposed to define "TSD" as an acronym for "treatment, storage or disposal", and to use this instead. The Board has also proposed to place the burden on the owner or operator, rather than the inanimate facility.

The final sentence in listing F038 includes a list of exclusions. This reads as follows: "Sludges ..., sludges ... and F037, K048, and K051 ... are not included." The Board has proposed to render this more clearly by replacing the "and" inside the list with a comma, as follows: "Sludges ..., sludges ..., F037, K048 and K051 ... are not included."

There are also two minor problems with 40 CFR 261.31(b)(1)(ii)(A). "The units employs" has been revised to "the unit employs". The Board has proposed to replace "6 hp" with "6 horsepower", which is presumably what USEPA intends.

Section 721.135

This new Section is derived from 40 CFR 261.35, which was added at 55 Fed. Reg. 50483. This excludes certain wood preserving wastes from the listings after cleaning or replacement of certain equipment.

The USEPA wood preserving rules have very long sentences with multiple lists. The Board has attempted to break the longer ones up to make them more understandable. In some cases this process has revealed grammatical errors in the maze, which the Board has proposed to correct. In some, discussed below cases the USEPA rules are ambiguous: the Board has proposed or suggested in this Opinion what it believes is the likely meaning, but **solicits comment.**

Subsection (b): Cleaning or Replacement of Equipment

General Cleaning or Replacement Standard

The first major problem is in 40 CFR 261.35(b), which is reflected in Section 721.135(b). The first sentence is a general standard for cleaning or replacing equipment which has come into contact with chlorophenolic preservatives. This is a variation on the general closure performance standard of Section 724.211. The generator is required to clean or replace equipment:

> [I]n a manner which minimizes or eliminates the escape of hazardous waste or waste constituents, leachate, contaminated drippage, or hazardous waste decomposition products to the ground and surface water and to the atmosphere. [40 CFR 261.35(b)]

There are several problems with this. One is the form of the first series, which is: "A or B, C, D, or E". This is equivalent to "A, B, C, D or E", the format the Board has used.

This interpretation reads "hazardous waste" and "waste constituents" as separate elements in the list. It's possible that "A or B" in this provision ought to read together as "hazardous waste or constituents", grouping "A" and "B" to make "hazardous" modify "constituents". The repetition of "waste" seems to argue against this meaning. A second alternative is that "hazardous" is supposed to modify "waste or waste constituents".

These two alternatives, together with the option the Board has proposed, represent very different closure standards. As proposed, the generator has to minimize "waste constituents", whether they derive from hazardous waste or not, and whether they are themselves hazardous or not. Under the first alternative, "hazardous constituents" would have to be minimized, whether they come from hazardous waste or not. Under the second alternative, "hazardous waste constituents" would have to be minimized. The Board solicits comment as to what USEPA means.

The second series in subsection (b)(1) requires the operator to clean so as to minimize escape "to the ground and surface water and to the atmosphere". This is worded as "to (A and B) and to C". It would probably be more clearly stated as "to A, B and C". However, the use of "and" could be construed as limiting the standard to cleaning up stuff which escapes to all three media, a result USEPA probably did not intend. The Board has therefore worded this as "to A, B or C". As used in the Administrative Code, "A or B" means "A or B, or both".

As edited by the Board, the performance standard reads as follows:

> [I]n a manner which minimizes or eliminates the escape of hazardous waste, waste constituents, leachate, contaminated drippage or hazardous waste decomposition products to the groundwater, surface water or atmosphere. [35 Ill. Adm. Code 721.135(b)]

Cleaning and Replacement Options

> 40 CFR 261.35(b) then says that "Generators must either:...", followed by a single sentence consisting of three subsections separated by semicolons, each containing internal lists. To some people, "either" introduces a binary choice ("A or B"). And, it's impossible to make such a long "sentence" grammatically correct. For example, 40 CFR 261.35(b)(2) winds up reading "Generators shall either ... removing all visible residues..." The Board has therefore replaced the introduction with the following sentence: "Generators shall do one of the following as specified in subsections (b)(1), (2) or (3):..."

The three alternatives are: prepare and conduct a cleaning or replacement plan; clean; or, document prior cleaning or replacement.

It's not clear what the difference is between alternatives (b)(1) and (2): if the choice is [plan and clean] or [clean], why would anyone choose [plan and clean]? And, (b)(1) alone does not include a standard for "clean". It is possible, in view of the introductory "either", that there are really just two choices: [1 and 2] or [3]. Under this interpretation, (b)(2) would be read as specifying how "clean" you have to plan for in (b)(1). But, this ignores the "or" between (1) and (2). The Board has not followed this interpretation, but **solicits comment.**

Cleaning and Replacement Plan

40 CFR 261.35(b)(1) reads as follows:

> Prepare and sign a written equipment cleaning or replacement plan that describes the equipment to be cleaned or replaced, how the equipment will be cleaned or replaced, and the appropriate solvent chosen to use in cleaning and conduct cleaning and/or replacement in accordance with the plan by replacing the equipment and managing the discarded equipment as F032 waste; or [40 CFR 261.35(b)(1)]

There are a number of internal problems with this subsection. It has the following form: "Prepare ... plan that describes [A, B, and C] and conduct [D or E]". The Board has proposed to break this into subsections dealing first with the plan and second with its implementation. The result is as follows:

Cleaning or replacement plan.

A) Prepare and sign a written equipment cleaning or replacement plan that describes:

   i) The equipment to be cleaned or replaced;

   ii) How the equipment will be cleaned or replaced; And

   iii) The appropriate solvent chosen to use in cleaning. And,

B) Conduct cleaning or replacement in accordance with the plan by replacing the equipment and managing the discarded equipment as F032 waste. [35 Ill. Adm. Code 721.135(b)(1)]

This is a lot easier to read. But, there is still something wrong. Why doesn't the generator have to plan to manage discarded equipment as hazardous waste? And, why does the generator have to plan to "clean or replace", but is only required to "replace" in accordance with the plan. Also, as discussed above, why is there no standard for "clean" with this option? And, why doesn't the generator have to discard cleaning residues as F032 waste (as required in subsection (b)(2)? Language fixing these problems is discussed below.

Cleaning

The second option, 40 CFR 261.35(b)(2), reads as follows:

> Removing all visible residues from process equipment; and rinsing process equipment with an appropriate solvent until dioxins and dibenzofurans are not detected in the final solvent rinse at or below the lower method calibration limit (MCL) in Table 1 when tested in accordance with SW-846 Method 8290; and managing all

residues from the cleaning process as F032 waste; [40 CFR 261.35(b)(2)]

The main problems with this subsection have to do with its relationship to the rest of the subsection, as discussed above. For one thing, why doesn't subsection (1) have the "how clean" standard and the requirement to dispose as F032? Fixing these problems would require the major rewrite discussed below.

The internal problem with this subsection also relates to Illinois Administrative Code requirements. First, the Code Division would take the reference to "Table 1" as a reference to a (nonexistant) 35 Ill. Adm. Code 721.Table 1. And, it is necessary to cross reference to the incorporations by reference Section, where SW-846 already exists. Also, the USEPA language is trying to say "use test X; interpret the results in accordance with Y" backwards, and with too few words. The Board has proposed the following to fix this:

Cleaning.

A) Remove all visible residues from process equipment.

B) Rinse process equipment with an appropriate solvent until dioxins and dibenzofurans are not detected in the final solvent rinse.

i) Rinses must be tested in accordance with SW-846, Method 8290, incorporated by reference in 35 Ill. Adm. Code 720.111.

ii) "Not detected" means at or below the lower method calibration limit (MCL) in Method 8290, Table 1.

C) Manage all residues from the cleaning process as F032 waste. [35 Ill. Adm. Code 721.135(b)(2)]

Documentation of Prior Cleaning or Replacement

The final option allows documentation of prior cleaning or replacement:

Document that previous equipment cleaning or replacement was performed in accordance with the requirements of this section and occurred after a change in preservative. [40 CFR 261.35(b)(3)]

There are three problems with this subsection. First, it requires documentation of "cleaning or replacement" in accordance with this Section. It needs to say "cleaning and replacement". If only one is to be required, the generator needs to document why.

Second, the USEPA rule allows the documentation option "after a change in preservative". The careful use of "a" negates any implication that the subsection is referencing the termination of use of chlorophenolic preservatives in subsection (a). The generator could document cleaning following a temporary cessation of use of chlorophenolics, or, for that

matter, even cleaning following the use of a non-chlorophenolic in preparation for resuming use of the latter.

Third, it appears to allow future cleaning and replacement with post-hoc documentation of compliance. The Board has not proposed to fix this in the Proposal, but has in the alternative language below.

The Board has proposed the following for the third option:

> Document that previous equipment cleaning and replacement was performed in accordance with this Section and occurred after cessation of use of chlorophenolic preservatives. [35 Ill. Adm. Code 721.135(b)(3)]

Alternative Version of Cleaning and Replacement Rules

As discussed above, the Board has proposed to fix a number of problems with 40 CFR 261.35(b), but has noted many others. These have mainly been fixed by breaking subsections out of the USEPA text. There is no way to fix the remaining problems without internally rearranging subsection (b). Since this would pose a problem with cross references into this Section, the Board has not formally proposed it. However, the Board will set forth alternative language for Section 721.135(b) in this Opinion for the purpose of **soliciting public comment.**

> Generators shall either clean or replace all process equipment that may have come into contact with chlorophenolic formulations or constituents thereof, including, but not limited to, treatment cylinders, sumps, tanks, piping systems, drip pads, fork lifts and trams, in a manner which minimizes or eliminates the escape of hazardous waste, waste constituents, leachate, contaminated drippage or hazardous waste decomposition products to the groundwater, surface water or atmosphere.
>
> 1) Generators shall do one of the following:
>
> A) Prepare and carry out a cleaning plan or replacement plan; or
>
> B) Document cleaning and replacement in accordance with this Section, carried out after termination of use of chlorophenolic preservatives and before June 6, 1991.
>
> 2) Cleaning requirements.
>
> A) Prepare and sign a written equipment cleaning plan that describes:
>
> i) The equipment to be cleaned.
>
> ii) How the equipment will be cleaned.

iii) The solvent chosen to use in cleaning.

iv) How solvent rinses will be tested.

v) How cleaning residues will be disposed of.

B) Equipment must be cleaned as follows:

i) Remove all visible residues from process equipment.

ii) Rinse process equipment with an appropriate solvent until dioxins and dibenzofurans are not detected in the final solvent rinse.

C) Analytical requirements

i) Rinses must be tested in accordance with SW-846, Method 8290, incorporated by reference in 35 Ill. Adm. Code 720.111.

ii) "Not detected" means at or below the lower method calibration limit (MCL) in Method 8290, Table 1.

D) The generator must manage all residues from the cleaning process as F032 waste.

3) Replacement requirements.

A) Prepare and sign a written equipment replacement plan that describes:

i) The equipment to be replaced;

ii) How the equipment will be replaced;

iii) How the equipment will be disposed of.

B) The generator must manage the discarded equipment as F032 waste.

Section 721.App. C

This Section is derived from 40 CFR 261, App. III, which was amended at 55 Fed. Reg. 50483. The amendment adds test methods for benzo[k]fluoranthene, in conjunction with the wood preserving listings above. This Section is subject to amendment in R90-11.

The Board has used incorporation by reference, rather than setting forth the text of this Appendix. This Appendix presently references the 1989 Edition of the CFR, with a series of Federal Registers which amended that Edition. The 1990 Edition is now available, and includes all Federal Registers through June 30, 1990. The Board has therefore proposed to delete these, and replace them with a reference to the 1990 Edition, as amended at 55

Fed. Reg. 50483. Note that the reference proposed in R90-11 winds up being removed in this rulemaking.

Section 721.App. G

This Section is derived from 40 CFR 261, App. VII, which was amended at 55 Fed. Reg. 46396 and 50483, to add bases for listing the refinery sludges and wood preserving wastes discussed above. This involves addition of entries for F032, F034, F035, F037 and F038. This Section is subject to amendment in R90-11 prior to the adoption of this proposal.

Section 721.App. H

This Section is derived from 40 CFR 261, App. VIII, which was amended at 55 Fed. Reg. 50483, to add to the list of hazardous constituents Benzo[k]fluoranthene, Heptachlorodibenzofurans and Heptachlorodibenzo-p-dioxins, in connection with the listing of wood preserving wastes.

Part 722: Generators

Section 722.134

This Section is derived from 40 CFR 262.34, which was amended at 55 Fed. Reg. 50483, in connection with wood preserving wastes. This Section is subject to amendment in R90-11.

The amendment allows wood preserving waste generators, without become owners or operators of HWM facilities, to keep hazardous waste on site on drip pads which are cleared at least once every 90 days. The drip pads must comply with new 35 Ill. Adm. Code 725.Subpart W, and some other provisions of Part 725.

There are some minor editorial problems with this provision. First, the reference to Section "165.114" should probably be "265.114", which is equivalent to Section 725.214. Second, following 40 CFR 262.34(a)(2)(ii), is an unnumbered "hanging paragraph". This is prohibited by the Administrative Code Division. The Board has proposed to make this a subsection (a)(2)(C).

Part 724: Permitted HWM Facilities

Section 724.290

This Section is derived from 40 CFR 264.190, which was amended at 55 Fed. Reg. 50484, in connection with wood preserving wastes. The amendment adds subsection (c), which requires that tanks and sumps associated with drip pads meet the requirements for "tank systems".

There is a minor editorial problem with this amendment. In the introductory language, the USEPA rule reads: "except as otherwise provided in paragraphs (a), (b), and (c)..." These paragraphs are unrelated alternatives, so that "and" should be "or".

SUBPART W: DRIP PADS

This is a new Subpart regulating "drip pads" on which wood is placed after being treated with preservatives. This Subpart is derived from 40 CFR 264.570 et seq., which was adopted at 55 Fed. Reg. 50484, June 6, 1990. This Subpart is closely related to the definition of "drip pad" in Part 720, and to the new listings for F032, F034 and F035 in Part 721. This Subpart applies to facilities with RCRA permits; Part 725 applies to interim status facilities.

Section 724.670

This is the applicability Section for the Subpart. Section 724.670(a) includes the definitions of "existing" and "new" drip pads. The Board has broken these out into subsections so they are easier to find and read. Since these are defined at the beginning of the Subpart, there is no need to back-reference the definitions at each point in the rules (as USEPA does).

Subsection (b) cross references an exclusion for drip pads in structures. The USEPA rule provides that such pads are not subject to Section 264.572(e) or (f), "as appropriate". The Board has proposed to strike this as unnecessary. Since it's an exclusion, it doesn't matter whether they are excluded under (e) or (f).

Section 724.671

This Section requires operators to assess existing drip pads for integrity, and upgrade them to meet new requirements. The USEPA rule sets out a schedule keyed to the effective date of the rule, June 6, 1991. The Board has replaced these with actual dates.

Effective Dates

The Board has proposed to use the dates keyed to the federal effective date, rather than keying the dates to some future State effective date. Because these are HSWA-driven requirements, the USEPA rules become effective in Illinois immediately. (55 Fed. Reg. 50471) Operators have to meet these dates under federal rules anyway, so there is no problem with enacting what may turn out to be a retroactive State effective date. Moreover, the delayed dates for the assessments are several years in the future, so operators can plan to meet them.

Extension Procedure

40 CFR 264.571(b)(3) includes a procedure for postponing the liner and leak detection requirements:

> If the owner or operator believes that the drip pad will continue to meet all of the requirements of Section 264.572 of this subpart after the date upon which all upgrades, repairs and modifications must be completed as established under paragraphs (b) (1) and (2) of this section, the owner or operator may petition the Regional

> Administrator for an extension of the deadline as specified in paragraph (b)(1) or (2) of this section. The Regional Administrator will grant the petition for extension based on a finding that the drip pad meets all of the requirements of Section 264.572, except those for liners and leak detection systems specified in Section 264.572(b), and that it will continue to be protective of human health and the environment. [40 CFR 264.571(b)(3)

Subjective Precondition to Filing

There are several problems with this language. The first is the introductory clause: "If the owner or operator believes" the pad will "continue to meet" all requirements after the required date, the owner or operator "may petition" for an extension. In the first place, this is worded as a precondition to filing the petition. Does this mean the operator is subject to enforcement if he files the petition when he is not entitled to? Moreover, it is a subjective standard: the question is whether the operator "believes" he meets the requirements, rather than whether he in fact meets them.

There is a possible (though absurd) way to give meaning to the introductory precondition. As worded, although the operator must believe that the pad meets "all requirements", to grant the extension, the agency must find that it meets all requirements except the liner and leachate collection requirements. This could be read as granting extensions only to operators who truly, but mistakenly, believe they meet the liner and leachate collection requirements. We do not in any event understand either the intent of or rationale of this provision.

This is also the introductory clause to 40 CFR 264.571(b)(3) may also be establishing a time limitation on the filing of the petition: "after the date upon which all upgrades, repairs and modifications must be completed". However, it wouldn't make any sense to limit petitions to those filed after the compliance date. More likely this just modifies "meet", in which case it is mere surplusage. The Preamble discusses this extension at 55 Fed. Reg. 50454, but comes nowhere close to explaining this provision.

Usually subjective standards can be reworded as objective standards, and preconditions to filing can be reworded as findings the agency must make to grant the petition. However, in this case there appears to be no content in the introductory clause which is not already contained in the findings the agency must make. The main precondition to filing is "that the drip pad will continue to meet all of the requirements." This appears to be reflected in the findings the agency must make: "that the drip pad meets all of the requirements of Section 264.572, except those for liners and leak detection systems."

As is set out below, the Board has proposed to omit the entire introductory clause to 40 CFR 264.571(b)(3). As this Section is explained in the Preamble at 55 Fed. Reg. 50454, it is intended to grant an extension to pads which meet all requirements except the liner and leachate collection

requirements. It is not clear whether the USEPA language does that; but, it comes closer with the introductory clause removed.

Other Editorial Problems with Subsection (b)(3)

40 CFR 264.571(b)(3) allows the operator to petition "for an extension of the deadline as specified in paragraph (b)(1) or (2)". As worded, this suggests that the procedures for petitioning, rather than the deadline, are in (b)(1) or (2). The Board has proposed to fix this by deleting "as specified".

"Reasonable" Extensions

The USEPA language contains no limitation on the duration of the extension. The Preamble speaks of a "reasonable extension of the deadline for compliance". (55 Fed. Reg. 50454) As is discussed below, the Board has proposed that the time limitations on Board variances are "reasonable".

Agency or Board Decision on Extensions?

This brings us to the question of whether it is the Agency or Board which may make this determination. Section 7.2(a)(5) requires the Board to specify which agency makes decisions in the RCRA programs. In the introduction to this Opinion, there is a general discussion of the factors the Board considers in making these decisions.

Some factors indicate that this is a permit-type decision which the Agency could make. The "petitioner" is an operator who is subject to the RCRA permit requirement, such that this decision could be framed in terms of a RCRA permit application, or interim status-related application. However, other factors persuade the Board that this extension can be granted by the Board alone.

Typical permit decisions involve the Agency deciding whether an operator has to follow rule X or rule Y. This decision really is a temporary "waiver" of a requirement specified in a Board rule, as opposed to a choice between alternatives. Moreover, the standard for action is "be protective of human health and the environment". Application of such a broad standard is equivalent to "determining, defining or implementing environmental control standards", a power reserved to the Board under Section 5(b) of the Act.

Procedure for Extensions

The Board has evaluated three procedural routes by which a petition for extension might be considered: a variance (see Title IX of the Act) or an adjusted standard proceeding (see Section 28.1 of the Act), or a site specific rulemaking (see Title VII of the Act).

The Board proposes to use the variance procedure. The decision is similar to a variance insofar as it is a temporary extension of a compliance date and involves environmental effects considerations. While the USEPA rule does not, as does a variance, explicitly require a showing of arbitrary or unreasonable hardship, the Preamble at 55 Fed. Reg. 50454 speaks of

"reasonable" extensions, and by its language appears to implicitly expect a similar hardship showing. Another difference is that, while the USEPA rule does not set a maximum time for an extension, variances are limited to five years and after that require petitions for variance extensions (see Section 36(b) of the Act). We feel that this distinction may at worst create a procedural hurdle if an extension is needed beyond five years.

We feel that the adjusted standard procedure is not really appropriate in that it is established to consider a permanent extension based on an alternative standard. Here, the USEPA procedure focuses on a temporary extension of an existing standard. The procedure carries no advantage in terms of time as opposed to a variance, and, indeed, has no decision deadline as does a variance.

We believe that the site specific regulatory option, in terms of time and resources alone, is the least desirable of all.

The Board **solicits comment.**

Proposed Text for Section 724.671(b)(3)

The entire proposed text of Section 724.671(b)(3) is as follows:

The owner or operator may petition the Board for an extension of the deadline in subsection (b)(1) or (2).

A) The owner or operator shall file a petition for a RCRA variance as specified in 35 Ill. Adm. Code 104.

B) The Board will grant the petition for extension if it finds that:

i) The drip pad meets all of the requirements of Section 724.672, except those for liners and leak detection systems specified in Section 724.672(b); and

ii) That it will continue to be protective of human health and the environment.

As-Built Plans

Section 7224.672(c) requires the operator to file "as-built" plans with the Agency following upgrading. The Board has proposed to insert and delete several missing and/or extra commas.

Section 724.672

This Section specifies the design and operating requirements for drip pads at RCRA permitted facilities.

40 CFR 264.572(a)(1) provides that drip pads must:

> Be constructed of non-earthen materials, excluding wood and non-structurally supported asphalt; [40 CFR 264.572(a)(1)]

This is ambiguous as written. It probably means that wood cannot be used, and that asphalt cannot be used unless it is structurally supported. However, it could be read the other way. The Board has proposed the following:

> Not be constructed of earthen materials or wood, or asphalt unless the asphalt is structurally supported; [35 Ill. Adm. Code 724.672(a)(1)]

The next provision, provides that drip pads must:

> Be sloped to free-drain treated wood drippage, rain and other waters, or solutions of drippage and water or other wastes to the associated collection system; [40 CFR 264.572(a)(2)]

There seem to be two problems with this provision. First, "to the associated collection system" needs to be moved so it appears right after "drain". Then the list is at the end of the provision.

There is ambiguity as to how the elements in the list are supposed to be grouped. The most likely grouping is: "[A, B and C] or [solutions of D and (E or F)]" However, an alternative reading (among many) is: "A, [B and C], or solutions of [D and E], or F". The Board has chosen the former grouping since it seems to make sense that the only wastes of concern are those in solution.

The Board has therefore rearranged this to properly reflect this grouping, as follows:

> Be sloped to free-drain to the associated collection system treated wood drippage, rain, other waters, or solutions of drippage and water or other wastes; [35 Ill. Adm. Code 724.672(a)(2)]

Following 40 CFR 264.572(a)(5) is a "note" stating that USEPA will:

> [G]enerally consider applicable standards established by professional organizations generally recognized by the industry such as the American Concrete Institute (ACI) or the American Society of Testing Materials (ASTM) in judging the structural integrity requirement of this subsection. [40 CFR 264.572(a)(5)]

This appears to be an incorporation by reference which does not comply with Section 6.02(a) of the APA, in that it does not identify the standards by location and date. In addition, the reference appears to include future editions, which is prohibited by the APA. The Board **solicits comment** as to whether it should delete this note, or, in the alternative, complete the references. In the latter case, the Board needs to know which standards are to be referenced.

The introduction to 40 CFR 264.572(b) states that "A drip pad must have..." As is discussed below in connection with Section 725.543(b), the

comparable language in 40 CFR 265.443(b) deals separately with new and existing drip pads, requiring compliance by the effective dates in 40 CFR 265.441(b), which are the same as in 40 CFR 264.571(b). It is likely that the omission of the reference in Part 264 was an error by USEPA. The Board **solicits comment.**

40 CFR 264.572(e) reads as follows:

> Unless protected by a structure ... the owner or operator shall design ... a run-on control system ... unless the system has sufficient excess capacity to contain any run-on that might enter the system, or the drip pad is protected by a structure or cover, as described in Section 724.670(b). [40 CFR 264.572(e)]

In 35 Ill. Adm. Code 724.672(e), the Board has deleted the first of the two "unless" clauses as redundant.

In Section 724.672(g), the Board has proposed to separate the two sentences with a period, and inserted a needed comma in the second.

40 CFR 264.572(m) (equivalent to Section 724.672(m)) requires repairs within a "reasonably prompt period" after discovery of a condition which could cause a release. The Board solicits comment as to what "reasonably prompt" means.

The language in Section 724.672(m)(1)(iii) has been modified as is discussed below in connection with Section 725.543(m)(1)(iii). This is a compromise text combining the better aspects of the Part 264 and 265 language.

In Section 724.672(m)(2), the Board has proposed to break the list of Agency actions into elements separated by semicolons.

In 40 CFR 264.572(m)(3), there is a cross reference to "paragraph (m)(3) of this section", which the Board would ordinarily translate into "subsection (m)(3)". However, the cross reference occurs within subsection (m)(3). The Board has proposed to replace this apparent error with a reference to "subsection (m)(1)(D)", but solicits comment. Note that the same apparent error exists in the corresponding Section in 40 CFR 265.

Section 724.673

This Section requires the operator to conduct "inspections" of drip pads during construction, as well as weekly and after storms.

Section 724.674

This Section specifies the closure requirements for drip pads.

40 CFR 264.574(c) has no text. This is prohibited by the Code Division. The Board has proposed to insert a heading.

Section 724.675

According to the heading, this Section specifies which Sections govern "new" drip pads. However, the word "new" has been omitted from the text of the Section. The Board has proposed to insert the needed word.

Part 725: Interim Status Standards for HWM Facilities

This Part contains the standards for unpermitted facilities which treat, store or dispose of hazardous waste.

Section 725.290

This Section is derived from 40 CFR 265.190, which was amended at 55 Fed. Reg. 50486, December 6, 1990. The amendment is similar to Section 724.290 above. It adds a subsection (c), which requires that sumps for drip pads for wood preserving wastes meet the interim status requirements for tank systems.

There are several minor differences in wording between this Section and 724.290. The Board has followed the USEPA language, although there seems to be no reason for the differences.

SUBPART W: INTERIM STATUS DRIP PADS

This Subpart establishes standards for drip pads at interim status facilities: those for which no RCRA permit has been issued. The Subpart is almost identical to Part 724, Subpart W. It is also drawn from 55 Fed. Reg. 50485, December 6, 1990.

The following discussion will focus on the differences between the Part 724 and 725 rules. Except as noted, the Board has made the same editorial changes to this Part, and the same discussion applies.

40 CFR 264 and 265, Subparts W are unique in that they do not share the same final three digits of the Section number. For example, 40 CFR 264.571 corresponds with 265.441, and 264.573 with 265.444. The first problem (.4 v. .5) is relatively easy to deal with. However, for numbers beyond .xx1, all similarity in numbers ends. This is because of the frivolous placement of the standards for new pads in 40 CFR 264.575 and 265.442, which destroys all correspondence. The following is the correspondence table:

40 CFR 264.	35 Ill. Adm. Code 724.	40 CFR 265.	35 Ill. Adm. Code 725.
264.570	724.670	265.440	725.540
264.571	724.671	265.441	725.541
264.575	724.675	265.442	725.542
264.572	724.672	265.443	725.543

264.573	724.673	265.444	725.544
264.574	724.674	265.445	725.545
264.575	724.675	265.442	725.542

Section 725.540

This is the applicability Section, which includes the definitions of "new" and "existing" pads. Note that the regulations appear to contemplate "new" pads which would be subject to the interim status rules. The Board solicits comment as to how this relates to 40 CFR 270.73 and 703.155, which limit changes at interim status facilities.

Section 725.541

This Section requires the operator to assess the integrity of existing pads, and to upgrade them on a schedule.

40 CFR 264.571(a) provides that "the evaluation must document..." 40 CFR 265.441(a) provides that "the evaluation must justify and document..." The Board has proposed to follow the respective USEPA language, but solicits comment as to whether one Part is in error.

Section 725.542

This Section specifies design and operating requirements for new interim status drip pads. Note that the corresponding Section is 724.675, which terminates the correspondence of numbers between Parts 264 and 265.

Section 725.543

This Section specifies the design and operating requirements for drip pads. It corresponds with Section 724.672.

There is a minor difference in wording between 40 CFR 264.572 and 265.443(a)(4). While the former addresses "materials, or other wastes while ...", the latter addresses "materials and other wastes, while". The "or" in Part 264 appears to be correct, as does the comma in Part 265.

There is also a minor difference between the notes following subsection (a)(5). While Part 264 reads: "... recognized by the industry such as ... (ACI) or ... (ASTM)...", the latter reads: "... recognized by industry such as ... (ACI) and ... (ASTM)..." The Part 264 wording is preferable, since it makes it clear that the rule is talking about "the" wood preserving industry, and that the ACI and ASTM standards are alternatives.

Subsection (b) has what may be an important difference. While Part 264 provides that "A drip pad must have...", Part 265 provides separately for new and existing pads, and provides that existing pads must meet the requirements after the effective dates in 40 CFR 265.441(b), which are the same as the

effective dates in 40 CFR 264.571(b). It is likely that this is an error in Part 264. The Board has proposed to follow the language in the respective Parts, but solicited comment above.

In the second sentence in subsection (b)(1), the word "to" is omitted in "and to prevent releases". The Board has proposed to correct this apparent typo in Part 265.

While 40 CFR 264.572(b)(2)(A) has three subsections, 40 CFR 265.443(b)(2)(A) has only two. The second subsection in Part 264 has been omitted from Part 265. This requires that the leak detection system be designed to function without clogging through the scheduled closure of the pad. This may have been intentionally omitted from Part 265, or could represent an error by USEPA. The Board has proposed to follow the language in the respective Parts, but solicits comment.

In 40 CFR 264.572(m) there is a reference to permit specifications which, of course, is not appropriate in Part 265.

40 CFR 264.572(m)(1)(iii) and 265.443(m)(1)(iii) read quite differently. The Part 265 language reads as follows:

> Determine what steps must be taken to repair the drip pad, remove any leakage from below the drip pad, and establish a schedule for accomplishing the clean up and repairs; [40 CFR 265.443(m)(1)(iii)]
>
> The Part 264 language reads as follows:
>
> Determine what steps must be taken to repair the drip pad and clean up any leakage from below the drip pad, and establish a schedule for accomplishing the repairs; [40 CFR 264.572(m)(1)(iii)] [emphasis added]

The Part 265 language is weak in that it starts out talking about "removal", but then shifts to "clean up". "Clean up" may be preferable, since "removal" invites confusion with the closure by removal requirements. The Part 264 language is weak in that it fails to require a schedule for the clean up. The Board has proposed to use compromise language in both Parts:

> Determine what steps must be taken to repair the drip pad, clean up any leakage from below the drip pad, and establish a schedule for accomplishing the clean up and repairs; [35 Ill. Adm. Code 724.672 and 725.543(m)(1)(C)]

40 CFR 264.572(n) deals only with permits, and hence is absent from Part 265. Therefore, 40 CFR 264.572(o) corresponds with 40 CFR 265.443(n).

Section 725.544

This Section is drawn from 40 CFR 265.444, and corresponds with Section 724.673 and 40 CFR 264.573. It deals with "inspections" which are carried out by the operator.

40 CFR 265.444(b)(2) refers to "leakage detection". The Board has proposed to correct this to read "leak detection", the term use in Part 264, and everywhere else.

In 40 CFR 265.444(b), there is a "post/closure" which the Board has proposed to correct to "post-closure".

The final sentence of 40 CFR 264.574(b) has no equivalent in Part 265. This requires Part 264 pads which cannot close by removal to meet the post-closure care and financial assurance requirements for landfills. The Board has proposed to omit it, following the federal text. However, the Board solicits comment as to whether this might be a USEPA error, since the concept would appear to apply also to interim status landfills. The Board also notes that the prior sentence, which deals specifically with permitted facilities, is present in both Parts. It is possible that this is not appropriate in Part 265. The Board solicits comment on this also.

This Proposed Opinion supports the Board's Proposed Order of this same date. The Board will allow 45 days for public comment following publication of the proposal in the Illinois Register.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Proposed Opinion was adopted on the 28th day of March, 1991, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board