ILLINOIS POLLUTION CONTROL BOARD
August 8, 1991

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

ADOPTED RULES. FINAL ORDER

OPINION OF THE BOARD (by J. Anderson):

[1]By a separate Order, pursuant to Section 7.2 and 22.4(a) of the Environmental Protection Act (Act), the Board is amending the RCRA hazardous waste regulations. The amendments involve 35 Ill. Adm. Code 703, 720, 721, 722, 724 and 725. The Board will not file the rules until after September 9, 1991, to allow time for post-adoption review and comments by the agencies involved in the authorization process.

As is discussed below, the Board has modified the proposed rules in response to public comment so as to make changes to the wood preserving rules, and to the "Bevill exemption" and K066 listings. The Board urges the United States Environmental Protection Agency and the Illinois Environmental Protection Agency to review these changes carefully. The Board will not file the rules until after September 9, 1991, to allow time for post-adoption review and comment by the agencies involved in the authorization process.

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

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[1]The Board acknowledges the contributions of Morton Dorothy, Mike McCambridge and Anne Manly in preparing the Opinion and Order.

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.

In addition, on 56 Fed. Reg. 27332, June 13, 1991, USEPA published an "administrative stay" of the December 6, 1990, wood preserving rules, and on July 1, 1991, a set of corrections to the same rules. As is discussed below, the Board will address these actions, even though they are outside the time frame of this update.

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 USEPA site-specific delistings unless and until someone files a proposal showing that the waste will be generated or managed in Illinois.

PUBLIC COMMENT

The Board adopted a Proposed Opinion and Order on March 28, 1991. The Proposal appeared on April 26, 1991, at 15 Ill. Reg. 5980. The Board has received the following public comment:

PC 1 Beazer East, Inc., May 13, 1991

PC 2 Administrative Code Division, May 16, 1991

PC 3 American Wood Preservers Institute, June 7, 1991

PC 4, 5 Koppers Industries, June 10, 1991

PC 6 Big River Zinc, June 28, 1991

PC 7 Joint Committee on Administrative Rules (JCAR), May 1 - 3, 1991.

Exhibit A of PC 4 was inadvertently docketed as a separate public comment, PC 5. These will be referred to just as "PC 4" below.

The JCAR comments were received over a span of several days. They were grouped into a single public comment, PC 7, for docketing after the other comment was received. JCAR had no questions about this rulemaking. The Administrative Code Division requested minor editorial corrections. (PC 2)

Most of the public comment concerned a USEPA "administrative stay" of the wood preserving rules. (PC 1, 3, 4) This is

discussed below, mainly in connection with Section 721.131, 721.135, 724.Subpart W and 725.Subpart W. The Board has effectuated the administrative stay by adding "Board Notes" at appropriate points in the rules.

Big River Zinc filed a motion for leave to file and a public comment requesting the addition of a "Board Note" acknowledging an administrative stay and/or federal court cases concerning listing K066. The motion for leave to file is granted. The stay is discussed below.

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. As discussed above, the first three Federal Registers in this batch period result in no change to the Board rules. The due date for this rulemaking is therefore October 5, 1991, one year after the first Federal Register which resulted in a change. This Opinion is adopted well in advance of that date.

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 May 23, 1991 (1/1/90 through 6/30/90)

R91-4 Dismissed 2/28/91 (No USEPA amendments 7/1/90 - 12-31-91)

R91-16 Next UIC Update Docket (1/1/91 - 6/30/91)

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 April 11, 1991, May 23, 1991; 15 Ill. Reg. 9323, effective June 17, 1991 (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)

R91-13 Next RCRA Docket (1/1/91 - 6/30/91)

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 February 28, 1991; 15 Ill. Reg. 6527, effective April 22, 1991 (1/1/90 - 6/30/90)

R91-2 July 25, 1991 (7/1 through 12/31/90)

R91-14 Next UST Docket (1/1/91 - 6/30/91)

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.

R91-12 USX, Proposed June 6, 1991; 15 Ill. Reg. 9288, June 28, 1991

The Board modified the delisting procedures to allow the use of adjusted standards in lieu of site-specific rulemakings:

R90-17 February 28, 1991; 15 Ill. Reg. 7934, effective May 9, 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.

BASE TEXT FOR R91-1

R90-11, the RCRA update for 3/1 through 6/30/90, was pending as of the date of this proposal. Many of the Sections in this were amended in that Docket. This is indicated in the detailed discussion of each Section below.

Because R90-11 was still pending when this proposal came out, the changes to be made in that Docket had to be shown in this Docket also. For example, a portion of the proposal in this Docket might have looked like this:

> [Pre-R90-11 base text] ~~{Text to be repealed in R90-11}~~ [Text to be adopted in R90-11] ~~{Text to be repealed in R91-1}~~ [Text to be adopted in R91-1].

Since R90-11 has been filed, this Proposal has to be reformulated to show the base text as amended in R90-11. As reformulated, the above example would appear as follows:

> [Pre-R90-11 base text] [Text adopted in R90-11] ~~{Text to be repealed in R91-1}~~ [Text to be adopted in R91-1].

Reformulating the base text essentially involves identifying the R90-11 portions of the proposal, and carrying out the actions indicated by the striking and underlining, while reviewing to identify changes which were made prior to final adoption of R90-11.

DETAILED DISCUSSION

A Section-by-Section discussion of the 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. The December 6, 1990, wood preserving rules are subject to a stay and corrections, which are discussed below.

STAY OF WOOD PRESERVING 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. The wood preserving rules were subject to an administrative stay at 56 Fed. Reg. 27332, June 13, 1991, and to a correction at 56 Fed. Reg. 30192, July 1, 1991. The Board has also addressed these in this update, as is discussed in detail below.

Several commenters asked the Board to give effect to the stay in this rulemaking. (PC 1, 3, 4) One commenter asked the Board to defer action until after the stay. (PC 4) This, and the following discussion of the Big River Zinc comment require a general discussion as to how the Board reacts to stays and remands of rules at the federal level.

The stay involved in this rulemaking occurred before the Board adopted the rule in question. Thus, the issue of the stay is before the Board at the time of original adoption. Other stays and remands have occurred subsequent to the Board's adoption of the rules. In such a case, the Board is not obligated to reopen the rulemaking to modify or repeal the identical in substance rule in anticipation of USEPA's action in modifying the rules. However, the Board regards the federal stay or remand as applying to the State's identical in substance rule, which has no independent regulatory basis. (In the Matter of Pretreatment Regulations, R86-44, December 3, 1987, at p. 39; R90-2, Order of August 9, 1990)

The question is somewhat different when the stay or remand arises prior to the Board's adoption of the rule in question. Ignoring the stay or remand becomes a positive action of adopting a rule which may incorrectly state the obligations of the persons who will have to comply with the rule. However, deferring action on the rulemaking is not generally the appropriate response. One problem with this approach is that the Board's rules would not read the same as the USEPA rules. While the latter would say: "Do X (but don't do X until the stay is lifted)", the Board rule would be silent.

Sections 7.2 and 22.4(a) of the Act require the Board to adopt, within certain time frames, regulations which are "identical in substance" to USEPA regulations. This update is a "batch" involving USEPA actions between July 1 and December 31, 1990. Under Section 7.2(b), the Board must complete the rulemaking within one year after the adoption date of the first USEPA rule in the batch. As is explained above, this rulemaking

must be completed by October 5, 1992. Deferring action until the stay is removed might cause the Board to miss the due date. Furthermore, the Board's statutory authority for adopting the rules is triggered by federal adoption, with no mention of the lifting of stays.

Although the Board could defer action and adopt the rules after the deadline with an appropriate explanation under Section 7.2(b) of the Act, deferring action would lead to severe practical problems in maintaining the "identical in substance" State rules. The adoption process is simplest if the State rules are adopted in the same temporal order as the USEPA rules. Deferring action would require that the wood preserving rules be adopted at some later date out of sequence. At a minimum, this would require an extra layer of review to guard against inadvertently repealing provisions which may have been added in the interim.

Because of these problems, the Board cannot automatically defer action on a USEPA rule which has been stayed or remanded by a court prior to adoption by the Board.[2] Rather, the Board has to adopt, within the statutory timeframes, a State rule reflecting the USEPA action as modified by the stay or remand. In other words, returning to the example above, the Board's goal is to adopt a rule which says "Do X (but don't do X until the stay is lifted)", thereby approximating the USEPA rule as closely as possible.

With respect to the wood preserving stays, USEPA has effectuated most of the stay by inserting into the text of its rules "notes" articulating the stay. As is set forth below, the Board is able to adapt these notes, and insert similar language into the Board rules at appropriate points, thereby achieving an "identical in substance" rule in a very efficient manner.

Notification Requirement for Stay

USEPA has added notes to the listings F032, F034 and F035 in 40 CFR 261.31 [721.131], and following 40 CFR 264.573(a)(4) and 265.543(a)(4). The notes following the listings include a requirement that, to be eligible for the stay, the generator notify USEPA by August 6, 1991, and again on November 6, 1991. The August 6 date passed before these rules were adopted. There is a question as to whether the Board ought to condition the stay on the August 6 notification to USEPA, or, alternatively,

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[2]There may be cases in which the appropriate Board response to a stay or remand would be to defer action. For example, if the stay or remand indicated that USEPA was about to repeal a rule in its entirety, there would be no point in adopting it in the first place. However, this is not the case here.

establish a later date with notification to the Agency.

This depends on the difference between a "HSWA" and "non-HSWA" RCRA requirement. A "HSWA" requirement is one adopted pursuant to the 1984 Hazardous and Solid Waste Amendments to the federal RCRA Act. HSWA requirements become effective as federal law upon adoption by USEPA, even in authorized States. Non-HSWA requirements, on the other hand, become effective (in an authorized State, such as Illinois) only upon adoption by the State.

As explained by USEPA at 55 Fed. Reg. 27332, June 13, 1991, while the F032 listing (chlorophenolic preservatives) is a HSWA requirement, the F034 and F035 listings, and the management standards, are non-HSWA requirements. Therefore, while the F032 listing became effective upon federal adoption, the other listings and management standards will not become effective until State adoption. Although the F034 and F035 listing Notes include the August 6 notification requirement[3], the federal rule itself is not yet effective in Illinois.

Persons subject to the HSWA requirements relating to the F032 (chlorophenolic) listing were required to notify USEPA by August 6 to get the stay. It is unlikely that USEPA would allow the Board to extend this date. Furthermore, it is unnecessary to require a second notification to the Agency. Therefore, the Board will adopt the rule granting the stay, conditioned on notification having been made to USEPA by August 6.

On the other hand, persons who are not subject to the HSWA requirements could argue that, since they were not yet subject to the rules, they did not have to notify USEPA by August 6. They may not have done so, since they may have assumed that the State would defer action on the listing until after the stay was lifted. Such persons ought to have the opportunity to receive the State rule prior to the date the notice is required. It is unlikely that USEPA would object to extension of this date, since it has indicated that it doesn't care whether the States even adopt this portion of the rules at this time. Since USEPA may reject notifications from non-HSWA notifiers, the Board has adopted this so as to grant the extension to persons based only on notification to the Agency.

As discussed above, the Board intends to allow the non-HSWA persons to notify after the Board rules become effective. At this time, the Board estimates that these rules will become effective by October 6, 1991, depending on the volume of post-

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[3]Apparently USEPA stayed the non-HSWA requirements to prevent State adoption or provide a pattern rule for State stays, as well as to stay these listings in USEPA-administered states.

adoption comment. As was discussed above, the USEPA rule requires a second notification by November 6, 1991. The Board has therefore adopted language allowing the August 6 notification to be combined with the November 6 notification.

The Board has modified the Notes following the F034 and F035 listings, in Section 721.131, to read as follows:

> ...Furthermore, the F034 and F035 listings are administratively stayed with respect to the process area receiving drippage of these wastes provided that, by November 6, 1991, persons desiring to continue operating notify the Agency of their intent to upgrade or install drip pads, and provide evidence to the Agency that they have adequate financing to pay for drip pad upgrades or installation, as provided in the administrative stay...

There is a possibility that the filing of these rules may be delayed beyond November 6. If this happens, the Board will consider whether it is necessary to further extend the date.

CORRECTIONS TO WOOD PRESERVING RULES

The wood preserving rules were also subject to a USEPA correction at 56 Fed. Reg. 30192, July 1, 1991. Although this is outside the time span of this batch period, the Board has made the corrections indicated, since many of these address errors noted by the Board in the Proposed Opinion. In several instances USEPA has adopted precisely the language earlier proposed by the Board.

The July 1 correction makes no reference to the June 13 stay. The Board interprets the correction as an independent regulatory action which is correcting editorial errors in the original December 6, 1990, publication of the wood preserving rules, rather than as the anticipated regulatory action lifting the stay. However, one of the Sections receiving "notes" in connection with the stay, 40 CFR 264.572, is renumbered and republished (as 264.573) in the correction. USEPA has dropped the "note" from the correction. The Board construes this as an editorial error by USEPA, rather than as a repeal of the "note".

BIG RIVER ZINC

Big River Zinc has filed a comment requesting addition of a note to listing K066 in Section 721.132, reflecting the remand of that listing by a federal court. (PC 6) This is related to the above general discussion concerning stays and remands of federal rules in connection with the wood preserving rules. However, this remand has a long history.

Bevill Exemption and K066

Big River's problems concern two related RCRA rules. The first is the "Bevill exemption" of Section 721.104(b)(7) [261.4(b)(7)], which excludes from the definition of "hazardous waste" certain "solid waste from the extraction, beneficiation and processing of ores and minerals". The second is listing K066 in Section 721.132 [40 CFR 261.32], which "listed" as hazardous waste, "sludge from treatment process wastewater or acid plant blowdown from primary zinc production".

USEPA "lists" a waste when it determines that the waste generally has a hazardous characteristic. In the case of K066, USEPA determined that the described wastes generally have lead and cadmium (Section 721.App G). Wastes which are "listed" are hazardous regardless of whether the hazardous characteristic is present in a given quantity of waste. Furthermore, a listed waste cannot be treated so as to render it "nonhazardous" for regulatory purposes. (Section 721.103(d)(2))

Listings may be overinclusive, because a particular waste may not actually exhibit any hazardous characteristics, or may have been treated to remove those characteristics. The "delisting" procedures are available to remove wastestreams which meet within a listing, but which do not in fact have any hazardous characteristic. Delisting is addressed in Section 720.122, as amended in R90-17.

The hazardous waste determination is as provided in Section 722.111 [262.11]. The first question is whether a zinc production waste is exempted under Section 721.104(b)(7). Generally, this depends on whether the waste is from the "beneficiation" of ores (exempted) or from the "processing" of ores ("unexempted", i.e., potentially included in the definition of hazardous waste). If the waste is unexempted, the second question is whether the waste is "listed", specifically, whether the waste fits within the K066 listing, i.e., whether it is "sludge from treatment of process wastewater or acid plant blowdown from primary zinc production". If not, the third question is whether the waste exhibits a characteristic of hazardous waste, such as corrosivity or the toxicity characteristic, as defined in Sections 721.120 through 721.124 [261.20 - 261.24].

The order in which these rules are addressed is critical to the outcome. As is discussed below, Big River has become subject to an "unexemption", which means its wastes are potentially hazardous. If the wastes fall within a presently-enforceable hazardous waste listing, the wastes are hazardous wastes whether or not they also exhibit any hazardous waste characteristic(s). However, if this waste is not subject to a presently-enforceable hazardous waste listing, Big River's waste is a hazardous waste

only if it exhibits a hazardous characteristic.

Beneficiation and Processing

As worded, 40 CFR 261.4(b)(7) exempts wastes from the "beneficiation and processing" of ores and minerals. While it then goes on to define "beneficiation" in a general manner, it defines "processing" as limited to certain specific, exempted processing operations. In other words, the Section exempts wastes from "beneficiation" and certain listed processing operations. It therefore appears to include all other, unlisted processing operations.

As presented in the comments (and in the above discussion), this rule is simplified to: "beneficiation is exempt; processing is not exempt" (See PC 6 in R91-11, and attached letter of May 22, 1991 from USEPA). However, using the terms as defined in the rules, as we construe them, the rule ought to be stated as: "beneficiation and listed processing is exempt; unlisted processing is not exempt".

In this Opinion the Board will use the term "processing" as it is used in the comments: "processing" means "unlisted processing", i.e "something which is not 'beneficiation' and which is not specifically listed as exempted 'processing'".

Procedural History

R89-1

USEPA modified the Bevill exemptions and added listing K066 at 53 Fed. Reg. 35420, September 13, 1988. The Board adopted State equivalents in R89-1, on September 13, 1989. At the request of Big River, in an Order entered October 18, 1989, the Board added delayed effective dates to a portion of the Bevill unexemption, and to listing K066. As modified, the unexemption and listing were to become effective in Illinois on June 30, 1990, which was reckoned to be the last day for the State to respond to the September 13, 1988, Federal Register pursuant to 40 CFR 271.21(e)(2)(iii) (1990)[4].

R90-2

USEPA next amended the Bevill exemptions at 54 Fed. Reg. 36641, September 1, 1989. The Board responded to this action in R90-2, in an Opinion dated July 3, 1990, and a short Order of August 9, 1990.

What happened in R90-2 is obscured by a major change in the

[4]This was cited as 271.21(a)(2) in R89-1. The citation given is to the current CFR.

format of the USEPA rule. While the R89-1 Bevill rules were written as a series of specific unexemptions, the R90-2 rules were specific exemptions. The unexemption of concern to Big River, to which the Board had added the delayed effective date, disappeared from the rule, with the result that Big River's waste became unexempted in silence. The Board responded to this by adding an exemption, with a termination date of June 30, 1991, which was reckoned as the final date for State adoption of the September 1, 1989, USEPA amendments pursuant to 40 CFR 271.21(e)(2)(iv) (1990)[5].

During the Board's consideration of R90-2, the United States Court of Appeals for the District of Columbia remanded the K066 listing to USEPA for further action. [American Mining Congress v. USEPA, 907 F. 2d 1179 (DC 1990)] ["AMC"]. As noted above in connection with the wood preserving stay, in R90-2 the Board stated that it regarded the AMC decision as binding on the derivative State rules. The remand is the main focus of Big River's comment in this matter.

R90-10

As though the matter was not confusing enough, USEPA again renumbered the Bevill exemptions at 55 Fed. Reg. 2353, January 23, 1990. The Board adopted the renumbering in R90-10, on August 30, 1990. At this time, the Bevill exemption of concern became Section 721.104(b)(7)(U).

PCB 91-61

On April 8, 1991, Big River filed a variance petition with the Board, docketed as PCB 91-61. The petition requested a variance which would essentially extend the Bevill exemption applicable to Big River. On July 11, 1991, the Board dismissed the variance petition on Big River's motion.

R91-11

The Board opened Docket R91-11 to consider whether to extend the exemption of Section 721.104(b)(7)(U). On August 8, 1991, the Board dismissed that proceeding in favor of action in this proceeding.

R91-1 (This Docket)

Big River has filed a public comment in this Docket requesting the addition of a note to listing K066 in Section 721.132. Big River has asked that a note be added "reflecting

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[5]This was cited as 271.21(a)(3) (1989) in R90-2. The citation given is to the current CFR.

the proper status of this listing".

Description of Big River's Process

Big River is a primary zinc producer. The following is a brief description of its process, drawn from the variance petition in PCB 91-61.

Production Operations

Big River uses a zinc sulfide ore which is high in magnesium. The magnesium is removed in a preleaching operation with dilute sulfuric acid. All participants agree that this is a beneficiation operation, which is therefore subject to the Bevill exemption, so that any wastes would not be hazardous, regardless of listings or characteristics.

The purified zinc sulfide is processed into zinc by: roasting to zinc oxide; leaching with sulfuric acid to form a zinc sulfate solution; settling and purification to remove other metal salts for sale; electrowinning; and casting. Any wastes from these processes would be "processing"[6] wastes, and hence potentially hazardous.

The roasting process generates sulfur dioxide. This is routed through air pollution-type equipment to the acid plant, which produces sulfuric acid. This is used in the leaching and preleaching operations. Since this is downstream of the first "processing" operation[7], any wastes are outside the Bevill exemption, and hence are potentially hazardous.

Waste and Recycling Operations

The production operations produce two primary wastestreams of concern. The first is the acid plant blowdown. This is discharged to a 100,000 gallon basin. Part of the water is reused as makeup water for the preleaching operation. The overflow from the basin is discharged to a 900,000 gallon basin.

The second primary production waste is the filtrate from the

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[6]Big River argues that the roasting and leaching processes are also "beneficiation", and therefore subject to the Bevill exclusion. For purposes of discussion, the Board is accepting USEPA's position, as articulated in the May 22, 1991, letter which is attached to Big River's comment (PC 6 in R91-11).

[7]However, if one accepted Big River's argument that the roasting and leaching operations are also "beneficiation", the acid plant would arguably also be beneficiation.

preleaching operation (i.e. magnesium sulfate, or Epsom salt, in solution). This is discharged directly to the 900,000 gallon basin.[8]

The wastewater treatment operations themselves yield several secondary wastestreams. The first is solids from the 900,000 gallon basin, which are recycled as ore into the initial beneficiation step.[9] The second is wastewater, which is discharged to Big River's pretreatment plant, and hence to the Village of Sauget's physical/chemical treatment plant, which in turn discharges to Sauget's American Bottoms regional wastewater treatment plant.

The final wastestream is the filter cake produced by Big River's pretreatment plant. This is the principal waste of concern.

Nature of the Filter Cake

If the filter cake is derived from a listed hazardous waste, it is itself a listed hazardous waste under Section 721.103(d)(2). As is discussed above, the filter cake is derived from the preleaching filtrate and the acid plant blowdown. If either of these are a listed hazardous waste, the filter cake is a hazardous waste.

The preleaching filtrate is from a beneficiation operation. It is therefore exempted under the general language of the Bevill exemption in Section 721.104(b)(7). It is not a hazardous waste, regardless of any listing or characteristic.

On the other hand, the acid plant blowdown is from a

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[8]Big River does not identify any other wastes from the processing operations. The absence of wastes may be in part due to the settling and purification steps which produce salts of toxic metals (lead, silver, copper, cadmium, nickel and cobalt) for sale. These might otherwise simply be discarded as sludges or muds from these processes. To the extent these processes may produce wastes, they are potentially outside the Bevill exclusion, and need to be judged individually.

[9]Internal recycling operations are generally exempt from the definition of "solid waste", and hence from the RCRA program, under Section 721.102(e)(1)(C). However, this, and several other internal recycling operations, arguably place the preleaching "after" the downstream processing, making it "processing", bringing it into the RCRA program. Big River has indicated that it will take "whatever steps may be necessary" to avoid this. It would be regrettable if the RCRA rules were construed so as to discourage this type of internal recycling.

processing operation.[10] It therefore does not fall under the Bevill exemption, and is potentially a hazardous waste. Since acid plant blowdown is within the K066 listing, the filter cake is listed K066 waste, to the extent that listing may be valid. This would mean that the filter cake would be a hazardous waste regardless of characteristics, and that it could not be treated so as to render it "nonhazardous" for regulatory purposes.

Assuming the K066 listing is invalid, then the filter cake would be hazardous only if it exhibited a characteristic of hazardous waste under Section 721.120 et seq. Furthermore, the waste could be treated to remove the characteristic.

Effect of the K066 Remand

As is discussed above, Big River has requested the addition of a note to listing K066 in Section 721.132[11]. To add the appropriate note, the Board has to determine the effect of the remand on the State program. This depends on: the meaning of the remand itself; what USEPA requires in the way of "equivalency" in the State program; what Illinois law requires in the "identical in substance" mandate; and, the Board's statutory authority to acknowledge the remand in the regulations.

Meaning of the Remand

The federal court in AMC remanded the K066 listing to USEPA because the listing was arbitrary and capricious, in the absence of an adequate statement of basis in the USEPA preamble. The Board's adoption of the derivative State rule did not cure the deficiency in the USEPA action, since the Board had no rulemaking record before it, beyond the USEPA rule and preamble, when it adopted the derivative rule. Nor is the Board going to re-evaluate the USEPA record for sufficiency and substitute its judgment for the federal court's.

In R91-11 and PCB 91-61, Big River went to great lengths to obtain a definitive statement from the Agency and/or USEPA as to the effect of the remand. We really do not have such a statement at this point. The Board believes that USEPA has recognized that the federal remand has thrown the present enforceability of the

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[10]This is subject to the above acceptance of USEPA's position as to the dividing line between beneficiation and processing.

[11]This discussion concerns the K066 listing. The Board will below revisit the questions presented in PCB 91-61 and R91-11, to determine the status of the Bevill exclusions, and to consider whether it is appropriate to add a note to Section 721.104(b)(7) in this Docket.

hazardous waste listing into doubt.[12]

At some time in the future, USEPA will presumably revisit the K066 listing pursuant to the remand. USEPA's possible actions include: repealing the K066 listing; modifying the listing so that it would be supported by the earlier statement of basis; issuing a new statement of basis supporting the earlier language; or, a combination of a modified listing and with a supplemented statement.

Big River Zinc has asserted in its April 8, 1991 variance petition in PCB 91-61:

> Big River was advised regarding the U.S. EPA's anticipated actions in response to that remand was a low priority, and that it was unlikely that K066 would be relisted. Thus, sludges which had been designated as K066, even if they did not fall under the Bevill amendment, would only be hazardous wastes if they were characteristically hazardous. Since Big River's sludge is not characteristically hazardous, at least this potential problem appeared to be resolved for the time being.
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> Petition for Variance in PCB 91-61 at 3 (filed April 8, 1991).

USEPA Program Requirements: "Equivalency"

Sections 3006(b) and 3009 of the federal RCRA Act require the State to maintain a program which is "equivalent" to the federal program. 40 CFR 271 regulates the contents of the State program. One limitation on the Board's action is that it must have rules which are "equivalent" to the USEPA program for Illinois to attain and maintain the RCRA program.

As discussed in today's Order of the Board in the R91-11 proceeding, although USEPA requires the Board to adopt the termination of the Section 721.104(b)(7)(U) exemption effective July 1, 1991, USEPA has stated that it does not similarly require that the Board have adopted the K066 hazardous waste listing. USEPA has stated that, in connection with the K066 listing:

> ...[T]he States' RCRA authorization is not in jeopardy for lack of an immediately-effective listing. (PC 4 and 5 in R91-11).

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[12]The Board cannot determine this issue of federal law at this time. The Board recognizes that issues exist as to the enforceability of the K066 listing until USEPA has complied with the judicial remand.

At a minimum, USEPA does not expect the States to enforce the K066 listing. The Board therefore concludes that federal law does not require it to adopt this listing to maintain program "equivalency".

Program Requirements: "Identical in Substance" Mandate

The Act requires the Board to maintain regulations which are "identical in substance"[13] with USEPA rules. This represents a second limitation on the Board's action in response to a stay. Not only must the Board satisfy the federal mandate to maintain "equivalency", but it must also meet the State "identical in substance" mandate. As provided in Section 7.2(a) of the Act, this requires regulations:

> ...[W]hich require the same actions ... as would federal regulations if USEPA administered the subject program in Illinois...

To meet this requirement, the Board must determine whether USEPA itself enforces the K066 listing. Based on USEPA's comments in R91-11, the Board is confident that USEPA does not so enforce this listing. In other words, a person in a USEPA-administered state would not have to comply with this listing. The Board's rules, without the K066 listing, would therefore be "identical in substance" with the USEPA rules, pending USEPA action on the remand.

Authority to Acknowledge Remand

The Board has several options as to how to carry the remand into State law. The simplest is to adopt the USEPA rule, with the understanding that the rule is subject to the remand. Other options include modifying the text of the rule to meet the remand, or adding "Notes" referencing the remand and/or explaining its effect. These other options raise a question as to the extent of the Board's authority to modify "identical in substance" rules in response to court actions.

In the RCRA program, USEPA adopts rules, then the Board adopts regulations which are "identical in substance". As is discussed above, the Board generally considers federal court decisions concerning federal RCRA rules as binding on such derivative State rules, which have no true independent basis in State law.

It is arguable that the ultimate interpretation of the

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[13]These terms are defined in Sections 7.2(a) and 22.4(a) of the Act.

effect of the remand is strictly up to USEPA and the federal courts, with the Board serving strictly as a passive conduit carrying these into Illinois law. However, if someone attempted to enforce the K066 listing against Big River, the question would come before the Board in an enforcement action. In such a case, the Board would have to decide the effect of the remand to determine the outcome of the case. Since the Board clearly has jurisdiction to decide this issue after the fact, it must have jurisdiction to make this determination in advance by way of rulemaking. Once the enforceability of a federal rule is thrown into doubt, we believe that the Board should make every effort to address the question up-front in a rulemaking context.

As was also discussed above, the Board would face practical problems if it were to attempt to anticipate the result of a remand of a USEPA rule, and modify the Board rule in advance of the USEPA action on the remand. However, where these remands are brought to the Board's attention, it is desirable to acknowledge the court action in the rule, so as to avoid any possible future misunderstanding. The mechanism of adding a "Board Note", as was done above for the wood preservers, is an appropriate option.

Adoption of "identical in substance" rules usually involves the adoption of the verbatim text of USEPA rules. However, under Section 7.2(a) of the Act, the Board is supposed to adopt:

> ...State regulations which require the same actions with respect to protection of the environment, by the same group of affected persons, as would federal regulations if USEPA administered the subject program in Illinois...

In a situation in which the Board knows that the USEPA regulation says "Do X", but means "Don't do X", it is acceptable to adopt "Don't do X". The Board has therefore determined that it has the power to acknowledge the AMC remand in the regulations.

Language of the K066 Note

Big River differs from the wood preservers in that USEPA has not given us a text for the appropriate notes. The Board therefore has to attempt to discern the appropriate note.

It would clearly be appropriate to simply add a note referencing the AMC case, and let that case speak for itself. Such a note might read:

> BOARD NOTE: The K066 listing was remanded to USEPA in American Mining Congress v. USEPA, 907 F. 2d 1179 (DC 1990).

One problem with this note is that it is still subject to

the possibility that somehow the remand could be resolved in a manner such that USEPA might attempt to revalidate the K066 listing with possible retroactive effect. For example, USEPA might simply publish a new statement of basis for the listing, without changing the regulation. Big River might then be subject to enforcement for failing to comply as of the original effective date. To avoid this possibility, the Board has adopted the following note to insert after the K066 listing:[14]

> BOARD NOTE: This waste listing is the subject of a judicial remand in American Mining Congress v. EPA, 907 F.2d 1179 (D.D.C. 1990). The Board intends that this listing not become enforceable in Illinois until the first date upon which the Board RCRA program becomes "not equivalent to the Federal program," within the meaning of Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Board RCRA rules become "less stringent" than the USEPA rules, as this phrase is used in Section 3009, 42 U.S.C. § 6929, or the Board RCRA rules are not "identical in substance" with the federal rules as that term is intended by Ill. Rev. Stat. 1989 ch. 111½, par. 1007.2 and 1022.4 as a result of some action by USEPA with regard to this listing in response to the American Mining Congress remand.

As is discussed above, USEPA neither requires Illinois to have an enforceable K066 listing, nor does USEPA itself enforce the K066 listing at the federal level. The Board intends that the K066 listing not be enforceable in Illinois at least until such time as USEPA makes a positive statement that it has resolved the remand, thus making the K066 listing enforceable at the federal level and a necessary component of the Illinois program.

Effective Date for K066

As discussed above, the Board added a delayed effective date to the K066 listing in R89-1. Generally, the Board removes delayed effective dates from rules after they are past. However, in this case, there is another reason to remove the June 1, 1990 date: it is wrong. Left in, it could be construed as requiring compliance on that date, regardless of the remand. The Board has therefore deleted the date.

Bevill Exemptions

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[14]This language is drawn from, and is substantially the same, as the language proposed by the Board in R91-11, as a Note to Section 721.104(b)(7)(U). It was reviewed and approved by USEPA in that context.

Variance Request

Big River initially requested a variance in PCB 91-61 to extend the temporary exemption of Section 721.104(b)(7)(U). Big River has withdrawn that variance request, and has not requested modification of this Section in this Docket.

What Big River was really attempting to avoid is discharging a listed hazardous waste to a surface impoundment. If Big River did so, it would potentially be subject to RCRA closure and post-closure care requirements, even if USEPA ultimately eliminated the K066 listing.

Big River is committed to phasing out the basins in question, replacing them with lined steel tanks, which would not ordinarily subject Big River to post-closure care, even if the tanks held hazardous waste.[15] In PCB 91-61, Big River was requesting time to allow it to use other basins while it built the tanks. However, Big River did not file the petition in time for the Board to grant it before the exemption expired. (See Modine v. IEPA, PCB 88-25, July 25, 1991, pages 7-11)

At the time of the variance request, Big River was assuming that its preleaching operation was a "processing" operation which would be unexempted upon the expiration of Section 721.104(b)(7)(U).[16] Now that Big River has been assured that USEPA regards the preleaching as "beneficiation", it feels that there is no need for a variance to extend Section 721.104(b)(7)(U).

Emergency Rule

The Board opened Docket R91-11 for the purpose of adopting an emergency rule extending the expiration of Section 721.104(b)(7)(U) prior to July 1, 1991. The Board distributed suggested language for comment. However, Big River has indicated that, with USEPA's interpretation of "beneficiation", it does not need the exemption extended.

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[15]A tank can ordinarily be closed by cleaning the tank and removing it. On the other hand, "clean closure" of a surface impoundment may require removal of contaminated soil under the liner. If all contamination cannot be removed, the operator is required to close the impoundment like a landfill, by placing an impermeable cap over it. The operator would be required obtain a post-closure care permit and conduct groundwater monitoring for at least 30 years. (Sections 703.159, 724.217 and 724.328)

[16]Big River is prepared to accept that the acid plant is not "beneficiation", and is hence potentially hazardous. (PC 6 in R91-11, p. 2)

Repeal of Section 721.107(b)(7)(U)

As was discussed above, Section 721.107(b)(7)(U) is a temporary exemption which the Board added at the request of Big River Zinc, after the USEPA rule was amended to unexempt Big River in silence. This subsection no longer has a federal counterpart, and serves no purpose now that July 1, 1991 has passed. Furthermore, leaving it in the rule may result in a substantial divergence between the Board and USEPA rules. While Big River's waste is now addressed under the general provisions in the USEPA rules, the Board rule could be construed as specifically including the Big River waste after July 1, 1991. The Board has therefore repealed it in its entirety.

FORMAT CHANGES

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 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.

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 703.212

This new Section is derived from 40 CFR 270.26, which was added at 55 Fed. Reg. 50489, and renumbered at 56 Fed. Reg. 30192. 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.

This Section was proposed as Section 703.208, which would correspond with 40 CFR 270.22. The number has been changed to "703.212", to correspond with 40 CFR 270.26, the new number assigned in the USEPA corrections to the wood preserving rules. Several cross references to Part 724 have also been revised to conform with other renumbering, discussed below.

40 CFR 270.26(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 703.212(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 followed the latter format.

Section 720.111

The proposed wood preserving rules, discussed below mainly in connection with Section 724.670 et seq., include a reference to "Method 8290" in SW-846, which is already incorporated by reference in this Section. In the Proposal, the Board cited to the pre-existing reference in this Section. However, in the USEPA correction at 56 Fed. Reg. 30192, July 1, 1991, USEPA indicated that "Method 8290" is not in the current edition of SW-846. Rather, it will be in an editions to be proposed in the Summer of 1991. The Board has therefore added a reference to the proposed method. This appears to be available from USEPA at Room M2427, 401 M Street SW, Washington, D.C. 20460, 202/475-9327, Number F-90-WPWF-FFFFF.

Presumably USEPA will eventually update all the references to SW-846 to the new edition. However, in the interim, we will have references to two Editions of SW-846. The Board has therefore limited this reference to "Method 8290". At the time all the references are updated, this limitation will need to be removed.

As is discussed below in connection with Sections 724.673 and 725.543, the Board has added references to ASTM C-94 and ACI - 318, which are used as examples for the design of wood preserving drip pads.

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 was amended in R90-11 prior to this action.

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. This was corrected at 56 Fed. Reg. 30192 to specifically exclude wastewaters. The final language in Section 721.104(a)(9) is as follows:

> ...The following materials are not solid wastes...Wood preserving wastes.
>
> A) Spent wood preserving solutions that have been used and are reclaimed and reused for their original intended purpose; and
>
> B) Wastewaters from the wood preserving process that have been reclaimed and are reused to treat wood.

As is discussed above in connection with the Big River comment, the Board has repealed Section 721.104(b)(7)(U) in its entirety. This was a temporary exemption from the definition of "hazardous waste" for certain zinc production wastes. The Board has repealed it now that it has expired. However, these wastes will not be listed as K066 wastes until the remand in the AMC case is resolved.

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 adopted the latter date, even though it is, strictly speaking, outside the scope of this update.

The March 25 date passed before this rulemaking was adopted. The Board usually does not adopt provisions which expire before Board adoption. However, the Board has adopted 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 followed 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 was amended in R90-11, mainly through the addition of listing F039.

Listings F032, F034 and F035 were subject to a USEPA "administrative stay" which appeared in the Federal Register on June 13, 1991. (PC 4) The Board has added a "Board Note" containing USEPA's stay language, with modifications appropriate for a State rule. The language adopted by the Board is as follows, applicable only to F032:

> BOARD NOTE: The listing of wastewaters that have not come into contact with process contaminants is stayed administratively. The listing for plants that have previously used chlorophenolic formulations is administratively stayed whenever these wastes are covered by the F034 or F035 listings. These stays will remain in effect until further administrative action is taken. Furthermore, the F032 listing is administratively stayed with respect to the process area receiving drippage of these wastes provided persons desiring to continue operating notify USEPA by August 6, 1991, of their intent to upgrade or install drip pads, and by November 6, 1991, provide evidence to USEPA that they have adequate financing to pay for drip

pad upgrades or installation, as provided in the administrative stay. The stay of listings will remain in effect until February 6, 1992, for existing drip pads, and until May 6, 1992, for new drip pads.

The Board has modified the note applicable to the F034 and F035 listings as discussed above in connection with the stays. Persons subject to these non-HSWA listings will have until November 6 to notify IEPA of their intentions, if they wish to become subject to the stay. The language adopted by the Board is as follows:

BOARD NOTE: The listing of wastewaters that have not come into contact with process contaminants is stayed administratively. These stays will remain in effect until further administrative action is taken. Furthermore, the F034 and F035 listings are administratively stayed with respect to the process area receiving drippage of these wastes provided that, by November 6, 1991, persons desiring to continue operating notify the Agency of their intent to upgrade or install drip pads, and provide evidence to the Agency that they have adequate financing to pay for drip pad upgrades or installation, as provided in the administrative stay. The stay of listings will remain in effect until February 6, 1992, for existing drip pads, and until May 6, 1992, for new drip pads.

New listings F037 and F038 concern certain petroleum refinery wastes. The amendments also add a new subsection (b), with specialized 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 made 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 changed "and/or" to "or".

An example of this occurs in the first line 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 261.31(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 rendered 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 solicited comment on this, but received no response.

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 defined "TSD" as an acronym for "treatment, storage or disposal", and used this instead. The Board has also worded this so as 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 rendered 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 replaced "6 hp" with "6 horsepower", which is presumably what USEPA intends.

Section 721.132

As is discussed above in connection with the Big River comment, the Board has added to the K066 listing a note referencing the AMC case, and the remand of the USEPA listing. The Board has also deleted the past compliance date for this listing.

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. In the Proposal, the Board attempted to break the longer ones up to make them more understandable. In some cases this process revealed grammatical errors in the maze, which the Board proposed to correct. The worst was 40 CFR

261.35(b). The Board placed alternative language in the Proposed Opinion. USEPA corrected this at 56 Fed. Reg. 30192, by adopting language which is nearly identical to the Board's alternative language. The Board has adopted the corrected language, with minor corrections, which are discussed below. The corrected language of Section 721.135, as adopted by the Board, is as follows:

> 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 or 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 follow an equipment cleaning plan and clean equipment in accordance with this Section; or
>
> B) Prepare and follow an equipment replacement plan and replace equipment in accordance with this Section; or
>
> C) Document cleaning and replacement in accordance with this Section, carried out after termination of use of chlorophenolic preservatives.
>
> 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 to be used in cleaning.
>
> iv) How solvent rinses will be tested. And,
>
> v) How cleaning residues will be disposed.
>
> 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; and

iii) How the equipment will be disposed of.

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

4) Documentation requirements. Document that previous equipment cleaning and replacement was performed in accordance with this Section and occurred after cessation of use of chlorophenolic preservatives.

USEPA Corrections

USEPA has corrected the general cleaning or replacement standard. As originally adopted, this required the generator to clean or replace "...in a manner which minimizes or eliminates the escape of hazardous waste or waste constituents, leachate, ..." This could be read as requiring the generator to address non-hazardous waste constituents. USEPA has revised this so as to eliminate the second "waste". As revised, it is clear that the generator is to address "hazardous waste or [hazardous] constituents".

The original USEPA rule also required the generator to control escape "to the ground and surface water and to the atmosphere". This was wordy, and could be construed as requiring control only of things which could escape to all three media. USEPA has shortened and clarified this to require control of escape "to the ground water, surface water, or atmosphere."

The remainder of 40 CFR 261.35(b) had several pages worth of editorial problems, which USEPA has removed by reorganizing and rewording the subsection along the lines suggested in the Proposed Opinion. As reworded, it is clear that the generator has three basic choices: clean its equipment; replace its equipment; or, document prior cleaning and replacement carried out after termination of the use of chlorophenolic preservatives.

Ambiguities in Corrected USEPA Language

The corrected USEPA language could be read as requiring each generator to make a choice, for the entire site, between cleaning, replacement and documentation. In other words, this reading would not allow the option of cleaning some equipment, replacing some, and documenting prior cleaning and replacement for other equipment. On the other hand, it is possible to interpret the language as applying to each piece of equipment, so that the generator can clean, replace or document with respect to each piece of equipment. This is the most likely meaning, which is supported by the "cleaning and replacement" language in the documentation provisions, which suggests that these might properly occur together.

The corrected USEPA language, in 40 CFR 261.35(b)(1)(iii) [721.135(b)(1)(C)], allows the generator to document "cleaning and replacement in accordance with this Section, carried out after termination of use of chlorophenolic preservatives." This is clearly intended to ratify cleaning and replacement which occurred prior to the effective date of this rule. At first sight it also appears to authorize generators in the future to conduct cleaning and replacement programs outside the regulatory program, and then document it as "previous cleaning or replacement". However, after the rules become effective, it will be impossible to claim that this was "in accordance with this Section".

Minor Editorial Corrections [721.135(b)]

40 CFR 261.35(b)(1)(iii) refers to chlorophenolic "preservations". This probably is a typo, and should read "preservatives", as in the rest of this Section. The Board has corrected this apparent typo.

40 CFR 261.35(b)(4) has a subsection (i), but no (ii). One

possibility is that USEPA omitted (ii) through an editorial error. In any event, the Administrative Code rules prohibit having an (i) without a (ii). The Board has omitted the (i), and placed the text after the (b)(4) heading.

40 CFR 261.35(b)(4)(i) requires the generator to document that "previous equipment cleaning and/or replacement" was properly carried out. The Code Division prohibits the use of "and/or". "A and/or B" means "A or B, or both", which, as used by the Code Division, is what "A or B" means. However, in this case, the USEPA rule seems to be saying "document cleaning or replacement, or both". This seems to leave open the possibility that the generator could meet the requirement by documenting, for example, that just the cleaning was properly carried out. The Board has therefore adopted this to require documentation that "cleaning and replacement" were properly carried out, with the understanding that, if the generator did just one, he need only document that he just did one, and that it was proper.

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 deleted these, and replaced them with a reference to the 1990 Edition, as amended at 55 Fed. Reg. 50483. The reference just adopted 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 was amended in R90-11.

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 was 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.

In the Proposal, the Board noted two editorial problems with the amendments to this Section. USEPA has addressed these with the corrections at 56 Fed. Reg. 30192, July 1, 1991. The first is a simple correction of "§ 165.114" to "§ 265.114". The second concerns the placement of the "in addition" clause. The Board had noted that this was a "hanging paragraph" which had to be assigned a subsection label to meet Code Division requirements. The Board had assigned a subsection label making the clause subordinate to the wood preserving drip pad rules. This clause was repeated in pre-existing language concerning containers and tanks. In the corrections, USEPA has extensively reorganized this Section to combine the language concerning containers, tanks and drip pads, with just a single "in addition" clause. Unfortunately, it is still a hanging paragraph, which requires attention to meet Code Division requirements.

As corrected, 40 CFR 262.34 reads as follows, with the "in addition clause" in bold[17]:

> a) Except as provided in paragraphs (d), (e) and (f), a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that:
>
> 1) The waste is placed:
>
> i) in containers and the generator complies with Subpart I of 40 CFR part 265; and/or
>
> ii) In tanks and the generator complies with Subpart J of 40 CFR part 265, except § 265.197(c) and § 265.200; and/or

---

[17]This has been placed insofar as possible into the USEPA format for indentation. Placing it into the Administrative Code format would require knowledge of the proper level of subordination of the "In addition" clause.

iii) On drip pads and the generator complies with Subpart W of 40 CFR part 265 and maintains the following records at the facility:

A) A description of the procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

B) Documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal.

In addition, such a generator is exempt from all the requirements in Subparts G and H of 40 CFR 265, except for § 265.111 and § 265.114.

2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste"; and

4) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR part 265, and with § 265.16 and with 268.7(a)(4).

As located in the USEPA language, the "in addition" clause appears to be a continuation of the (a)(1) text. In other words, subsection (a)(1) would have the following structure: [introductory text] [subordinate list] [hanging text]. It's usually possible to rewrite such a rule to place the list at the end, so as to eliminate the hanging text, as follows: [hanging text] [introductory text] [list]. However, this rule makes no sense with the hanging paragraph placed with the introductory text for (a)(1). Rather, the hanging paragraph makes sense if placed into the introduction to subsection (a), so that the introduction reads as follows, with the "in addition clause" in bold:

a) Except as provided in paragraphs (d), (e) and (f), a generator **is exempt from all the requirements in Subparts G and H of 40 CFR 265, except for § 265.111 and § 265.114 and** may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that:

The problem with this reading is that it makes (a)(2) - (4)

conditions for the Part 265 exemption. If the curious placement of the "in addition" clause meant anything, it would mean that only (a)(1) was a condition for the Part 265 exemption. In other words, there would be three possible classes, who would be subject to the following regulations:

Conditions Met	Exempt From	Subject to
None	None	Interim Status filing requirements and Part 265
(a)(1)	Interim status filing requirements, and Part 265, Subparts G and H, except 265.111 and 265.114	Rest of Part 265
(a)(1) - (4)	Interim status filing requirements	All of Part 265

Under this reading of the USEPA rule, a generator who met conditions (1) - (4) would have to comply with more regulations than the generator who just complied with (1), including the financial assurance requirements. In other words, a generator who clearly marked his drums with the date the period of accumulation began would be rewarded by having to provide financial assurance, which would not be required if he just didn't mark the drums. This interpretation makes no sense whatsoever. The Board has therefore concluded that the "in addition" clause is a part of the introductory language to 40 CFR 262.34(a), and that the operator must meet all four conditions to obtain the exemption in that clause. The Board has therefore adopted the following language:

a) Except as provided in subsections (d), (e) or (f), a generator <u>is exempt from all the requirements in 35 Ill. Adm. Code 725.Subparts G and H, except for 35 Ill. Adm. Code 725.211 and 725.214 and</u> may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status<u>,</u> provided that:

1) The waste is placed<u>:</u>

<u>A)</u> <u>I</u>~~i~~n containers and the generator complies with 35 Ill. Adm. Code 725.Subpart I<u>;</u> or

<u>B)</u> <u>I</u>~~the waste is placed i~~n tanks and the

generator complies with 35 Ill. Adm. Code 725.Subpart J except 35 Ill. Adm. Code 725.297(c) and 725.300~~.~~; or

C) On drip pads and the generator complies with 35 Ill. Adm. Code 725.Subpart W and maintains the following records at the facility:

i) A description of the procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

ii) Documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal. ~~In addition, such a generator is exempt from all the requirements in 35 Ill. Adm. Code 725.Subparts G and H, except for 35 Ill. Adm. Code 725.211 and 725.214;~~

BOARD NOTE: The "in addition" hanging paragraph is in the introduction to subsection (a).

2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste", and

4) The generator complies with the requirements for owners or operators in 35 Ill. Adm. Code 725.Subparts C and D, with 35 Ill. Adm. Code 725.116 and 728.107(a)(4).

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.

As is discussed above, USEPA corrected these rules at 56 Fed. Reg. 30192, July 1, 1991. The Board has adopted the corrections in this update Docket. The corrections involve renumbering most of the Sections in this Subpart, a result of moving 40 CFR 264.575 up to 264.572, and renumbering old 264.572 - 264.574. The Board has followed this renumbering in the Order. This Opinion will use only the new numbers.

Section 724.672(a)(4) is also subject to the administrative stay discussed above in the June 13, 1991 Federal Register.

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).

The December 6 rules applied to operators of pads that use "drip pads to convey treated wood drippage to an associated collection system". On July 1, USEPA corrected this to "drip pads to convey treated wood drippage, precipitation and/or surface water run-on to an associated collection system".

As is discussed above, as used by the Code Division, "or" means the same thing as "and/or". The Board has substituted "or", with this understanding.

Subsection (b) cross references an exclusion for drip pads in structures. The USEPA rule provides that such pads are not

subject to Section 264.573(e) or (f), "as appropriate". The Board has struck this as unnecessary. Since it's an exclusion, it doesn't matter whether they 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 used dates keyed to the federal effective date, rather than dates keyed to some future State effective date. Because these are partially HSWA-driven requirements, part of 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.

As is discussed above, USEPA has stayed the effective date of these rules. It is possible that USEPA intended that these delayed compliance dates, some of which are several years in the future, should be advanced so as to be keyed to the new dates. However, the Board does not so construe the USEPA stay, which does not specifically address this question. It is not necessary to advance these future dates, which are not directly related to the stay, and, some of which will not arrive until after the new effective dates have passed. Also, it is not clear which of these new dates should be construed as the "effective date" for this purpose.

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 264.573 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 264.573,

except those for liners and leak detection systems specified in Section 264.573(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. What does the operator's belief have to do with protection of the environment? 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 264.573, except those for liners and leak detection systems."

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. Why limit the extension to true believers who are mistaken? Again, this has nothing to do with the explanation of the extension at 55 Fed. Reg. 50454.

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.

Other Editorial Problems with Subsection (b)(3)

As is set out below, the Board has omitted 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.

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 fixed 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 used the variance mechanism, which allows extensions for up to five years.

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. A general discussion of the factors the Board considers in making these decisions appears in the introduction to this Opinion.

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 could grant this extension by three procedures: variance, adjusted standard or site specific rulemaking. This decision resembles a variance under Title IX of the Act insofar as it is a temporary extension of a compliance date. It differs in that the USEPA rule fails to mention any hardship factors, and variances require a definite compliance plan. Also, while the preamble speaks of "reasonable" extensions, Board variances are limited to 5 years, with one year extensions.

The other viable alternative is an "adjusted standard". This procedure could be adapted to this purpose. However, adjusted standards would be more appropriate for approval of a permanent design based on an alternative standard. The USEPA procedure focuses on temporary extensions for existing facilities.

A possible objection to the variance is the required showing of arbitrary or unreasonable hardship. However, as is detailed in the Preamble at 55 Fed. Reg. 50454, there is apt to be an element of hardship involved in replacing a good drip pad just to install a liner and leachate collection.

Another possible problem is whether a 5 year maximum, with possible extensions, would be "reasonable". The Preamble indicates that pads have a normal 15 year life. Part of this will already be gone with the compliance dates in the rule, which extend through 1999. A five year variance beyond this would be one-third of the normal life of the pad. The Board solicited comment as to whether five years was "reasonable", but received no response.

Text for Section 724.671(b)(3)

The entire 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 724.673, except those for liners and leak detection systems specified in Section 724.673(b); and

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

As-Built Plans

Section 724.671(c) requires the operator to file "as-built" plans with the Agency following upgrading. The Board proposed to insert and delete several missing and/or extra commas. In the July 1, 1991, correction, USEPA corrected some, but not all of these.

USEPA also corrected "Upon completion of all, repairs, and modifications" to read: "Upon completion of all upgrades, repairs, and modifications". The Board has followed this correction.

Section 724.672

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 inserted the needed word.

This Section was proposed as Section 724.675. It has been moved to Section 724.672 to conform with USEPA's renumbering in the July 1, 1991, corrections. All subsequent Section numbers are increased by 0.001.

Section 724.673

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

40 CFR 264.573(a)(1) provides that drip pads must:

> Be constructed of non-earthen materials, excluding wood and non-structurally supported asphalt; [40 CFR 264.573(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 adopted the following:

> Not be constructed of earthen materials, wood or asphalt, unless the asphalt is structurally supported; [35 Ill. Adm. Code 724.673(a)(1)]

USEPA did not correct this problem in the July 1, 1991, correction. However, the subsection picked up several minor typos when it was reprinted in the correction. The Board has retained the correct language.

40 CFR 264.573(a)(2) 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 264.573(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 a lot of 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 724.673(a)(2)]

Section 724.673(a)(4) requires that drip pads be "impermeable". This provision is subject to the administrative stay in the June 13, 1991, Federal Register, discussed above. The Board has added the following note, which tracks the USEPA language:

> BOARD NOTE: The requirement that new drip pads be impermeable, e.g., that new drip pads be sealed, coated or covered with an impermeable material, is administratively stayed. The stay will remain in effect until further administrative action is taken.

40 CFR 264.573 was the subject of a USEPA correction on July 1, 1991. "[Must be] of sufficient structural strength and thickness to prevent failure due to physical contact, climatic conditions, the stress of installation, and the stress of daily operations..." was changed to read: "[Must be] of sufficient structural strength and thickness to prevent failure due to physical contact, climatic conditions, the stress of daily perations...", deleting "stress of installation". In addition, two typos have appeared in the corrected text: "perations", and the deletion of a final "and" in the series. The obvious typos call into question whether USEPA really meant to delete "stress of installation". Since this is not mentioned as a correction in the Preamble, the Board believes all of these apparent changes are typos, and has not made them.

Following 40 CFR 264.573(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 264.573(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 solicited comment as to whether it should delete this note, or, in the alternative, complete the references. In the latter case, the Board stated that it needed to know which standards are to be referenced. The Board received no response, and has therefore considered deleting the note. However, the Board has identified ASTM C-94 and ACI-318 as examples of appropriate standards. The Board has therefore referenced these as examples. In this way a person who wanted to design a pad could find a specific standard, yet would not be limited only to that design. The Note is as follows:

> BOARD NOTE: In judging the structural integrity requirement of this subsection, the Agency should generally consider applicable standards established by professional organizations generally recognized by the industry, including ACI 318 or ASTM C94, incorporated by reference in 35 Ill. Adm. Code 720.111.

In the proposed Opinion, the Board pointed out that, while 40 CFR 264.573(b) applied only to new drip pads, the comparable subsection in 40 CFR 265 applied both to new and existing pads. On July 1, 1991, USEPA corrected the introductory material to read as follows:

> A new drip pad or an existing drip pad, after the deadline established in Section 264.571(b)..., must have:

In the Proposed Opinion, the Board pointed out that, in 40 CFR 264.573(e) [724.673(e)] there were two "unless" clauses which said the same thing. The Board proposed to delete the first. USEPA has now corrected this, but by deleting the second clause. The Board has revised the proposal to more closely follow the USEPA text.

The corrected USEPA text starts out with: "Unless protected by a structure ..., the owner or operator shall..." What this probably means is: "Unless the drip pad is protected by a

structure...", the format the Board has followed. The Board has also corrected the same problem in Section 264.573(f) [724.673(f)].

USEPA has also made a second correction to 40 CFR 264.573(e). Originally the Section addressed "run-on". As corrected, it addresses "run-off". This may represent another typo, since the text would disagree with the Part 725 text, and since "run-off" appears to be unrelated to the remainder of the subsection, which reads as follows:

> Unless protected by a structure,... the owner or operator must design, construct, operate and maintain a run-on control system capable of preventing flow onto the drip pad during peak discharge from at least a 24-hour, 25-year storm, unless the system has sufficient excess capacity to contain any run-off that might enter the system.

The Board has retained "run-on".

In Section 724.673(g), the Board has separated the two sentences with a period, and inserted a needed comma in the second.

40 CFR 264.573(i) and (k) each have misplaced modifiers which escaped notice in the proposal. The Board has corrected these as follows:

i) ...The owner or operator shall document, in the facility's operating log, the date and time of each cleaning and the cleaning procedure used ~~in the facility's operating log~~.

k) After being removed from the treatment vessel, treated wood from pressure and non-pressure processes must be held on the drip pad until drippage has ceased. The owner or operator shall maintain records sufficient to document that all treated wood is held on the pad, in accordance with this Section, following treatment ~~in accordance with this requirement~~.

The misplaced modifier in (i) is amusing, but unlikely to actually mislead anyone. On the other hand, (k) says something which makes sense, and is totally different than what was probably intended. As worded, it appears to require documentation of "treatment" in accordance with "this requirement". As used in the wood preserving rules, "treatment" is referring to the addition of preservative to the wood, a process which occurs in the "treatment vessel", before the wood is moved to the pad. The subsection needs to require

documentation of the drippage on the pad, not the "treatment" process itself.

40 CFR 264.573(m) (equivalent to Section 724.673(m)) requires repairs within a "reasonably prompt period" after discovery of a condition which could cause a release. The Board solicited comment as to what "reasonably prompt" means, but received no response.

40 CFR 264.573(m)(1)(B) has a minor misplaced modifier which escaped detection in the proposal. The Board has corrected this so it reads: "Immediately remove from service the portion of the drip pad affected by the condition ~~from service~~."

The language in Section 724.673(m)(1)(C) has been modified as is discussed below in connection with Section 725.543(m)(1)(C). This is a compromise text combining the better aspects of the Part 264 and 265 language.

In Section 724.673(m)(2), the Board has broken the list of Agency actions into elements separated by semicolons.

USEPA has corrected a cross reference in 40 CFR 264.573(m)(3), which was noted in the Proposed Opinion. The correct reference is "(m)(1)(iv)" [or (m)(1)(D)], as in the Proposal.

Section 724.674

This Section requires the operator to conduct "inspections" of drip pads during construction, as well as weekly and after storms. USEPA has corrected this Section by changing cross references.

Section 724.675

This Section specifies the closure requirements for drip pads. USEPA has corrected this Section by changing cross references.

40 CFR 264.575(b) has an apparent editorial error which escaped notice in the Proposal. The subsection reads as follows:

> If, after removing or decontaminating all residues ..., the owner or operator finds that not all contaminated subsoils can be practically removed or decontaminated, the operator shall close the facility and perform post-closure care in accordance with closure and post closure care requirements that apply to landfills (Section 724.410). For permitted units, the requirement to have a permit continues throughout the post- closure period.

As worded, the first sentence appears to require closure of the entire facility. However, the second sentence speaks just of units. The Board believes this is an editorial error, and has changed the first to "unit".

40 CFR 264.575(c) has no text. This is prohibited by the Code Division. The Board has filled the hole by inserting a heading.

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.[18] This Subpart was also subject to the administrative stay at 56 Fed. Reg. 27332, June 13, 1991 and the corrections at 56 Fed. Reg. 30192, July 1, 1991. However, the corrections to this Part are not as extensive as Part 724.

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 solicited comment as to how this relates to 40 CFR 270.73 and 703.155, which limit changes at interim status facilities, but received no response.

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[18]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 265.440(a) was corrected in the July 1, 1991 Federal Register. As is discussed above in connection with Section 724.670, the applicability statement has been expanded to include drip pads used to convey "precipitation or surface water run-on", as well as wood drippage.

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 followed the respective USEPA language. The Board solicited comment as to whether one Part was in error, but received no comment

Section 725.542

This Section specifies design and operating requirements for new interim status drip pads.

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 264.573 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.

Section 725.543(a)(4) requires that drip pads be "impermeable". This provision is subject to the administrative stay in the June 13, 1991, Federal Register, discussed above. The Board has added the following note, which tracks the USEPA language:

> BOARD NOTE: The requirement that new drip pads be impermeable, e.g., that new drip pads be sealed, coated or covered with an impermeable material, is administratively stayed. The stay will remain in effect until further administrative action is taken.

There is also a minor difference between the notes following 40 CFR 264.573 and 265.443(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. The Board has used the same language as in Section 264.573(a)(5).

In the Proposed Opinion, the Board noted the apparent omission of a subsection of 40 CFR 265.443(b)(2). On July 1, 1991, USEPA corrected this by inserting a new subsection (b)(2)(ii). This requires that the leak detection system be designed to function without clogging through the scheduled closure of the pad.

40 CFR 265.443(e) [725.543(e)] contains language which is identical to language corrected by USEPA in 264.573(e), but which has not been corrected. The Board has corrected this language along the lines discussed above in Section 724.673(e). Sections 725.543(f), (i) and (m)(1)(B) have other errors which have been corrected in a manner similar to Section 264.573.

USEPA has corrected the repair standard of 40 CFR 265.443(m) and (m)(1) along the lines discussed above in connection with Section 264.573(m). This provision is triggered when the operator discovers a condition which "may have caused or has caused" a release of hazardous waste.

40 CFR 264.573(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 264.573(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 used 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 724.673 and 725.543(m)(1)(C)]

40 CFR 264.573(n) deals only with permits, and hence is absent from Part 265. Therefore, 40 CFR 264.573(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 corrected 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 corrected to "post-closure".

Section 725.545

This Section deals with closure of drip pads.

The final sentence of 40 CFR 264.575(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 omitted it, following the federal text. The Board solicited comment as to whether this might be a USEPA error, since the concept would appear to apply also to interim status landfills, but received no response. The Board also noted 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 solicited comment on this also, but received no response.

Section 725.545(b) has been corrected along the lines discussed above in connection with Section 724.675(b), changing "facility" to "unit".

This Opinion supports the Board's Order of this same date. The Board will not file the rules until after September 9, 1991, to allow time for post-adoption review and comments by the agencies involved in the authorization process.

IT IS SO ORDERED.

Mr. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Opinion was adopted on the 8th day of August, 1991, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board