ILLINOIS POLLUTION CONTROL BOARD
July 3, 1990

IN THE MATTER OF:	)	
	)	R90-2
RCRA UPDATE, USEPA REGULATIONS	)	(Rulemaking)
(7-1-89 THROUGH 12-31-89)	)	

ADOPTED RULES. FINAL ORDER.

OPINION OF THE BOARD (by J. Anderson):

By a separate Order, pursuant to Section 7.2 and 22.4(a) of the Environmental Protection Act (Act), the Board is amending the RCRA hazardous waste regulations. The amendments involve 35 Ill. Adm. Code 703, 721, 724, 725, 726 and 728. The Board will not file the adopted rules until August 3, 1990, to allow time for post-adoption review 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, 1989, through December 31, 1989. The Federal Registers utilized are as follows:

54 Fed. Reg. 33393	August 14, 1989
54 Fed. Reg. 36641	September 1, 1989
54 Fed. Reg. 36970	September 6, 1989
54 Fed. Reg. 41407	October 6, 1989
54 Fed. Reg. 50977	December 11, 1989

In addition, the Board notes that USEPA corrected the September 6, 1989 Federal Register at 55 Fed. Reg. 23935, June 13, 1990. Although this action is outside the scope of this rulemaking, it includes responses to some of the Board's requests for comment in the Proposed Opinion, and will be referenced below.

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

PUBLIC COMMENT

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

The Board adopted a Proposed Opinion and Order on April 12, 1990. The proposal appeared on May 4, 1990, at 14 Ill. Reg. 6528. The Board has received the following public comment:

PC 1 Big River Zinc Corporation (Big River), May 21, 1990

PC 2 Administrative Code Division, June 1, 1990

PC 3 Big River, June 18, 1990

PC 4 USEPA, June 22, 1990

PC 5 JCAR, June 14 through June 22, 1990

PC 1 was actually addressed to Docket R89-1, which was closed at the time the comment was received. Because the comment addressed the "mine waste exclusions", which are also an issue in this Docket, the Board included the comment in this Docket. PC 3 also addresses the mine waste exclusion.

In PC 4, USEPA provided comments which appear to have resulted from a comprehensive review of the proposal. However, USEPA found typographical and editing errors only. The Code Division and JCAR also found similar errors (PC 2 and 5).

The Proposed Opinion included a large number of specific requests for comment. USEPA indicated that it had submitted these to headquarters, and would forward its response under a separate cover. The Board may consider this if received during the post-adoption comment period. Otherwise, the Board may have to consider any issues in a future Docket.

The Board notes with concern the lack of any coment from the Illinois Environmental Protection Agency (Agency), which has the obligation to admininster these rules. The Board must assume that, where it requested comment on a proposed solution to a problem with the rules, that the solution is acceptable to the Agency. Furthermore, where the rules suggested alternative solutions, the Board must assume that either alternative is acceptable to the Agency.

EXTENSION OF TIME ORDERS

Section 7.2(b) of the Act requires that identical in substance rulemakings be completed within one year after the first USEPA action in the batch period. If the Board is unable to do so it must enter an "extension of time" Order.

HISTORY OF RCRA, UST and UIC ADOPTION

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

702	RCRA and UIC Permit Programs
703	RCRA Permit Program
704	UIC Permit Program

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

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

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

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

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

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

The UIC regulations were adopted as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

R85-22 67 PCB 175, 479, December 20, 1985 and January 9, 1986; 10 Ill. Reg. 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 This Docket (7/1/89 through 12/31/89)

R90-10 Next RCRA Docket, Proposed May 24, 1990 (1/1/90 through 3/31/90)

R90-11 Docket After Next RCRA Docket (4/1/90 through 6/30/90)

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

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

R88-27 April 27, 1989; 13 Ill. Reg. 9519, effective June 12, 1989 (Technical standards, September 23, 1989)

R89-4 July 27, 1989; 13 Ill. Reg. 15010, effective September 12, 1989 (Financial assurance, October 26, 1989)

R89-10 February 22, 1990; 14 Ill. Reg. 5797, effective April 10, 1990 (Initial update, through 6/30/89)

R89-19 April 26, 1990; 14 Ill. Reg. 9454, effective June 4, 1990 (UST State Fund)

R90-3 June 7, 1990; (7/1/89 - 12/31/89)

R90-12 Next UST Docket (1/1/90 - 6/30/90)

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

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

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

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

R85-2 69 PCB 314, April 24, 1986; 10 Ill. Reg. 8112, effective May 2,

1986.

R87-30 June 30, 1988; 12 Ill. Reg. 12070, effective July 12, 1988.

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?

Sections 724.213 and 725.213, which are discussed below, include questions as to whether decisions ought to be made by the Board or Agency. The following is a general discussion of these questions.

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.

DETAILED DISCUSSION

The Federal Registers involved in this rulemaking include the following:

August 14, 1989	Receipt of non-hazardous waste by units after final receipt of hazardous waste
September 1, 1989	Mining waste exclusion
September 6, 1989	Corrections to first third bans
October 6, 1989	Listing of methyl bromide wastes
December 11, 1989	Listing of aliphatic chlorination wastes

In addition, as noted above, USEPA corrected the September 6, 1989, Federal Register at 55 Fed. Reg. 23935, June 13, 1990. This is interestingly titled as "the corrections to the corrections to the first third". The Board will discuss one of these corrections below in connection with Section 728.133.

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

The text of the proposal made frequent references to the 1988 Supplement to the Illinois revised Statutes. These have been updated to the 1989 Edition, which is now available.

PART 703: RCRA PERMITS

Parts 702, 703 and 704 were originally based on the consolidated permit rules in 40 CFR 122. These have now been deconsolidated to 40 CFR 270 and 144. Some of the Sections still show the old Part 122 "Board Notes". Because these Parts lack the simple relationship to the current organization of the federal rules, it is necessary to use a cross reference table. An updated version of the table appears at the end of the R89-9 Opinion.

Section 703.Appendix A

This Section is drawn from 40 CFR 270.42, Appendix I, which was amended at 54 Fed. Reg. 33393, August 14, 1989. The amendments add item D.i.f. to the list of permit modifications. As is discussed below, a hazardous waste facility may accept non-hazardous waste after closure under certain conditions. This amendment allows the permit to be modified as a Class 2 permit modification.

Following the public comment period in this Docket, the Board learned of an error in Appendix A as amended in R89-9. The amendment was drawn from 54 Fed. Reg. 9607, March 7, 1989. The amendment "added" items F.4.a and b, but did not specifically say to delete existing F.4. The Board therefore retained old F.4, but renumbered it as F.5. The 1989 Edition of the CFR is now available, and does not include item F.5. Evidently USEPA meant to "revise" F.4, rather than add a new F.4. On careful examination, it is apparent that the subject matter of old F.4 is addressed in the new language. The Board has therefore deleted F.5.

PART 721: IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

Section 721.103

This Section is drawn from 40 CFR 261.3, which was amended at 54 Fed. Reg. 36641, September 1, 1989. These amendments concern the mining waste exclusion from the definition of hazardous waste. This is related to the amendments related to listing K066 in R89-1, and the issues raised in that Docket by Big River Zinc.

Section 721.104, discussed below, generally excludes from the definition of hazardous waste any wastes "from the extraction, beneficiation or processing of ores or minerals". The amendments to this Section create rules concerning mixtures of excluded mine waste with hzardous waste. Under certain circumstances mixtures become hazardous wastes (are "unexcluded") pursuant to this Section.

There are some minor problems with the text of these amendments. The text of 40 CFR 261.3(a)(2)(i) and (iii), which correspond to Section 721.103(a)(2)(A) and (C), is as follows:

> A solid waste ... is a hazardous waste if it is not excluded ... and...
>
> i) It exhibits any of the characteristics of hazardous waste identified in Subpart C except that any mixture of a waste from the extraction, beneficiation and processing of ores and minerals excluded under §261.4(b)(7) and any other solid waste exhibiting a characteristic of hazardous waste under Subpart C of this part only if it exhibits a characteristic that would not have been exhibited by the excluded waste alone if such mixture had not occurred or if it continues to exhibit any of the characteristics exhibited by the non-excluded wastes prior to mixture. Further, for the purposes of applying the Extraction Procedure Toxicity characteristic to such mixtures, the mixture is also a hazardous waste if it exceeds the maximum concentration for any contaminant listed in table I to 261.24 that would not have been exceeded by the excluded waste alone if the mixture had not occurred or if it continues to exceed the maximum concentration for any contaminant exceeded by the nonexempt waste prior to mixture. ...
>
> iii) It is a mixture of a solid waste and a hazardous waste that

> is listed in Subpart D of this part solely because it exhibits one or more of the characteristics of hazardous waste identified in Subpart C, unless the resultant mixture no longer exhibits any characteristic of hazardous waste identified in Subpart C of this part or unless the solid waste is excluded from regulation under §261.4(b)(7) and the resultant mixture no longer exhibits any characteristic of hazardous waste identified in Subpart C of this part for which the hazardous waste listed in Subpart D of this part was listed.

40 CFR 261.3(a)(2)(i) speaks of wastes "from the extraction, beneficiation and processing of ores and minerals". Since extraction, beneficiation and processing are sequential processes, it is unlikely that a single waste would come from all three. Likewise, there are ores and there are minerals, but relatively few "ores and minerals". The USEPA rule is subject to the interpretation that the un-exclusion applies only to a waste which comes from all three processes on something which is both an ore and mineral. The Board has changed the and's to or's to avoid this interpretation. In the Administrative Code "A or B" means "A or B or both".

40 CFR 261.3(a)(2)(i) also references "table I in §261.24". This is Table I in Section 721.124. This form of labeling of tables is no longer acceptable to the Code Division. However, since "Table I" is the only table in Section 721.124, the Board has shortened the reference to "Section 721.124". This avoids making a reference which would cause the Code Division to ask the Board to amend Section 721.124.

The "except" clause added to 40 CFR 261.3(a)(2)(i) does not have a verb. The Board has added "is a hazardous waste", and to make the clause into a separate sentence.

The USEPA language has an almost complete lack of punctuation. One should not be too quick to criticize this, since it is easier to deal with than many USEPA rules which have incorrect punctuation. It is much easier to insert commas, etc., without having to first remove incorrect punctuation. However, these provisions have many complex conditions. Without punctuation, it is not clear how the conditions are to be grouped. The Board has inserted punctuation, so that the adopted rule reads as follows:

A solid waste ... is a hazardous waste if it is not excluded ... and...

> A) It exhibits any of the characteristics of hazardous waste identified in Subpart C. Except that any mixture of a waste from the extraction, beneficiation or processing of ores or minerals excluded under Section 721.104(b)(7) and any other solid waste exhibiting a characteristic of hazardous waste under Subpart C is a hazardous waste only: if it exhibits a characteristic that would not have been exhibited by the excluded waste alone if such mixture had not occurred; or, if it continues to exhibit any of the characteristics exhibited by the non-excluded wastes prior to mixture. Further, for the purposes of applying the EP toxicity (extraction procedure toxicity)

characteristic to such mixtures, the mixture is also a hazardous waste: if it exceeds the maximum concentration for any contaminant listed in Section 721.124 that would not have been exceeded by the excluded waste alone if the mixture had not occurred; or, if it continues to exceed the maximum concentration for any contaminant exceeded by the nonexempt waste prior to mixture...

C) It is a mixture of a solid waste and a hazardous waste that is listed in Subpart D solely because it exhibits one or more of the characteristics of hazardous waste identified in Subpart C, unless the resultant mixture no longer exhibits any characteristic of hazardous waste identified in Subpart C, or unless the solid waste: is excluded from regulation under Section 721.104(b)(7); and, the resultant mixture no longer exhibits any characteristic of hazardous waste identified in Subpart C for which the hazardous waste listed in Subpart D was listed.

This is still only marginally comprehendable. The following is an attempt at restating these provisions in an understandable way:

Definitions

"Characteristic waste" means a solid waste exhibiting a characteristic of hazardous waste under Subpart C.

"Listed characteristic waste" means a hazardous waste which is listed in Subpart D solely because it is a characteristic waste.

"Excluded mine waste" means a waste from the extraction, beneficiation or processing of ores or minerals excluded under Section 721.104(b)(7).

Section 721.103

A solid waste ... is a hazardous waste if it is not excluded ... and...

A) It is a characteristic waste.

i) However, any mixture of an excluded mine waste and a characteristic waste is a hazardous waste only if it exhibits a characteristic which:

The excluded mine waste did not exhibit; or

The characteristic waste did exhibit.

ii) Further, for purposes of applying the EP toxicity characteristic of Section 721.124 to such mixtures, the mixture is a hazardous waste if it exceeds the maximum concentration for any contaminant which:

The excluded mine waste did not exceed; or

The characteristic waste did exceed. Or, ...

C) It is a mixture of a solid waste and a listed characteristic waste, unless the solid waste:

i) Is an excluded mine waste; and

ii) The resultant mixture no longer exhibits any characteristic for which the listed characteristic waste was listed.

The Board has not rewritten the un-exclusion in this way, but solicited comment as to whether the re-write is correct. If it isn't, then the changes to punctuation discussed above are probably wrong. The Board received no response.

Section 721.104

This Section is drawn from 40 CFR 261.4, which was amended at 54 Fed. Reg. 36641, September 1, 1989. These amendments also concern the mining waste exclusion from the definition of hazardous waste.

A portion of the text of 40 CFR 261.4(b)(7), which corresponds with Section 721.104 (b)(7) is set out as follows:

The following ... are not hazardous wastes: ...

7) Solid waste from the extraction, beneficiation ~~and~~-or processing of ores ~~and~~-or minerals (including coal), including phosphate rock and overburden from the mining of uranium ore. For purposes of this subsection, beneficiation of ores and minerals is restricted to the following activities: crushing, grinding, washing, dissolution, crystallization, filtration, sorting, sizing, drying, sintering, pelletizing, briquetting, calcining to remove water or carbon dioxide, roasting in preparation for leaching (except where the roasting/leaching sequence produces a final or intermediate product that does not undergo further beneficiation or processing), gravity concentration, magnetic separation, electrostatic separation, floatation, ion exchange, solvent extraction, electrowinning, precipitation, amalgamation, and heap, dump, vat tank and in situ leaching. For the purposes of this subsection, solid waste from the processing of ores ~~and~~-or minerals ~~does not include~~-includes only: ...

~~G)~~ ~~After June 30, 1990, sludge from treatment of process wastewater or acid plant blowdown from primary zinc production; - ...~~

A) The following solid wastes from the processing of ores or minerals, which are retained within this exclusion: ...

v) Slag from elemental phosphorus production; and

B) The following solid wastes from the processing of ores or minerals, which are conditionally retained within this exclusion, pending collection and evaluation of additional data: ...

xx) Slag from primary zinc smelting.

40 CFR 261.4(b)(7) refers to "calcining to remove water and/or carbon dioxide". As used in the Administrative Code, "and/or" means the same thing as "or".

In R89-1 the Board adopted USEPA rules which added listing K066, and which added Section 721.104(b)(7)(C), which is shown struck through above. This provision un-excluded certain pollution control wastes from primary zinc production. In response to comments from Big River Zinc, the Board added the June 30, 1990, delayed effective date to the un-exclusion. The result of this is that the pollution control wastes will become hazardous wastes in Illinois on June 30, 1990. When this rulemaking is filed, the un-exclusion will be removed from the rules. However, the format of the rule has been reversed, so that it is now listing exclusions, instead of un-exclusions. The effect of this is that the pollution control waste will now be un-excluded in silence. USEPA has clearly indicated this intent in the preamble. (54 Fed. Reg. 36631). Note also that these wastes remain listed as K066. Also, a previously unmentioned zinc production waste, slag from primary zinc smelting, is now expressly excluded from the definition of hazardous waste.

Big River filed two comments in this matter (PC 1 and 3). Big River is conducting process changes so as to avoid producing hazardous waste under the new rules, so that it will not have to either become a TSD facility, or ship waste off site to a RCRA permitted facility. Big River has asked the Board to delay the effective date of the rules derived from the September 1, 1989, Federal Register to July 1, 1991.

The Board cannot discern what provisions in the rules need to be delayed to grant the relief requested. As the Board understands it, K066 and the "unexclusion" brought certain wastestreams into the hazardous waste definition. The K066 listing was unaffected by the September 1 action, and the "unexclusion" was repealed. As was previously determined, the K066 listing must be effective by July 1, 1990. Also, delaying the repeal of the "unexclusion" would make certain that Big River's waste was hazardous after June 30, 1990.

Another aspect of the September 1 action is the new exclusion for zinc smelting slag. Delaying this would make zinc smelting slag a hazardous waste in Illinois, even though it is excluded at the federal level.

The final aspect of the USEPA action is the generic definition of "beneficiation". There are several problems with delaying the effective date of this. First, Big River has not specified what portions of the definition cause it to fall into the hazardous waste classification. Second, this is a generic provision which applies to other industries. It is possible that there are others who are excluded under this general definition, and want the definition to be adopted as soon as possible. It would be unfair to them to

delay the change. Finally, the USEPA action is adding a definition of a term which is presently undefined. Even if the Board delayed the effective date of the definition, it would be the only definition around. The Agency would be justified in construing "beneficiation" to mean exactly this, regardless of any delay in the effective date.

Mechanistically, there is no way in this Docket to grant Big River a delay. To add a specific provision for Big River, the Board would need additional information as to precisely what wastes are to be delayed. Moreover, this would arguably be outside the scope of the "identical in substance" mandate, as defined in Section 7.2 of the Act.

In PC 3 Big River is really asking for a delay in the effective date of a regulation in order to allow it to make process changes to come into compliance. This could be better handled by way of a variance pursuant to Title IX of the Act and 35 Ill. Adm. Code 104. Indeed, PC 3 is structured very much like a variance petition.

The Board has two questions which it would like to have answered by USEPA during the post-adoption comment period. First, would it be consistent with federal law to grant a generator a temporary variance from a new listing, conditioned on a compliance schedule leading to process changes which eliminated the production of hazardous waste? Second, what form should the variance take? For waste managed on-site, could the Board grant a variance from the requirement to file a Part A application (Section 703.150), and the management standards of Part 725? For waste shipped off-site, could the Board grant a generator a variance from the requirements to determine whether a waste is hazardous and initiate a manifest? (Sections 722.111 and 123) Would such a variance allow an off-site facility to manage the newly listed waste as non-hazardous?

Section 721.131

This Section is drawn from 40 CFR 261.31, which was amended at 54 Fed. Reg. 50977, December 11, 1989. These amendments concern the listing of wastes from free radical chlorination of certain aliphatic hydrocarbons. This takes the form of an amendment to F024, and addition of a new listing, F025.

Section 721.132

This Section is drawn from 40 CFR 261.32, which was amended at 54 Fed. Reg. 41407, October 6, 1989. These amendments concern the listing of wastes from production of methyl bromide, a pesticide. This takes the form of addition of listing K131 and K132.

Section 721.Appendix C

This Section is drawn from 40 CFR 261, Appendix III, which was amended at 54 Fed. Reg. 41407, October 6, 1989. These amendments concern the listing of wastes from production of methyl bromide, a pesticide. The incorporation by reference has been updated to include the analytical methods associated with these listings.

Section 721.Appendix G

This Section is drawn from 40 CFR 261, Appendix VII, which was amended at 54 Fed. Reg. 41407, October 6, 1989, and at 54 Fed. Reg. 50977, December 11, 1989. These amendments concern the listing of wastes from production of methyl bromide and the listing of wastes from free radical chlorination of certain aliphatic hydrocarbons. Appendix G has been updated to list the hazardous constituents for which these are listed.

Section 721.Appendix H

This Section is drawn from 40 CFR 261, Appendix VIII, which was amended at 54 Fed. Reg. 50978, December 11, 1989. These amendments concern the listing of wastes from free radical chlorination of certain aliphatic hydrocarbons. This adds a new hazardous constituent, allyl chloride, which is produced by this type of chlorination.

PART 724: STANDARDS FOR PERMITTED FACILITIES

The following amendments are drawn from 54 Fed. Reg. 33393, August 14, 1989. These amendments allow hazardous waste management units which have received the final volume of hazardous waste to receive non-hazardous wastes under certain conditions.

Section 724.113

This Section is drawn from 40 CFR 264.13, which was amended at 54 Fed. Reg. 33393, August 14, 1989. This Section requires the owner or operator to include, in the general waste analysis plan, any non-hazardous wastes to be received after the final volume of hazardous waste.

There is an ambiguity in the amendment to 40 CFR 264.13(a). This ambiguity arises because of the format of the Federal Register. Rather than print the entire text of the affected Section in a strike and underline format, the Federal Register presents a partial text, with instructions. In this case, instruction #2 says Section 264.13 "is amended by revising paragraphs (a)(1), ... to read as follows:" However, the revisions relate only to the first sentence of paragraph (a)(1). The Federal Register appears to have dropped the second sentence.

The problem is that the dropped sentence is the general standard for what the waste analysis plan should contain: "all the information which must be known to treat, store or dispose of the waste in accordance with the requirements..." It seemed unusual to repeal such a basic standard in a rulemaking which is not directly concerned with waste analysis. The Board proposed to repeal this language, but solicited comment which was not answered.

The Board has decided to leave the general standard in. The August 14, 1989, Federal Register was concerned with delay of the post-closure care period for certain disposal facilities. The amendments to the waste analysis plan requirements were tangential to this. Any change to the basic standard for the plans would appear to be beyond the scope of the August 14 Federal Register. Moreover, the Board cannot find any mention of the general standard in the Preamble, beginning at 54 Fed. Reg. 33376. It is unlikely that USEPA

would have dropped a basic standard without mentioning it.

Section 724.212

This Section is drawn from 40 CFR 264.112, which was amended at 54 Fed. Reg. 33393, August 14, 1989. This Section governs closure plans. 40 CFR 264.112(d)(2)(ii) allows USEPA to extend the time at which notification of closure must be given if the owner or operator "can demonstrate" the capacity to receive additional nonhazardous wastes. Consistent with the other provisions of this Section, the Board has edited Section 724.212(d)(2)(B) to allow the Agency to extend the time only if the owner or operator "demonstrates" the additional capacity. The USEPA language is subject to the interpretation that an operator who believes he "can demonstrate" additional capacity need not notify unless USEPA challenges him. The Board language makes it clear that an up-front demonstration is required.

The Board has corrected a typographical error in the proposal in Section 724.212(d)(2)(B). (Deletion of "of" from "The owner or operator of demonstrates...") (PC 5)

The rules generally refer to the "owner or operator". The intent of this is that either one can discharge the obligations under the rules, but that both are liable for a failure. Specifically, either the "owner or operator" can make the demonstration contemplated by this Section, and the benefit falls on both. However, 40 CFR 264.112(d)(2)(ii) provides: "If the owner or operator can demonstrate that ... and he has taken ... all steps necessary to prevent threats to human health ..." This seems to contemplate, for example, that an operator could gain the extension, which would then apply to the owner, even though the owner failed to protect human health. The Board has corrected this apparent error by rendering "he" as "the owner and operator".

Section 724.213

This Section is drawn from 40 CFR 264.113, which was amended at 54 Fed. Reg. 33393, August 14, 1989. This Section governs the time allowed for closure. Subsections (d) and (e) have been added to specify the conditions under which a unit may receive non-hazardous waste after final receipt of hazardous waste.

The introductory language to this Section, as previously adopted by the Board, does not read exactly like the USEPA language. The USEPA Section is worded in a manner which could be read as giving operators automatic extensions of closure deadlines. The Board reworded these provisions to make it clear that these extensions must be approved in advance as permit conditions. (R82-19, Opinion of July 26, 1983, p. 45; 53 PCB 131, 175).

40 CFR 264.113(d) and (e) allow certain units which have stopped receiving hazardous waste to remain open for non-hazardous waste. Subsection (d) applies to landfills, surface impoundments and land treatment units which the HSWA double liner and leachate collection requirements. Subsection (e) applies to surface impoundments which, although they don't meet the HSWA requirements, have removed all hazardous liguids, and as much sludge as possible. Although hazardous wastes will have been removed, and the impoundment will no longer receive hazardous waste, the unit will still be a

"HWM unit", and will eventually have to close as such.

There are a several major problems in translating 40 CFR 264.113(e) into a State rule.

REFERENCES TO RCRA ACT

40 CFR 264.113(e) includes a number of specific references to liner and leachate collection requirements contained in the RCRA Act. The Board wishes to avoid unnecessary references to federal statutes, since the APA is unclear as to whether these are incorporations by reference. The Board believes that these requirements are reflected in regulations which the Board has previously adopted, and has referenced those regulations instead. However, the Board solicited comment, but received no response.

In this case the references are serving the function of an incorporation by reference, in that they rely on the federal statute to set design and permitting standards. Whether the APA applies or not, unnecessary references to federal statutes are confusing to the public. Consider what would happen if Joe at Joe's Garage tried to comply with a State rule referencing "Section 3019 of RCRA". First, he would have to obtain a copy of the federal statute. This would probably by the USC. Then he would have to learn to convert the RCRA number to the USC number. He would have no way of of knowing whether the requirement had been implemented through regulations, nor would there be any systematic way to find the CFR provision which implemented the requirement. If Joe lucked out and found 40 CFR 270.10(j), he would still have to find the State regulation implementing that Section. In addition to the due process questions this would raise, it is not efficient to write regulations in a manner such that persons who wish to comply could not do so.

The USEPA rule references two of these as "42 USC 3004 and 3005". However, these numbers are to the RCRA Act itself. The USC citation should be to 42 USC 6901 et seq.

Section 3004(o) of RCRA includes mandatory design standards for new surface impoundments and landfills. These were adopted nearly verbatim in R86-1 as 35 Ill. Adm. Code 724.321(c), (d) and (e) and 724.401(c), (d) and (e). Section 3004(o)(1)(B) requires incinerators to comply with previous regulatory design standards. These are in 35 Ill. Adm. Code 724.443. Since this Section applies only to surface impoundments at permitted facilities, the Board Section need cite only Section 724.321(c) - (e).

Section 3005(j) of RCRA applies only to interim status facilities. Since this Section applies only to permitted facilities, the reference is unnecessary. However, it will be discussed below in connection with Part 725.

Section 3019 of RCRA requires owners or operators to submit exposure information and health assessments. This requirement was implemented in 40 CFR 270.10(j) and 35 Ill. Adm. Code 703.186.

The existing impoundments subject to 40 CFR 264.113(e) were required to retrofit or close under RCRA Section 3004 or 3005. Subsection (e) is a type of "extension by rule" Section which allows these units to remain open in limited operation following substantial removal of hazardous wastes.

SHOULD BOARD OR AGENCY HANDLE 'MINIPROCEDURES'

40 CFR 264.113(e) poses problems in translation into a State procedural context. Section 7.2(a)(5) of the Act and the factors considered by the Board in determining which agency should make decisions are discussed in general above. USEPA evidently allows a unit to remain open to receive non-hazardous waste based on the adequacy of the removal plan and contingent corrective measures plan. This "basic showing", or "basic decision", of the USEPA rule is set in the context of an application to modify the RCRA permit. However, it has three possible "mini-procedures" which may take place outside the context of the normal permit procedures. The basic showing and miniprocedures include:

264.113(e)(1) & (2)	Basic showing: unit is allowed to remain open to receive only non-hazardous waste following removal of hazardous waste and filing of an adequate "contingent corrective measures plan".
264.113(e)(3)	Extension of time for removal of hazardous waste.
264.113(e)(4)(iii)	Following detection of a release, shortening the time allowed for implementation of the corrective measures plan, or requiring the cessation of receipt of non-hazardous waste.
264.113(e)(6) & (7)	Requiring closure of the unit following a failure to implement the corrective measures plan, or failure to "make substantial progress".

Whether the basic showing is within the Agency's permit modification jurisdiction depends on whether it amounts to a "waiver" of the closure requirement in 35 Ill. Adm. Code 724.321, or whether it amounts to a "do A, or do B if condition X is true" rule. The basic showing could be construed either way. On the one hand, it is a "waiver" of the double liner and leachate collection and removal requirements of Section 724.321. On the other hand, it is an alternative standard under which the Agency reviews permits. For the reasons discussed below in connection with the other three "miniprocedures", the Board has characterized this a a "waiver" provision which requires some form of Board action.

40 CFR 264.113(e)(3) could be construed as a mini-procedure to be used for after-the-fact extensions of time to remove hazardous waste. However, the standard for approval is that the removal "will, of necessity, take longer". This appears to contemplate factors which ought to be known to the operator in advance of the removal, such that the operator should make the showing by way of normal permit application. Therefore, the Board suggests that the USEPA rule contemplates an advance showing as part of the approval of the removal plan.

On the other hand, 40 CFR 264.113(e)(4)(iii) comes into play after a release has been detected. This authorizes USEPA to alter the corrective measures plan to either shorten the one year allowed for implementation, or to require the operator to cease accepting non-hazardous waste. These are emergency actions, for which the standard is "to protect human health or the

environment". The USEPA rules do not specify a procedural context.

40 CFR 264.113(e)(6) and (7) deal with required closure of the unit. These subsections are intertwined. Under the former, the operator is required to close the unit if he either: fails to implement the corrective measures plan; or, fails to make "substantial progress" in implementing corrective action and achieving groundwater protection standards. The latter specifies a tentative decision/public comment/final decision process, which is an abbreviated version of the 40 CFR 124 permit modification procedures.

40 CFR 264.113(e)(4)(iii), (6) and (7) amount to "administrative orders", including a "closure order". The Agency cannot do this pursuant to its permit issuance authority under Section 39 of the Act. This power is reserved to the Board under Title VIII of the Act.

The process in the USEPA rules is patterned after the groundwater protection rules in 40 CFR 264, Subpart F, which appear in 35 Ill. Adm. Code 724.Subpart F. These were adopted in R82-19. (Opinion of July 26, 1983, p. 26, 42, 53 PCB 131, 156, 172.) The rules were amended in R89-1. A hazardous waste management facility is initially permitted with a "detection monitoring program". If a release is detected, the operator is required to file permit modification applications to establishing "compliance monitoring" and "corrective action" programs. If the applicant files the application, the Agency may act on the application, and modify the permit to require the operator to carry out remdial action measures. If the applicant fails to file the application, the Agency must bring an enforcement action, which may allege failure to file the application, as well as any underlying violations associated with the release itself. (R82-19, p. 27). The procedures in this rulemaking differ in that the operator does not initiate the process with an application, and Agency actions include a requirement to close a unit. This is more like a "cease and desist" order from the Board under Title VIII of the Act.

Another major problem with the USEPA rule is that it sets up a non-appealable determination. (40 CFR 264.113(e)(7)(v)). As noted above, for the Agency to have the authority to make this type of determination, it must be in the context of permit issuance, and, as such, subject to meaningful review by the Board. If a non-appealable decision is essential to the USEPA process, then it can't be an Agency permit decision.

The Board has therefore concluded that the Agency cannot implement the mini-procedures in 40 CFR 264.113(e) in the context of RCRA permit issuance. It is necessary for the Board to take some action, by way of enforcement order, variance, site-specific rulemaking or adjusted standard, to implement these requirements.

ADJUSTED STANDARD MECHANISM

This still leaves the question as to the character of the basic decision to allow the impoundment to remain open, which is discussed above. One option would be to allow the Agency to make the basic decision by permit modification, but to use Board decisions to modify or terminate the basic authorization. This appears to be rather complex, and it obscures the overall relationship of the basic decision and mini-procedures. The regulations seem

to be simpler if the Board construes the basic decision as a conditional waiver which is altered or terminated by the miniprocedures, with the result that the general rule, Section 724.321, again governs. Consistent with this, the Board has adopted a Board mechanism for the basic decision, subject to modification or termination by Board decision.

As noted, there are several possible ways for the Board to make these decisions. These include: enforcement order, variance, site-specific rulemaking or adjusted standard. An enforcement order or site specific rule would take too long to meet the intent of the federal rule. Variances are not appropriate, since the standard for the basic decision does not involve arbitrary or unreasonable hardship, and the rule would grant indefinite relief, without leading to eventual compliance with the general standard. The mini-proceedures also lean toward greater controls, opposite the usual direction of a variance. This is clearly a situation for an adjusted standard, in which the standards contained in the USEPA rule are construed as "justifications" for the adjusted standards, as the term is used in Section 28.1 of the Act, and 35 Ill. Adm. Code 106.701 et seq. The basic decision is to be done by adjusted standard. The mini-procedures are subsequent adjusted standards proceedings in which the Board considers whether to modify or terminate the original adjusted standard.

With the basic structure of 35 Ill. Adm. Code 724.213(e) decided, it is now time to turn to the details.

STRUCTURAL PROBLEMS WITH USEPA RULE

There are a number of basic problems with the way the USEPA rule is structured, which have forced the Board to completely rewrite the subsection in order to implement USEPA's intent in the adjusted standards procedural context. A correspondence table appears at the end of this Opinion. The main problem is that the structure of the USEPA rule is such that it is difficult to make a concise change to the procedural context.

To start with, the removal plan and contingent measures plan appear in the rule in the reverse of their temporal order. The operator has to remove the hazardous waste at the outset, but only implements the corrective measures plan if a release is detected. The way these appear in the USEPA rule leads the reader to the false conclusion that removal is to follow corrective measures.

The second basic problem is that the requirements for the removal and corrective measures plans are scattered about the rules. The Board has consolidated all of the requirements into subsections (e)(2) and (3). The scattering of requirements is the main structural defect which led to the reorganization. In the USEPA rule it is unclear whether the scattered provisions are part of the basic decision, or mini-procedures. In the State rule it would be necessary deal with the procedural nature of these requirements at many points in the rule. The result would be a confusing mess.

Along this line the Board has made a number of choices as to whether to characterize decisions as a part of the main decision, or mini-procedures. The Board solicited comment as to whether its interpretation is consistent

with USEPA's intent, but received no response.

One example is found in subsection (e)(2)(C), concerning extension of the 90 day removal period. (40 CFR 264.113(e)(3)). As is discussed above, the Board has construed this as a part of the main decision, and moved it into the requirements for the removal plan. The alternative would be to make it a post-hoc mini-procedure, but, as was discussed above, this appears to be inconsistent with the future-tense standard ("will, of necessity, take longer").

A second example occurs in subsection (e)(3)(C) and (D), which are drawn from 40 CFR 264.113(e)(4). These allow the contingent corrective measures plan to authorize continued receipt of waste following a release, and require implementation of the plan within one year after a release (or approval). These are clearly part of the plan, which need to be stated as standards for the basic decision.

One possible effect of moving these into the basic decision is to limit the use of these standards in a post-hoc fashion. For example, suppose the basic adjusted standard is issued, requiring 90 days for removal. However, bad weather delays removal in a manner which in retrospect was "of necessity". Under the Board rule it is necessary to reopen the basic adjusted standard to address this. A variance or provisional variance could be requested if there is not enough time to modify the adjusted standard in advance. The adjusted standard could then be modified to conform with the "as built" removal.

Two other structural ambiguities in the USEPA rule are in 40 CFR 264.113(e)(4), which is mainly in Section 724.213(e)(4) and (5). The first problem is the definition of a "release" in the introduction. A "release" triggers the miniprocedures, so that this is a very important definition for specifying procedures. The USEPA rule appears to define "release" in a parenthetical, as follows:

> If a release that is a statistically significant increase [or decrease in the case of pH] over background values for detection monitoring parameters or contaminants specified in the permit or that exceeds the facility's ground-water protection standard at the point of compliance, if applicable, is detected in accordance with the requirements if Subpart F of this part, the owner or operator of the unit: ...

This violates one of two canons of rule writing. It is either defining a term in a subordinate clause, or it is repeating a definition in a parenthetical. If one is defining a term in a rule, it is a complete thought and ought to be a separate sentence, preferably labled as a "definition". Also, it is not a good idea to repeat definitions as "aids to the reader" in parentheticals. For example: "If your horse, which, by the way, is a four legged mammal, breaks his leg..." The problem with restating definitions in parentheticals is that the reader never knows whether a redefinition is intended. And, if the redefinition is not perfect, the parenthetical opens the door to loopholes and contradictory provisions.

The Board has construed the clause as a special, local definition of "release", and made it a separate sentence in subsection (e)(4). However, the Board cannot see any difference between this definition and the general definition in Subpart F. If there is none, "release" ought to be defined simply as "a release detected pursuant to Subpart F". The Board solicited comment as to what the difference is, but received no response.

There is yet another apparent error in the USEPA rule which needs to be corrected. When one attempts to convert the clause directly into a sentence it becomes apparent that something is very wrong. The USEPA rule reads "If a release that is a ... statistically significant increase ... or that exceeds ... groundwater protection standard..." The subject changes in the middle of the clause. Moreover, the phrase "statistically significant increase [or decrease in the case of pH]" certainly needs to modify the provisions concerning groundwater protection standards, as well as detection monitoring parameters. The Board has adopted the following in Section 724.213(e)(4):

> Release. A release is a statistically significant increase (or decrease in the case of pH) over background values for detection monitoring parameters or constituents specified in the permit, or over the facility's groundwater protection standard at the point of compliance, if applicable, detected in accordance with the requirements in Subpart F.

The second major problem with this subsection arises from the "mini-procedures" in 40 CFR 264.113(e)(4)(iii). USEPA specifies no procedural requirements whatsoever for these procedures. They do not appear to be permit modifications under the USEPA rules. Nor does USEPA specify the procedures of subsection (e)(7). As is discussed above, the Board has used the adjusted standard mechanism for the basic decision, and to handle this "miniprocedure" as a modification of the adjusted standard.

At several points the USEPA rule requires the owner or operator to "implement" corrective measures. (40 CFR 264.113(e)(4)(i), (4)(iii), (6) and (7)). Does this mean to begin to implement the plan, or to complete the implementation of the plan? The Board solicited comment on this, but received no response.

Many of the requirements in 40 CFR 264.113(e) have three aspects: the operator has to have a plan to do X; he has to do X; and, doing X is a condition precedent to doing something else. The USEPA rules often omit one or more of these. For example, the USEPA requires a removal plan and requires removal of the hazardous waste, but omits any effect of failure to remove on the basic decision to allow the unit to continue accepting non-hazardous waste. As is discussed below, the Board has conditioned the adjusted standard on actually effecting the removal (Section 724.213(e)(8)(C)(i)).

The USEPA rule also omits an explicit standard for the basic approval. It is pretty clear that the standard is a sufficient removal plan and contingent corrective measures plan. However, the rules are vague as to what a sufficient contingent corrective measures plan might be. The standard may be implied by 40 CFR 264.113(e)(1)(i), which provides that the plan may be a corrective action plan filed under §264.99. In Section 724.213(e)(3)(A), the

Board has provided that the corrective measures plan ought to meet the requirements of a corrective action plan, based on the assumption that a release has been detected from the unit. The Board solicited comment on this, but received no response.

The USEPA rule appears to repeat the standard for required closure in 40 CFR 264.113(e)(6) and (7). The Board has placed the standard for closure in Section 724.213(e)(7), and the procedures in (e)(8), avoiding repetition.

DISCUSSION OF BOARD RULE

The Board rule, Section 724.213(e), is sufficiently different from 40 CFR 264.113(e) that it merits an independent explanatory discussion. The comparison with the USEPA rule and reasons for departure from the text are discussed above.

Section 724.213(e) allows the owner or operator of a surface impoundment which is not in compliance with the double liner and leachate collection requirements in Section 724.321 to remove hazardous waste, and remain open for receipt of non-hazardous waste only. The unit remains a HWM unit, and must eventually close as such.

An operator who wishes to remain open to receive non-hazardous waste must file a petition for adjusted standard with the Board. Procedures are discussed below in subsection (e)(8). The Board will grant the adjusted standard if it has a sufficient removal plan and corrective measures plan.

The removal plan (Section 724.213(e)(2)) must provide for removing all hazardous liquids, and for removing all hazardous sludges, to the extent practicable without imparing the integrity of any liner. The plan must call for removal within 90 days after the final receipt of hazardous waste. The Board may approve a longer time if the removal will, of necessity, take a longer time, and the extension will not pose a threat to human health and the environment.

The contingent corrective measures plan (Section 724.213(e)(3)) is a corrective action plan under Section 724.199, based on the assumption that a release has been detected, i.e., it tells what the operator would do in the event a release were to be detected. It differs from a normal corrective action plan in that it must be filed in advance of detection of a release. If the operator wishes to continue receiving non-hazardous wastes following a release, he must demonstrate that continued receipt will not impede corrective action. The corrective measures plan must provide for implementation within one year after a release, or after approval of the adjusted standard, whichever is later.

If a release is detected, the operator must file a new petition for adjusted standard with the Board within 35 days. Pursuant to the new adjusted standard, if the Board determines that it is necessary to protect human health and the environment, the Board will modify the original adjusted standard to require quicker implementation of corrective measures, or to require the unit to cease accepting waste. In addition, the Board will retain jurisdiction, or specify conditions leading to further consideration of the adjusted standard. (Section 724.213(e)(5)(A)).

The Board will terminate the adjusted standard if the operator fails to implement corrective measures in accordance with the plan, or if the operato fails to make substantial progress in implementing corrective measures and achieving the groundwater protection standard or background levels, as applicable. In addition, the adjusted standard will automatically terminate if the operator failed to remove hazardous waste, or failed to file an adjusted standard when required to do so. (Section 724.213(e)(7))

Procedures are governed by Section 724.213(e)(8). This subsection relies on the general adjusted standard procedures in 35 Ill. Adm. Code 106.701 et seq. These were adopted in R88-5, July 10, 1989, and appeared on July 21, 1989, at 13 Ill. Reg 12094. Note that there are relictual RCRA adjusted standard procedures in 35 Ill. Adm. Code 106.Subpart D, which are cited in other RCRA adjusted standard governing rules. The Board sees no reason why the general rules cannot be used for this adjusted standard. The Board solicited comment, but received no reponse. These adjusted standards will be granted based on "justifications", as defined in Section 28.1 of the Act. The justifications appear in Section 724.213(e).

The justification for the "basic decision" discussed above is that the operator has a sufficient contingent corrective measures plan and removal plan. (Section 724.213(e)(8)(B)). The justifications for modifying or terminating the adjusted standard are set out in Section 724.213(e)(5)(A) and (e)(7). These include: modification to accelerate the corrective action plan or cease accepting waste, pursuant to a finding of necessity in order to protect human health and the environment; and, termination on failure to implement corrective action, or failure to make substantial progress in implementing the plan, or achieving groundwater protection standards or background levels.

The basic adjusted standard will include a number of conditions set out in Section 724.213(e)(8)(C). These generally repeat the requirements set out above. The adjusted standard must include the following conditions: the removal plan; removal; the contingent corrective measures plan; required implementation of the plan; a semi-annual report; and, a variety of zipper clauses. These include a requirement to file a new adjusted standard petition within 35 days after a release; automatic termination on failure to implement removal or file a required adjusted standard petition; and, a requirement to close in the event of termination.

Under Section 724.213(e)(9) the Agency is required to modify the RCRA permit to reference the adjusted standard. It is necessary to add this requirement in the State rules, since the adjusted standard process is outside the permit issuance procedures.

Under Section 724.213(e)(10), the owner or operator is allowed to file a revised closure plan within 15 days after an adjusted standard is terminated. This provision is drawn from 40 CFR 264.113(e)(7)(iii). Revision of the closure plan would proceed by normal permit modification.

COMPARISON OF ADJUSTED STANDARD TO USEPA PROCEDURE

The adjusted standard procedures are somewhat different from the USEPA procedures for requiring closure in 40 CFR 264.113(e)(7). Under the USEPA

procedure, USEPA first makes a (tentative) decision that the owner or operator has failed to implement closure or to achieve substantial progress. USEPA gives a public notice, and allows a 20 day public comment period. If USEPA receives no comment, the decision becomes final 5 days after the end of the comment period. Therefore, in the absence of comment, USEPA could reach a final decision 25 days after the initial decision. If USEPA receives public comment, it is to wait 30 days after the end of the comment period, and publish notice of the final decision. This process would require 50 days, plus the final publication time, again measured from the initial publication.

Under the Board's adjusted standards procedure, a release would force the owner or operator to file a new adjusted standards petition. The Board would consider modification pursuant to Section 724.213(e)(5)(A), and either retain jurisdiction, or issue a modified adjusted standard with a condition requiring a new petition to address required closure. The following timeline assumes the latter situation. In the former situation, the matter would already be before the Board, so that some of these procedural steps would already have occurred, shortening the time to final decision.

The petitioner must give public notice of the filing of an adjusted standard petition within 14 days after filing. The public has 21 days in which to request a hearing. If a request is received, the Board will give at least 20 days notice prior to the hearing date. 14 more days are allowed for post-hearing comment. If a hearing is requested, it would take around 84 days to reach a final decision. If no hearing is requested, the Board would act on the petition and Agency response. The latter is due 30 days after the petition.

Thus the USEPA process takes some 25 to 50 days, while the Board process takes 30 to 84 days. However, it is not possible to compare these numbers directly, since the "procedures" do not start at the same moment: while the USEPA timeline starts from the publication of its initial decision, the Board's starts with the filing of a required petition. The USEPA rule does not articulate any timeline for the internal mechanisms leading up to publication of the initial decision. The comparable point in the Board procedure is either the publication of notice of the petition by day 14, or the receipt of the Agency response by day 30, which is the first time the State takes a position on whether closure ought to be required. After subtracting 30 days for the response, the adjusted standards process takes from zero to 54 days, very similar to the USEPA times.

Section 724.242

This Section is drawn from 40 CFR 264.142, which was amended at 54 Fed. Reg. 33393, August 14, 1989. This Section has been amended to specify the closure cost estimate in the event a unit is going to accept non-hazardous waste after its final volume of hazardous waste.

PART 725: STANDARDS FOR INTERIM STATUS FACILITIES

The following amendments are drawn from 54 Fed. Reg. 33393, August 14, 1989. These amendments allow hazardous waste management units which have closed to receive non-hazardous wastes under certain conditions. These pose many of the same issues as the Part 724 rules. However, these decisions take

place outside the context of the permit program. Issues in common between Parts 724 and 725 will not be repeated.

Section 725.113

This Section is drawn from 40 CFR 265.13, which was amended at 54 Fed. Reg. 33393, August 14, 1989.

40 CFR 265.13 and the following Sections repeat the following phrase, with varying punctuation: "...hazardous waste or nonhazardous waste, if applicable, under §265.113(d) ..." The Board has attempted to correct the punctuation, and render this phrase consistently as: "...hazardous waste, or nonhazardous waste if applicable under §265.113(d), ..."

Section 725.113(a)(1) has the same ambiguity discussed above in connection with Section 724.113: the Federal Register instructions are ambiguous as to whether the basic standard for a waste analysis plan has been repealed. As discussed above, the Board has determined that USEPA did not intend to repeal the standard, and has therefore left it in. As is also discussed above, the Board had originally proposed to drop the standard.

Section 725.112

This Section is drawn from 40 CFR 265.112, which was amended at 54 Fed. Reg. 33393, August 14, 1989.

Section 725.213

This Section is drawn from 40 CFR 265.113, which was amended at 54 Fed. Reg. 33393, August 14, 1989. This includes the addition of Section 725.213(d) and (e), which govern the conditions under which a unit may continue to receive nonhazardous waste after it has received its final volume of hazardous waste. This is similar to Section 724.213, discussed above, except that approval for interim status units must come outside the permit system. However, one of the conditions in 40 CFR 265.113(d) is that the owner or operator of an interim status unit must file a Part B permit application. Therefore, these provisions apply only to interim status units with an application pending. For this reason, many references go to the final permitting rules.

One difference is in the introduction to 40 CFR 265.113(d): USEPA may allow interim status units "to receive non-hazardous wastes". However, under 40 CFR 264.113(d), USEPA may allow permitted units "to receive only non-hazardous waste". The Board solicited comment on this, but received no response.

As discussed above, 40 CFR 264.113 and 265.113 include references to Sections 3004 and 3005 of RCRA. The references, in 40 CFR 265.113(e), to Section 3004 appear to be irrelevant, since Section 3004 applies only to permitted facilities. However, the references to Section 3005 do apply to interim status facilities.

As was discussed above, the Board wishes to avoid making unneccesary references to federal statutes, prefering to reference the derivative State

rules. It is somewhat more difficult to locate the requirements of Section 3005(j)(1), (2) - (4) and (13) in the regulations. Section 3005(j)(1) prohibits acceptance of hazardous wastes at an interim status surface impoundment, unless the unit meets the standards 3004(o)(1)(A) of RCRA, the standards for new facilities. This appears to be reflected in Section 725.321(a). Section 3005(j)(2) - (4) are exceptions to 3005(j)(1). They do not appear to correspond with the exceptions stated in the rules. The Board solicited comment, but received no response, as to whether it is necessary to reference these exceptions, and as to where the exceptions are located in the rules.

Section 3005(j)(13) allows the Administrator to modify the requirements of Section 3005(j)(1) in the case of surface impoundments subject to prior consent decrees. It is not clear whether this reference has any place in the State rules, pursuant to Section 7.2(a)(1).

In summary, the Board has referenced only 35 Ill. Adm. Code 725.321(a). The Board solicited comment on this, but received no response.

A second possible difference between the rules for interim status and permitted facilities occurs in Section 725.213(e)(3)(A) and (B), which relate the contingent corrective measures plan to the corrective action plan under Part 724. As was discussed above, the USEPA Part 264 rule provides that the contingent corrective measures plan may be one previously filed under §264.99. This is omitted from the interim status rule. However, as noted above, units subject to this rule have to file Part B applications, which might include a corrective action plan under §264.99. The Board sees no reason why this couldn't be used here, and has retained this reference.

As was also discussed above, the USEPA rule lacks a standard for approval of the contingent corrective measures plan. The Board fixed this above by reference to the equivalent of §264.99, 35 Ill. Adm. Code 724.199. Note that the corrective action plan is unique to Part 264: there is no equivalent in Part 265. Although the interim status unit is not subject to §264.99, it is required to file an application pursuant to it. There is no reason why the Board should not borrow this standard from the final rules with respect to the interim status facilities also. Therefore, in Section 725.213(e)(3)(A) and (B), the Board has used the same language as in Part 724.

The definition of "release" in Section 725.213(e)(4) is different for the interim status rules, because interim status facilities lack "detection monitoring parameters" and "groundwater protection standards". Rather, the interim status facility just monitors for "hazardous constituents". Also, "release" is judged against Subpart F of Part 265.

The Board has used the same adjusted standards procedures for the interim status approval as for permitted facilities. Indeed, a major advantage of the adjusted standard mechanism in this situation is that there is no need to create a special procedural system managed by the Agency outside the permit system.

Because the interim status facility lacks a formal permit, there is no necessity for Agency action following an adjusted standard granted by the Board. There is therefore no need for an equivalent of Section 724.213(e)(9),

which requires modification of permits to conform with the adjusted standard.

The Board has corrected a typographical error in the proposal at Section 725.213(d)(1)(B). (Repetition of "waste".) (PC 4)

Section 725.242

This Section is drawn from 40 CFR 265.142, which was amended at 54 Fed. Reg. 33393, August 14, 1989.

PART 726: STANDARDS FOR RECYCLING, ETC.

Section 726.120

This Section is drawn from 40 CFR 266.20, which was amended at 54 Fed. Reg. 36970, September 6, 1989. These amendments concern corrections to the first third land disposal bans, concerning use of commercial fertilizers made from hazardous waste.

PART 728: LAND DISPOSAL RESTRICTIONS

The following amendments were drawn from 54 Fed. Reg. 36970, September 6, 1989. They are corrections to the first third land disposal bans, which were adopted in previous Dockets.

Section 728.101

This Section is drawn from 40 CFR 268.1, which was amended at 54 Fed. Reg. 36970, September 6, 1989. Paragraph (c) has been broken into two paragraphs, (c) and (e). The former now deals with "restricted" wastes, which may still be land disposed if certain "exemptions" have been granted. New paragraph (e) states the exclusions from Part 728: Small quantity generator waste; waste pesticides disposed on the farm; and, wastes identified or listed after November 8, 1984 (the effective date of the HSWA amendments to RCRA), and for which no land disposal prohibitions or treatment standards have been promulgated.

The last exclusion is keyed to the date of USEPA action in listing additional wastes. It appears to be necessary to reference the USEPA action on this point.

Section 728.105

This Section is drawn from 40 CFR 268.5, which was amended at 54 Fed. Reg. 36970, September 6, 1989. This Section incorporates by reference the USEPA procedures for case-by-case extension of effective dates for land bans. Extensions granted by USEPA are deemed extensions of the derivative Board rule. The Board has updated the incorporation by reference to include the USEPA amendment.

Section 728.106

This Section is drawn from 40 CFR 268.6, which was amended at 54 Fed. Reg. 36970, September 6, 1989. In Section 728.106(f)(1), "restricted waste" is changed to "prohibited waste".

Section 728.107

This Section is drawn from 40 CFR 268.7, which was amended at 54 Fed. Reg. 36970, September 6, 1989. The amendments reflect minor changes in wording to subsections (a)(3), (a)(4) and (b)(8), and add (c)(4).

Section 728.108

This Section is drawn from 40 CFR 268.8, which was amended at 54 Fed. Reg. 36970, September 6, 1989. This Section incorporates by reference the USEPA procedures for extensions of certain landfill and surface impoundment restrictions. The Board has updated the incorporation. However, in that this procedure will no longer be available after May 8, 1990, the Board solicited comment as to whether it would be better to repeal it. The Board received no response. In that this is a recently passed date, the Board will leave the rule in place for the time being.

Section 728.132

This Section is drawn from 40 CFR 268.32, which was amended at 54 Fed. Reg. 36970, September 6, 1989. The correction concerns Section 728.132(f). 40 CFR 268.32(f) originally read: "may be disposed in a landfill or surface impoundment only if such disposal is in compliance with ... §268.5(h)(2)". The Board noted a problem with this wording and adopted "the facility" in place of the underlined words. USEPA has now corrected the problem by replacing the underlined words with "such unit". The Board has now adopted the USEPA correction.

The proposal failed to show "the" struck out with "facility". This has been corrected. (PC 2)

Section 728.133

This Section is drawn from 40 CFR 268.33, which was amended at 54 Fed. Reg. 36970, September 6, 1989. There are major problems with the Federal Register text of these corrections.

Item 24 in the Federal Register instructs to remove "K015 wastewaters". However, this listing does not appear in Section 728.133(a). It also appears absent from the Federal Register cited in the correction. One possiblity is that the listing was added subsequent to the orginal Federal Register. Another possibility is that the listing for "K015" should be removed. Yet another possibility is that "K015" should be changed to "K015 nonwastewaters", thereby removing "K015 wastewaters" from the "K015" listing. The Board solicited comment, but received no response.

As was discussed in the Proposed Opinion, Item 32 in the Federal Register included instructions which could not be carried out. This was clarified at 55 Fed. Reg. 23935, June 13, 1990. The insert should have been keyed to "extract or the waste", at the second occurrence in Section 728.133(g).

In the proposal, in Section 728.133(a), listing K102 was incorrect. This has been corrected to correspond with the Federal Register. (PC 4)

Section 728.144 (No amendment)

This Section is drawn from 40 CFR 268.44, which was amended at 54 Fed. Reg. 36970, September 6, 1989. The amendment changes the office with USEPA which is to receive requests for "variances" from treatment standards. This has been rendered as an adjusted standard in the Board rule, and the office remains unchanged at the State level.

Section 728.150

This Section is drawn from 40 CFR 268.50, which was amended at 54 Fed. Reg. 36970, September 6, 1989. The prohibition on storage of restricted wastes has been corrected.

CONVERSION TABLES FOR SECTION 724.213(e)

The following tables show equivalence between 35 Ill. Adm. Code 724.213(e) and 40 CFR 264.113(e).

STATE TO FEDERAL TABLE

35 Ill. Adm. Code	40 CFR
106.711	264.113(e)(7)(ii)
106.903	264.113(e)(7)(iii)
106.903	264.113(e)(7)(iv)
724.213(e)	264.113(e)
724.213(e)(1)	264.113(e)(1)
724.213(e)(1)(A)	264.113(e)(1)(ii)
724.213(e)(1)(B)	264.113(e)(1)(i)
724.213(e)(2)(A)	264.113(e)(2)
724.213(e)(2)(B)	264.113(e)(2)
724.213(e)(2)(C)	264.113(e)(3)
724.213(e)(2)(C)(i)	264.113(e)(3)
724.213(e)(2)(C)(ii)	264.113(e)(3)
724.213(e)(3)(A)	state
724.213(e)(3)(B)	264.113(e)(1)(i)
724.213(e)(3)(C)	264.113(e)(4)(ii)
724.213(e)(3)(D)	264.113(e)(4)(i)
724.213(e)(4)	264.113(e)(4)
724.213(e)(5)(A)	264.113(e)(4)(iii)
724.213(e)(5)(A)(i)	264.113(e)(4)(iii)
724.213(e)(5)(A)(ii)	264.113(e)(4)(iii)
724.213(e)(5)(B)	264.113(e)(4)(i)
724.213(e)(5)(C)	264.113(e)(4)(ii)
724.213(e)(6)	264.113(e)(5)
724.213(e)(6)(A)	264.113(e)(5)
724.213(e)(6)(B)	264.113(e)(5)
724.213(e)(6)(C)	264.113(e)(5)
724.213(e)(7)	264.113(e)(6)
724.213(e)(7)(A)	264.113(e)(7)

724.213(e)(7)(A)	264.113(e)(6)
724.213(e)(7)(B)	264.113(e)(7)
724.213(e)(7)(B)	264.113(e)(6)
724.213(e)(8)	state
724.213(e)(8)(A)	state
724.213(e)(8)(B)	state
724.213(e)(8)(C)(i)	264.113(e)(1)(ii)
724.213(e)(8)(C)(ii)	264.113(e)(2)
724.213(e)(8)(C)(iii)	264.113(e)(1)(i)
724.213(e)(8)(C)(iv)	264.113(e)(4)(i)
724.213(e)(8)(C)(v)	state
724.213(e)(8)(C)(vi)	264.113(e)(6)
724.213(e)(9)	state
724.213(e)(10)	264.113(e)(7)(iii)
n.s.e.	264.113(e)(7)(v)
n.s.e.	264.113(e)(7)(i)

FEDERAL TO STATE TABLE

40 CFR	35 Ill. Adm. Code
264.113(e)	724.213(e)
264.113(e)(1)	724.213(e)(1)
264.113(e)(1)(i)	724.213(e)(1)(B)
264.113(e)(1)(i)	724.213(e)(3)(B)
264.113(e)(1)(i)	724.213(e)(8)(C)(iii)
264.113(e)(1)(ii)	724.213(e)(1)(A)
264.113(e)(1)(ii)	724.213(e)(8)(C)(i)
264.113(e)(2)	724.213(e)(2)(A)
264.113(e)(2)	724.213(e)(2)(B)
264.113(e)(2)	724.213(e)(8)(C)(ii)
264.113(e)(3)	724.213(e)(2)(C)
264.113(e)(3)	724.213(e)(2)(C)(i)
264.113(e)(3)	724.213(e)(2)(C)(ii)
264.113(e)(4)	724.213(e)(4)
264.113(e)(4)(i)	724.213(e)(8)(C)(iv)
264.113(e)(4)(i)	724.213(e)(3)(D)
264.113(e)(4)(i)	724.213(e)(5)(B)
264.113(e)(4)(ii)	724.213(e)(3)(C)
264.113(e)(4)(ii)	724.213(e)(5)(C)
264.113(e)(4)(iii)	724.213(e)(5)(A)
264.113(e)(4)(iii)	724.213(e)(5)(A)(i)
264.113(e)(4)(iii)	724.213(e)(5)(A)(ii)
264.113(e)(5)	724.213(e)(6)
264.113(e)(5)	724.213(e)(6)(A)
264.113(e)(5)	724.213(e)(6)(B)
264.113(e)(5)	724.213(e)(6)(C)
264.113(e)(6)	724.213(e)(7)(A)
264.113(e)(6)	724.213(e)(7)(B)
264.113(e)(6)	724.213(e)(7)
264.113(e)(6)	724.213(e)(8)(C)(vi)
264.113(e)(7)	724.213(e)(7)(B)
264.113(e)(7)	724.213(e)(7)(A)
264.113(e)(7)(i)	n.s.e.

264.113(e)(7)(ii)	106.711
264.113(e)(7)(iii)	106.903
264.113(e)(7)(iii)	724.213(e)(10)
264.113(e)(7)(iv)	106.903
264.113(e)(7)(v)	n.s.e.
state	724.213(e)(9)
state	724.213(e)(8)(C)(v)
state	724.213(e)(8)
state	724.213(e)(8)(A)
state	724.213(e)(8)(B)
state	724.213(e)(3)(A)

This Opinion supports the Board's Order of this same day. The Board will not file the rules until after August 3, 1990, to allow time for post-adoption review by the agencies involved in the authorization process.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 3rd day of July, 1990, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board