ILLINOIS POLLUTION CONTROL BOARD
July 16, 1987

IN THE MATTER OF:	)	
	)	
RCRA UPDATE, USEPA REGULATIONS	)	R86-46
(7-1-86 THROUGH 9-30-86)	)	

FINAL ORDER. ADOPTED RULE

OPINION OF THE BOARD (by J. Anderson):

By a separate Order, pursuant to Section 22.4(a) of the Environmental Protection Act (Act), the Board is amending the RCRA regulations.

On October 9, 1986, the Board opened this docket for the purpose of updating the RCRA rules to agree with recent USEPA amendments.

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, and 280. This rulemaking updates Illinois' RCRA rules to correspond with federal amendments during the period July 1 through September 30, 1986. The Federal Registers utilized are as follows:

51 Fed. Reg. 25350	July 11, 1986
51 Fed. Reg. 25422	July 14, 1986
51 Fed. Reg. 28295	August 6, 1986
51 Fed. Reg. 28556	August 8, 1986
51 Fed. Reg. 28663	August 8, 1986
51 Fed. Reg. 29429	August 15, 1986
51 Fed. Reg. 33612	September 22, 1986

The Board appreciates the assistance of Morton Dorothy in drafting the proposal.

PUBLIC COMMENT

The Board proposed these rules for public comment on March 19, 1987. The proposal appeared on April 17, 1987 at 11 Ill. Reg. 6958. The Board received the following public comment:

PC #1 Illinois Department of Insurance, April 13, 1987

PC #2 United States Environmental Protection Agency (USEPA), May 21, 1987

PC #3 USEPA, May 27, 1987

PC #4 Illinois Environmental Protection Agency (Agency), June 22, 1987

PC #5 Joint Committee on Administrative Rules (JCAR), May 7, 1987

The Board has accepted the Agency's comment, although it was filed significantly after the end of the comment period.

The Board received, during the public comment period, a series of questions from the Joint Committee on Administrative Rules (JCAR). Although Section 22.4(a) of the Act exempts these fast-track "identical in substance" rulemakings from formal interaction with JCAR, the Board will attempt to respond to JCAR's section specific comments, and, at the end of the Opinion, to JCAR's general questions.

The Board also received codification comments from the Administrative Code Unit.

HISTORY OF RCRA and UIC ADOPTION

The Illinois RCRA and UIC (Underground Injection Control) rules, together with more stringent state rules 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
729	Landfills: Prohibited Wastes
730	UIC Operating Requirements
731	Underground Storage Tanks

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

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

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

The UIC rules were amended in R82-18, which is referenced above. The UIC rules 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 rules:

R85-23 June 19, 1986; 10 Ill. Reg. 13274, August 8, 1986.

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

The Phase II RCRA rules included adoption of Parts 703 and 724, which established the permit program and final TSD standards. The Phase II rules 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 rules to correspond with USEPA amendments in several dockets. The period of the USEPA rules 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 July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986. (7/1/85 -- 1/31/86)

R86-19 October 23, 1986; 10 Ill. Reg. 20630, December 12, 1986. (2/1/86 -- 3/31/86)

R86-28 February 5 and March 5, 1987; 11 Ill. Reg. 6017, April 3, 1987. Correction April 16, 1987; 11 Ill. Reg. 8684, May 1, 1987. (4/1/86 -- 6/30/86)

R86-46 This Docket. (7/1/86 -- 9/30/86)

R87-5 Next Docket, proposed May 14, 1987 (10/1/86 -- 12/31/86)

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

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 effectively repealed by R85-22, which included adoption of USEPA's dioxin listings. The Board has adopted a USEPA delisting at the request of Amoco:

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

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

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, which is listed above. Part 106 is amended below.

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 rules adopted October 23, 1986; 10 Ill. Reg. 19787, effective November 5, 1986.

The Board's action in adopting emergency rules in R86-9 was reversed (CBE and IEPA v. IPCB et al., First District, January 26, 1987).

DETAILED DISCUSSION

The USEPA amendments involved in this update are summarized as follows:

51 FR	1986	
25350	July 11	Liability insurance
25422	July 14	Tank systems
28295	August 6	Corrections to listings
28556	August 8	Corrections to biennial reporting requirement
28663	August 8	Exports of hazardous waste
29429	August 15	Corrections to tank systems rules
33612	September 22	Correction to listing of spent pickle liquor

Most of the amendments are drawn from the July 14 tank systems rules. The second largest set are drawn from the August 8 requirements concerning exports of hazardous waste to other countries. The July 11 rules add a corporate guarantee mechanism as an alternative to liability insurance.

Section 106.401 et seq.

The Board is amending the procedures for solid waste and boiler determinations which were adopted in R85-22. These are now generic procedural rules which the Board will reference in the substantive rules whenever adjusted standards procedures are appropriate. The rules are discussed below in connection with Sections 724.293 and 725.293, which reference the adjusted standards procedures.

JCAR has questioned whether these rules are a part of the RCRA rules, and whether they can be adopted by way of "identical in substance" procedures. (PC #5). This Subpart is a part of the RCRA rules. The Board has cited Section 22.4 of the Act in the authority note. These rules will be submitted to USEPA as a part of the RCRA program package.

The USEPA rules include decisions which are to be made by the authorized states. As noted below, in Illinois there is a question as to whether a decision involves applying a Board rule in the context of permit issuance by the Agency, or whether the action is one of determining an environmental control standard, which has to be done by the Board. When the decision is by the Agency, the permit rules in Parts 702 through 705 usually form a procedural framework for decision. These procedures are similar to the permit application procedures before USEPA, so it is often possible to adopt the USEPA rules verbatim. When the decision has to be made by the Board, the procedural context is much different. It is necessary to have some sort of a petition to the Board to initiate the process, and it is necessary to coordinate the Board's action with the permit application process. These procedures would be used when the Board exercises adjusted standards authority pursuant to Section 28.1 of the Act.

These rules are identical in substance with USEPA rules. The Board grants or denies the request based on the same standards as USEPA. However, the procedural context has been modified to accomodate the division of authority between the Board and Agency as required by the Act, and to comply with specific procedural requirements in the Act for adjusted standards.

Section 703.155

This Section is drawn from 40 CFR 270.72, which was amended at 51 Fed. Reg. 25471. Operators of interim status facilities are allowed, without filing a permit application, to modify tank systems to meet the new requirements discussed below in connection with Section 725.293.

Section 703.183

This Section is drawn from 40 CFR 270.14, which was amended at 51 Fed. Reg. 25471. The amendments modify the contents of the general Part B application to request information related to the new requirements for tank systems.

Section 703.202

This Section is drawn from 40 CFR 270.16, which was amended at 51 Fed. Reg. 25471. The portion of the application relating specifically to tank systems has been largely replaced. Section 703.202(h) deals with alternative design and operating practices for tank systems. As is discussed elsewhere, the Board will grant alternatives pursuant to a petition for adjusted standards. Section 703.202(h)(3) has been added to require the permit applicant to include a copy of the Board Order granting an adjusted standard, or a copy of the petition if the matter is still pending.

JCAR questions why Section 703.202(h)(3) is not worded verbatim with USEPA rules. (PC #5). As is discussed below in the general response to JCAR and in the discussion of Part 106, the Board has above amended its adjusted standards rules which are to be used in certain cases in which the USEPA rules specify a decision which is the equivalent of determining an environmental control standard. 40 CFR 270.16(h) is the portion of the permit application in which USEPA requests information which would lead to a tank system variance under USEPA rules. In the Illinois rules, the "variance" has to be handled through the adjusted standards mechanism. The information requested in 40 CFR 270.16(h)(3) is requested by way of 35 Ill. Adm. Code 106.413 and 724.293. All the applicant has to do is advise the Agency as to whether alternative standards have been granted, or whether a petition is pending. This has been provided in Section 703.202(h)(3). These rules taken together are identical in substance to the USEPA rules in that the same people get the same "variances" in the same circumstances. However, the procedures have been modified to reflect requirements of the Environmental Protection Act.

Section 720.102 (Not amended)

This Section deals with confidentiality. USEPA amended its confidentiality rule, 40 CFR 260.2, at 51 Fed. Reg. 28682, to add specific provisions regarding confidentiality of information supplied to the State Department regarding exports of hazardous waste. The Board has not adopted an equivalent for two reasons. First, exports will be primarily administered by USEPA, as is discussed in connection with Section 722.150. Second, to the extent the Agency may become involved in this, confidentiality must be handled pursuant to 35 Ill. Adm. Code 120, as is already provided in Section 720.102.

Section 720.110

This Section is drawn from 40 CFR 260.10, which was amended at 51 Fed. Reg. 25471. The amendments add definitions related to tank systems. The following definitions have been added: Aboveground tank, ancillary equipment, component, corrosion expert, existing tank system, inground tank, installation inspector, leak-detection system, new tank system, onground tank, sump, tank system, underground tank, unfit-for-use tank system and zone of engineering control.

The Board has also made several minor corrections to other definitions. (PC #4).

Section 720.111

This Section incorporates by reference materials used in Parts 720 through 725. It has no close counterpart in the CFR. The Board has amended this Section by adding references to several items used in the new requirements for tank systems.

The Administrative Procedure Act (APA) requires that the Board limit incorporations by reference to materials readily available to the public, that it provide sufficient information for the public to find the documents and that it not incorporate future amendments or editions. The Board has modified these rules to comply with the APA requirements.

The Board has consolidated the incorporations into a single Section, which is referenced when the incorporations are used in the other rules. The Board has to include with incorporations more information than USEPA. It is more efficient to provide this one time, rather than repeating it throughout the rules.

Most of the incorporations are standards set by industry or standards organizations. The standards are known by the initials of the organization, such as ANSI, API and ASTM. The Board has rearranged this Section into an alphabetical list of organizations by initials. This allows the Board to shorten the Section since it is not necessary to repeat the full names and addresses of the organizations, some of which have several standards used.

The Board has added the statement, now required by the APA, that the incorporations include no future editions or amendments. The Board has obtained a copy of the Steel Tank Institute (STI) "Standards for Dual Wall Underground Steel Storage Tanks." STI has indicated by telephone that this is the 1986 edition, and the Board has used this date in the incorporation by reference. However, the date does not appear on the document. The Board will maintain a copy of this document in case questions should arise later as to which edition was incorporated.

The Board has deleted the availability statements concerning the Federal Register Office and the Illinois State Library. USEPA has not indicated whether the newly incorporated material has in fact been deposited in the Federal Register Office. Since these statements are not necessary, the Board has deleted them.

Section 721.104

This Section is drawn from 40 CFR 261.4, which was amended at 51 Fed. Reg. 25471. The amendment to Section 721.104(a)(8) adds an exclusion for secondary materials that are reclaimed and returned to the original production process where storage occurs in a closed tank system.

Section 721.105

This Section is drawn from 40 CFR 261.5, which was amended at 51 Fed. Reg. 28682. Small quantity generators will no longer be conditionally exempt if they export hazardous waste to other countries.

Section 721.106

This Section is drawn from 40 CFR 261.6, which was amended at 51 Fed. Reg. 28682. The exclusion for reclaimed ethanol under Section 721.106(a)(3)(A) may be subject to the new provisions regarding exports of hazardous waste.

40 CFR 261.6(a)(3)(i)(E) provides that: "Transporters ... may not accept a shipment if he knows the shipment does not conform to the EPA Acknowledgement of Consent, ..." (sic). The Board has corrected a number of grammatical and stylistic problems with this Section, including changing it to read: "shall not accept." JCAR says that this "alters the entire scope of that Section." (PC #5). The Board believes that its rule is identical in substance. In the first place, the provision in question does not relate to the "scope" of the Section. In the second place, the Board believes that USEPA intended to state a prohibition. One has to reach to come to the conclusion that transporters have an election to comply or not to comply with the acknowledgement of consent. If the transporter had this option, the entire attempt to control exports of hazardous waste would fail. As a matter of style, the Board has attempted in these rules to use "shall" when stating prohibitions, and to reserve "may" for provisions in which an option is open.

Section 721.132

This Section is drawn from 40 CFR 261.32, which was amended at 51 Fed. Reg. 33612. This again modifies the definition of K062, spent pickle liquor. This listing is now defined in terms of waste from facilities within SIC Codes 331 and 332. The Board has added a reference to the definition of "SIC Code" which was added to Section 720.110 in a prior rulemaking. The definition in turn refers to Section 720.111, which includes full information required under the APA.

Section 721.133 and Appendix H (not amended)

These are drawn from 40 CFR 261.33 and Appendix VIII which were amended at 51 Fed. Reg. 28298. USEPA proposed to correct several listings, and to add Chemical Abstracts reference numbers to the listings.

The USEPA publication is supposed to make no substantive changes. It includes a table which purports to list the changes to the listings, and also the listings as modified. However, on careful examination, not all of the changes in the table have actually been made to the listings as published. Furthermore, the changes indicated in the table comprise only about 5% of the changes which have actually been made. The Board noted these problems and solicited comment in the Proposed Opinion. USEPA indicated that it is aware of the problems and will publish a correction at some time in the future. (PC #2 and #3). USEPA indicates that the states are not expected to adopt the

amendments pending correction. The Board will follow this course. These Sections will be dropped from the proposal.

Section 722.134

This Section is drawn from 40 CFR 262.34, which was amended at 51 Fed. Reg. 25471. This modifies the accumulation times for generators using tank systems.

The Board notes that this Section includes, without amendment, the provisions relating to extension of accumulation times, which were commented on in R86-19 and R86-28. The Board solicited additional comment on these provisions in the Proposed Opinion, but received none.

Section 722.141

This Section is drawn from 40 CFR 262.41, which was amended at 51 Fed. Reg. 28682. The Board rule differs from the USEPA rule in that, in R84-9, the Board declined to adopt the USEPA biennial report requirement, but instead retained the annual report. The Board cited Section 20.1 of the Act, which requires the Agency to prepare an annual report for the public identifying the types and quantities of hazardous waste managed in the State. It would not be possible for the Agency to prepare this report without the annual report requirement which was in the regulations at the time Section 20.1 was adopted.

The present amendments exempt exported waste from the report requirement. Exports are reported instead under Section 722.156.

JCAR claims that Sections 722.141(a)(3) and (a)(4) include requirements which are not found in the federal regulations. (PC #5) The Board cannot find any difference in the language, except that "EPA" has been changed to "USEPA." The Section references national identification numbers which are issued by USEPA. The Board has changed the designation to avoid confusion with similar numbers issued by the Agency pursuant to 35 Ill. Adm. Code 809.

Section 722.150 et seq.

USEPA modified the requirements concerning exports, and imports, of hazardous waste at 51 Fed. Reg. 28682. An exporter has to notify USEPA 60 days prior to shipment. USEPA notifies the receiving country through the State Department. If the country consents to accept the waste, the U.S. Embassy cables an "Acknowledgement of Consent" to USEPA. The exporter has to attach the Acknowledgement to the manifest or shipping paper. A copy of the manifest must be given to U.S. Customs at the point of departure from the United States.

This system is intrinsically one which only USEPA can administer. USEPA has indicated that the Board can use incorporation by reference of much of this, although it should

add requirements of notice to the Agency. (PC #3) The Board has modified the proposal along these lines.

Section 722.150(d) and (e), which concern imports, have been moved to Subpart F, Section 722.160. Section 722.151, which concerns farmers, has been moved to Subpart G, Section 722.170.

Section 722.156

This Section is drawn from 40 CFR 262.56, which was amended at 51 Fed. Reg. 28682. JCAR claims that Section 722.156(a)(5) is missing an exception for small quantity generators which is contained in the federal rule. (PC #5). The language quoted by JCAR is in the Board rule.

Section 723.120

The rules governing manifests for transporters have been amended to reflect the new rules on exports of hazardous waste.

JCAR questions the Board's use of "shall not" in Section 723.120(a) to state a prohibition which USEPA states as "may not." (PC #5) The language is virtually identical to that discussed above in connection with Section 721.106, and the Board will not repeat the complete discussion here. The Board has made editorial changes to correct grammer and to follow its style, but the rule is identical in substance.

Section 724.115

Section 724.115(b)(4) has been amended to reference the inspection schedule rules for tank systems, which are discussed below. 51 Fed. Reg. 25471 contains an error which has been corrected. "Malfunction of any operator error" has been changed to "Malfunction or any operator error."

Section 724.173

Section 724.173(b)(6) has been amended to reference testing as required under the tank systems rules. 51 Fed. Reg. 25471 contains an error which has been corrected. USEPA has also added a reference to the groundwater protection rules of Subpart F, so that the operating record must now include analytical data where required by "Subpart F and Sections 724.291..." This has been corrected to "Subpart F or Sections 724.291..."

Section 724.175

40 CFR 264.75 was amended at 51 Fed. Reg. 28556. Section 724.175(h) and (i) have been added to require generators which treat, store or dispose of waste on-site to report on their efforts to reduce volume or toxicity. Note that the Board rule will require an annual report, rather than a biennial report. As is discussed above, the Board declined to adopt the biennial report requirement in R84-9.

Section 724.210 and 724.240

Section 724.210(b)(3) has been added to state that the post-closure rules apply to certain tank systems, as well as to landfills, and to certain piles and lagoons. Under new Section 724.240(b)(3), such tank systems would have to provide financial assurance for post-closure care.

Section 724.247

The liability insurance requirements were amended at 51 Fed. Reg. 25354. Section 724.247(g) has been added to allow parent corporations which meet the financial test to give a guarantee in lieu of liability insurance for the subsidiary. As provided in Section 724.247(a)(2) and (3), and (b)(2) and (3), the operator can meet the liability insurance requirement through a combination of insurance and financial test, or a combination of insurance and parent guarantee.

40 CFR 264.147(a)(2) is worded slightly differently from (b)(2). For sudden accidental occurrences, the operator can meet the insurance requirement "by passing a financial test or using the corporate guarantee ... as specified in paragraph (g)." For non-sudden accidental occurrences, the operator can meet the requirement "by passing a financial test or using the corporate guarantee ... as specifed in paragraphs (f) and (g)." This assymmetry is repeated in Section 265.147. The Board has modified the language of paragraph (a)(2) to make it clear that it refers to the financial test of paragraph (f). (PC #4).

The third sentence of paragraph (g)(1) seems to contain an error which the Board has corrected. "The guarantee must meet the requirements for owners and operators..." has been changed to "The guarantor must meet the requirements for owners and operators."

The introductory material to 51 Fed. Reg. 25354 refers to a Section 264.147(g) which is to be redesignated as (h). This paragraph, which includes past compliance dates, has never been adopted by the Board.

40 CFR 264.147(g)(2) provides that corporate guarantees may be used only if the Attorney General or the insurance commissioner of two states submit written statements to USEPA that the guarantee is valid and enforceable. The statements must come from officials in the state in which the facility is located and the state in which the guarantor is incorporated. There are a number of problems involved in translating this into State law.

There are several possible legal objections to this type of guarantee. The first is that the guarantor is in a sense writing an insurance contract, and may be subject to regulation as an insurer. The second objection has to do with the power of the

guarantor. It may be incorporated under a state law which does not allow business corporations to write guarantees or insurance, or its articles of incorporation may so limit it. The third objection is whether the person signing the guarantee is an agent of the corporation with power to bind the corporation. The fourth objection has to do with the law of guarantees, which may be very restrictive in some states. There are also practical problems which would confront states if they had to collect on these guarantees in the courts of other states, since, unlike USEPA, they do not have offices and attorneys in all states.

The USEPA rule seems to require case-by-case certification where USEPA administers the RCRA program. For the Illinois program, the facility is always in Illinois. Therefore, the Board can get generic certification as to legality in Illinois. The Illinois Department of Insurance has advised the Board that guarantees from parent corporations would not be subject to its regulation. (PC #1). The problem is how to get certification as to out-of-state guarantors.

The Board addressed several options in the Proposed Opinion for getting certification as to out-of-state guarantors. These included requiring each guarantor to produce an Attorney General's opinion for case-by-case review by the Agency, or requesting generic certifications from nearby states to form the basis of a list of acceptable states in the rule. The rules as adopted limit guarantees to those in which the guarantor subjects himself to Illinois law. This approach resolves some problems with the USEPA rule, and appears to be easy to administer. (PC #4).

The USEPA rule requires a statement from the state of incorporation of the guarantor. However, the validity of this type of guarantee is governed by the law of the place where it is executed, not the law of the state of incorporation. For example, consider a Delaware corporation with headquarters in New York and a subsidiary with a facility in Illinois. If the guarantee were executed in New York, its validity, assuming the corporation had power to make guarantees, would be a matter of New York law. The USEPA rule would not require certification from New York. This is a major weakness, since many corporations have headquarters in states other than the state in which they are organized. Another major problem with the USEPA rule would be the expense associated with enforcement by states of the guarantee in the courts of other states.

The Board rule requires officials of the parent corporation to come into Illinois to execute the guarantee, to agree that the guarantee is governed by Illinois law, and to agree to submit to Illinois Court jurisdiction. This makes the question one of Illinois law, to which the Illinois Attorney General and Department of Insurance can certify acting alone. It also avoids the problems of enforcement in foreign courts.

The power of the corporation to make the guarantee would still be subject to question. There could be some limitation on guarantees either in the law of the state of incorporation or in the articles of incorporation. The Agency can insist on proof that the parent has the power to make the guarantee on a case-by-case basis, just as it examines documents to assure that the corporate officials have the power to act for the corporation.

In R86-28 the Board proposed to delete Section 724.247(b)(4), which includes past compliance dates for obtaining liability insurance. Pursuant to a request from USEPA, on March 5, 1987, the Board reinserted this language, but indicated that it would consider deleting it again in this Docket. In the Proposed Opinion the Board proposed to repeal these past compliance dates, and solicited comment. USEPA indicated that repeal of these dates was acceptable if the Attorney General certifies that past violations of these requirements are covered by Illinois rules from the date the rules were first effective. USEPA agrees that prior to the effective date of interim authorization these rules were federal rules, strictly federally enforceable. (PC #3) The Board has received no comment from the Attorney General, but will proceed on the assumption that the certification will be forthcoming. The Board would appreciate comment during the post-adoption comment period if there will be problems with this.

This rule specifies dates for obtaining liability insurance for various types of facilities between January 15, 1983 and January 15, 1985. The Board first adopted it in R82-19 in October, 1983. The Board received authorization, and the rules became enforceable by the State, on January 31, 1986. In retrospect, the dates had no impact at the State level since they were all passed before the program was authorized. Retaining the dates is actually misleading, since it appears to create a retroactive requirement.

Section 724.251

The Board has updated the incorporation by reference of the USEPA forms in 40 CFR 264.151, which have been modified to reflect the changes discussed above. The Agency will revise its printed forms to reflect these changes.

Section 724.290

USEPA amended the requirements for tank systems which treat or store hazardous waste at 51 Fed. Reg. 25471. Corrections appeared at 51 Fed. Reg. 29430. The Board has adopted similar changes.

These provisions involve tanks used to treat or store hazardous wastes. Tanks used to store petroleum products are regulated under Part 732.

Section 724.291

Section 724.291(a) requires that the operator of an existing tank conduct an assessment of the tank and determine either that the tank system is not leaking or, on the other hand, that it is unfit for use. The Board has added language to the federal text to make this clearer. 40 CFR 264.191(b) requires that the assessment "determine that the tank system is adequately designed..." The Board has modified this to make it clear that the assessment could reach a negative conclusion also.

This and the following Sections reference various industry design standards. These will be incorporated by reference in Section 720.111 above. Since the full library reference is in Section 720.111, the Board has shortened the names of the documents as used in the rules.

Section 724.292

This Section specifies requirements for the design and installation of new tank systems.

Section 724.293

40 CFR 264.193(a)(2) contains a reference to tanks used to store or treat "F020, F021, ... and F027." From the context it is clear that "or" was intended.

Section 724.293(a) requires "secondary containment" for tank systems. This could consist of a lined berm, a vault system or a double wall on the tank. Secondary containment is required for new tank systems and at various future dates for existing systems. The purpose is to contain any leaks from the primary system. Of course, it is essential to protection of public health and the environment that any leaks to the secondary containment be promptly detected and removed, or else the secondary containment would just be a second primary containment.

Section 724.293(c)(3), (c)(4) and (e)(3)(C) allows the Agency to approve designs of secondary containment systems which would not necessarily detect or allow removal of accumulated liquids within 24 hours if the operator makes certain specified showings. 40 CFR 264.193(c) allows these if the operator "can" make the demonstrations. The Board has modified these to require that the operator actually make the demonstrations, which appears to be what USEPA intends. The Board has also modified these provisions to specify that the demonstrations are to be made by way of a permit application. If operators have tank systems which will not allow prompt removal of liquids, the issue should be addressed in the permit process. If the Agency determines that another removal time is justified, the Agency will specify the removal time in the permit. If there is a disagreement with the Agency's decision, it can be appealed.

The Agency and JCAR have commented on these provisions. (PC #4 and #5). The Board will therefore address the reasoning behind these modifications more extensively than in the Proposed Opinion.

The USEPA rules are vague as to what is intended. The 24 hour removal time appears to be a "preferred", rather than a "firm", design requirement, since no special federal procedural "variance" mechanism is articulated in the rules. Further, the showing required to vary from the 24 hour time appears to be closely allied with the permitting process.

The Board recognizes that the rule could be interpreted as a firm design standard, and thus a Board determination by way of an adjusted standard would be more appropriate. However, on balance, the Board believes that the decision more logically fits into the permit review process. Under this interpretation, the rule is saying that tanks should preferably be designed for a 24 hour liquids removal; if not, the applicant should so specify in the permit application, and also make additional showings. In either case, the Agency will specify the removal time as a permit condition. If the applicant does not make a showing, but rather claims a 24 hour removal capability, and then fails to do so, the applicant then has violated a permit condition and is subject to enforcement.

The Board notes that the "can" language could also be interpreted as providing an affirmative defense in the context of an enforcement action to excuse compliance with the 24 hour detection or removal time. This interpretation is rejected however, since it would seem to specifically authorize a deliberately false application if the applicant "can", but doesn't, make the alternative demonstration.

In summary, the Board has modified the text of this rule so that it is identical in substance with the USEPA rule, but so as to eliminate vagueness as to the procedural context.

JCAR also questions the Board's substitution of "Board" or "Agency" for "Regional Director" (sic) in this rule. (PC #5). Sections 20(a) and 22.4(a) of the Act contemplate that the State should assume responsibility for those portions of the RCRA program which USEPA intends to delegate. USEPA would not accept rules which specified that it was to make decisions which it intended to delegate. Nor does the Board have statutory authority to adopt rules which purport to regulate federal agencies.

As is discussed in the general response to JCAR comments below, the Board's responsibility is to discern which State agencies are to make various decisions consistent with the Act, and to so specify in the rules. This often takes the form of deciding whether a decision implements a rule in the context of permit issuance, or whether it is determining environmental control standards.

40 CFR 264.193(e)(2)(i) includes a reference to "its" boundary, where the antecedent is not altogether clear. Section 724.293(e)(2)(A) replaces this with "the vault system's".

40 CFR 264.193(e)(2)(v) includes incorrect cross references to the definition of hazardous waste. These have been corrected in Section 724.293(e)(2)(E).

40 CFR 264.193(g) allows USEPA to grant "variances" from the secondary containment requirements for tanks. The operator has to demonstrate either that "alternative design and operating practices," together with location characteristics, will be at least as effective as secondary containment, or that, in the event of a release which does migrate to groundwater, there will be no substantial hazard to human health or the environment. The Board has utilized an adjusted standards procedure pursuant to Section 28.1 of the Act to make these decisions. The Board has also adopted procedures in 35 Ill. Adm. Code 106. These are adaptations taken from the combined sewer overflow procedures of Part 306. They will replace the existing Board procedures in Part 106, which were adopted in R85-22. The modified procedures will allow the Agency to join as a co-petitioner, and will require a rulemaking-type hearing instead of the contested case type hearing of old Part 106.

Section 724.293(g) and (h) reference these procedures, and specify the level of justification required for the adjusted standards. The levels of justification are taken verbatim from the USEPA rules.

As provided in Section 28.1 of the Act and Part 106, adjusted standards are available only where the substantive rule of general applicability specifically references the adjusted standards procedures. Operators cannot request adjusted standards with respect to any other general rules.

40 CFR 264.193(h)(1) requires that the USEPA variance request be initiated 24 months prior to the date secondary containment is required for existing tanks, or 30 days prior to entering into a contract for a new tank. The Board has included these time limits, but notes that any contracts should be contingent on the outcome of the alternative design or operating practices demonstration, since 30 days would not be enough time to complete the adjusted standards proceeding.

The Board has added Section 724.293(h)(2)(B) to require that the applicant include a portion of the Part B permit application with the petition for an adjusted standard.

Section 724.293(h)(4) requires that the Agency issue or modify the RCRA permit so as to require the permittee to construct and operate the tank as provided in the Board Order approving the alternative design or operating practices.

Section 724.294

This Section specifies operating requirements, such as spill prevention, for tank systems.

Section 724.295

This Section requires inspection of tank systems.

Section 724.296

Section 724.296(b) contains release response requirements which relate to the time limits for responding to releases discussed above in connection with Section 724.293. The Agency has commented on this also. (PC #4). As is discussed above, the Board construes the alternative time limit provision as a design standard which is to be addressed in the permit application process, rather than as a waiver or affirmative defense provision. Accordingly, the Board has modified these provisions to eliminate a similar ambiguity. Rather than repeat the alternative language in this provision, the Board has referenced the permit. Response will be required within 24 hours or as otherwise required in the permit.

Section 724.296(d)(1) requires reporting of releases from tank systems to USEPA within 24 hours unless the release has already been reported pursuant to 40 CFR 302, which concerns CERCLA reporting. The Board required reporting to the Agency.

Following 40 CFR 264.196(f) is a note reciting USEPA's enforcement authority under the RCRA Act. Although USEPA may retain part of this authority in Illinois following authorization, it is not necessary for the Board to recite it in the Board rules.

Section 724.297

This Section requires that the operator remove or decontaminate all waste residues and tank system components on closure. If this is not possible, the tank system is subject to the post-closure care requirements and associated financial assurance.

Section 724.298 and 724.299

The provisions regarding ignitable, reactive and incompatible waste have been modified to reflect changes in terminology.

Section 725.113

Section 725.113(b)(6) has been modified to reference waste analysis rules for interim status tank systems.

Section 725.115

Section 725.115(b)(4) has been modified to reference inspection requirements for tank systems.

Section 725.173

Section 725.173(b)(3) and (6) have been modified to require results of waste analysis in the operating record for facilities with tank systems.

Section 725.175

40 CFR 265.75 was amended at 51 Fed. Reg. 28556. Section 725.175(h) and (i) have been added to require generators which treat, store or dispose of waste on-site to report on their efforts to reduce volume or toxicity. Note that the Board rule will require an annual report, rather than a biennial report. As discussed above, the Board declined to adopt the biennial report requirement in R84-9.

Section 725.210

40 CFR 265.110 was amended at 51 Fed. Reg. 25471 to state that tanks which must close as landfills are subject to the post-closure care rules. The USEPA amendment seems to delete 40 CFR 264.210(b)(2), which states the similar requirement for lagoons and piles which must close as landfills. The Board believes this may be an error, and will retain these provisions. The tank system rule will therefore appear as Section 725.210(b)(3).

Section 725.240

Interim status tank systems which must close as landfills have to provide financial assurance for post-closure care.

Section 725.247

The Board has repealed Section 725.247(b)(4). This is similar to Section 724.247(b)(4), which was discussed above.

40 CFR 265.147(b)(4) required various types of interim status facilties to obtain liability insurance by various dates between January 15, 1983 and January 15, 1985. The Board incorporated this Section by reference in R81-22, in April, 1982. Illinois received Phase I interim authorization on May 17, 1982, which made these dates enforceable as State law. The Board actually adopted the text of this Section in R86-28. At that time it proposed to adopt omitting the past dates. The Board inserted the dates at the request of USEPA during the post-adoption comment period, but indicated that it would propose to delete them in this Docket. As discussed above, USEPA has indicated that the Board can delete the dates if the Attorney General certifies that past violations are covered from the dates they were first effective.

Since the Board rules became effective and enforceable before any of these dates, they are the actual dates on which insurance was required as a matter of State law. This is a matter of historical record which can be alleged in any enforcement action in which the length of non-compliance is an issue. The Board will delete provisions with no prospective impact as a small act of mercy to anyone who has to read these lengthy rules.

Interim status facilities will be allowed to use a corporate guarantee for liability insurance. This is similar to Section 724.247, discussed above.

JCAR questions the Board's use of "shall not" instead of "may not" in Section 725.247(g)(1)(B). (PC #5) The answer to this is the same as for Section 721.106 above. USEPA means that the guarantee cannot be terminated until alternative financial assurance has been approved. The rule would have no meaning if the guarantor had the option of terminating the guarantee prior to approval of alternatives. Furthermore, the entire financial assurance system would be meaningless if parent corporations could renege on these promises at the first sign of trouble. As a matter of style, the Board has modified the language to use "shall not" to state the mandatory language, reserving "may" to indicate an election.

JCAR also questions the use of "shall" in Section 725.247(g)(2). (PC #5) For the reasons discussed in connection with Section 724.247(g), this subsection implements 40 CFR 265.247(g)(2), but does not attempt to track the language.

Section 725.290 et seq.

The interim status rules for tank systems are very similar to Section 724.290 et seq., discussed above.

Section 725.293

40 CFR 265.193(a)(2) contains a reference to tanks used to store or treat "F020, F021, ... and F027." From the context it is clear that "or" was intended.

Interim status facilities are allowed to modify their units to provide secondary containment without filing a Part B permit application. Otherwise, these rules are the same as Section 724.293, discussed above.

Placing the decision regarding interim status facilities into the permit review process poses a problem since there is no permit application or review procedure associated with the interim status standards. One possibility would be to create a waiver procedure for the Agency to follow under Part 725. The Board has done this in other Sections. Since prompt detection and removal of leaks from secondary containment are essential to

protection of public health and the environment, public notice and comment comparable to that in the RCRA permit issuance process is essential before longer times are approved. Furthermore, with the interim status rules there is a possibility that operators will be engaging in new construction to provide secondary containment to existing tanks. If the Agency takes a positive step to approve deviation from the 24 hour removal requirement, it is likely that this will control the eventual Part B application.

The Board has decided to use the mechanism proposed in Section 724.293. Interim status facilities will have to build secondary containment to allow 24 hour removal, or else file a Part B application. This allows utilization of existing procedures with adequate public participation.

In summary, the Board has modified the text of this rule so that it is identical in substance with the USEPA rule, but so as to eliminate vagueness as to the procedural context.

JCAR also questions the Board's substitution of "Board" or "Agency" for "Regional Administrator" in this rule. (PC #5). Sections 20(a) and 22.4(a) of the Act contemplate that the State should assume responsibility for those portions of the RCRA program which USEPA intends to delegate. USEPA would not accept rules which specified that it was to make decisions which it intended to delegate. Nor does the Board have statutory authority to adopt rules which purport to regulate federal agencies.

As is discussed in the general response to JCAR comments below, the Board's responsibility is to discern which State agencies are to make various decisions consistent with the Act, and to so specify in the rules. This often takes the form of deciding whether a decision implements a rule in the context of permit issuance, or whether it is determining environmental control standards.

USEPA and the Agency commented on the lack of certain special notice procedures from 40 CFR 265.193(h) in Section 725.293(h). (PC #3 and #4) The Board has proposed to utilize the Part 106 procedures, as is discussed above. The Board has corrected the reference in Section 106.415(b) to the RCRA notice procedures of Section 102.124.

USEPA also commented on the lack of the 90-day decision period of Section 265.193(h) in the Board's procedures. The Board is reluctant to adopt an unnecessary decision period which could be construed to allow alternative standards by default. (PC #3)

The JCAR questions include four which were asked in one form or another with respect to most of the Parts involved in R86-19 through 46. The numbering below refers to the specific questions

asked with respect to Part 720 as proposed in R86-46. In addition several sets of questions ask about specific Sections. These are answered in detail with respect to those Sections in the main portion of the Opinion above. However, most of these involve a question as to why the Board is not adopting USEPA rules verbatim. The Board will give a general response to this question as question five below.

JCAR first questions how a rule can be adopted more than 180 days after USEPA has adopted it. JCAR asks whether Section 5 of the APA applies after 180 days.

JCAR apparently interprets Section 22.4(a) as saying that identical in substance rulemaking is exempt from Title VII of the Act and the APA for 180 days and thereafter subject to those provisions. However, the statute does not say whether identical in substance rules are or are not exempt after 180 days.

Section 22.4(a) of the Act is a specific statutory provision dealing with adoption of identical in substance rules, while Title VII of the Act and the APA are general provisions for rulemaking. One should not construe the statute so as to make the general provisions override the specific provisions, absent an express provision.

Because Section 22.4(a) is silent as to what happens if it does not meet the 180-day goal, the Board must look to the intent of the statute. The General Assembly intended quick adoption so as to maintain a RCRA program equivalent to the federal program to meet the policy objectives of Section 20(a)(8). Full Board rulemaking, pursuant to Title VII of the Act and the APA would, of course, cause further delay and also backup subsequent rulemakings so that the 180 days might never be met, at least until the USEPA slowed in the frequency of RCRA rulemakings. This would certainly result in loss of program approval, contrary to the policy of Section 20. The Board therefore concludes that Section 22.4(a) does not require full rulemaking to adopt identical in substance rules after the 180 day period has elapsed. The Board, of course, is obligated to make a good faith attempt to meet the 180 day time-frame. (See also R87-3,4; Resolution of June 25, 1987.)

The second JCAR question asks is why the Board published a notice of proposed rulemaking in accordance with Section 5.01 of the APA. The proposal was noticed in accordance with procedural rules adopted in R84-10, and was not in accordance with Section 5.01 of the APA. The Board notes that the public comment format was made similar to the APA first notice format in order to avoid confusion.

The third question concerns the statement of statewide policy objectives in the notices in the Register. Section 22.4(a) of the Act gives the Board no alternative but to adopt the rules in question. The policies behind the decision to adopt

the rules are those of the General Assembly and not the Board. The policy objectives were set forth in Section 20 of the Act, which was referenced in the Notice, as required by the APA.

The State Mandates Act is not applicable to these RCRA rules anyway, because they have no direct impact on local government so long as it is exercising normal governmental activities. If a local government becomes involved in the business of generation, transportation or management of hazardous waste, then federal and State statutes mandate that these rules apply.

The fourth question concerns whether the Board "received" any public comment, and whether it ever considers changing a rule in response to comment. As is detailed above, the Board has made numerous changes in response to comments.

The fifth question suggests that JCAR construes "identical in substance" to mean that the Board is to adopt USEPA rules "verbatim." The Board does not construe the "identical in substance" mandate of Section 22.4(a) to mean this. In adopting "identical in substance" rules, the Board is seeking to create in Illinois a program which comes as close as possible to the substance of the program which USEPA would administer. For example, the Illinois and USEPA programs should require a given person to manage a given waste in the same manner, although the person might not have to complete identical forms to be mailed to the same address under both programs.

Although the Board attempts to keep the RCRA rules as nearly verbatim as possible with the rules as administered in USEPA, it is not possible to maintain an identical in substance program simply by adopting large blocks of USEPA rules verbatim. Indeed, the result of such blind adoption of verbatim rules would be a program which differed substantially from the USEPA program, and which would be subject to attack under Illinois laws. The following is a compilation of issues which have arisen in identical in substance rulemaking.

The first question is often whether it is necessary to adopt a USEPA rule as a State rule. Some rules, such as site-specific delistings, are simply not applicable in Illinois. Other rules govern actions to be taken by USEPA, such as standards for program approval. It would not be appropriate for Illinois to adopt rules which purport to regulate a federal agency. Other rules describe the contents of the State program in a manner such that the USEPA rule would not be appropriate as a portion of the State program itself. These may describe the type of rule the State needs to adopt, or include a list of options. Other rules describe program contents that are not appropriate to address by Board rules, such as the adequacy of funding for the Agency's inspection staff.

Another question that arises is whether the Board should adopt the text of a federal rule, or whether to merely incorporate the rule by reference.

Many issues center on whether Board, Agency or USEPA action is required. USEPA is often imprecise as to whether it intends to retain authority to make certain decisions, or whether it intends to devolve the authority to the State. In Illinois there is usually a question as to which State agency is to receive this authority. Section 5(b) of the Act authorizes the Board to "determine, define and implement environmental control standards," while Sections 4(g) and 39 of the Act allow the Agency to administer permit systems established under the Act and Board rules. Since USEPA has both of these functions, it does not differentiate between them in its rules. Questions of Board or Agency authority are often decided based on whether the action is one of "determining, defining or implementing environmental control standards," or of applying Board rules as part of permit issuance. (Commonwealth Edison et al. v. IPCB, 127 Ill. App. 3d 446; 468 NE 2d 1339 (Third District 1984)

Another question involves the existence of more stringent, consistent State programs. Sometimes USEPA will add or amend rules for which there is an existing State program which is consistent and more stringent. An example is the federal and State liquids bans in Section 724.414 and Part 729. The Board modified the USEPA rule to reflect the existing, more stringent State rule. (Commonwealth Edison et al. v. IPCB, op. cit.)

Sometimes questions arise as to whether USEPA provisions would conflict with provisions of the Act or other State laws, including the Administrative Procedure Act. An example is USEPA rules which allow USEPA to issue RCRA permits at its discretion in authorized States. This cannot be allowed in Illinois, since USEPA is not authorized to determine whether a facility has met the local government approval requirements under Section 39.2 of the Act. (Commonwealth Edison et al. v. IPCB, op. cit.) Other examples result from USEPA rules which appear to provide that USEPA will do something if certain conditions are met, or not do it at its discretion without the possibility of meaningful review. Because such provisions are contrary to the APA, the Board usually restates the rule to remove the apparent discretion. USEPA and the Agency are given the opportunity to comment if they believe that such discretion is necessary to the program, or to advise the Board of additional factors which influence the decision.

Other questions arise from attempting to adapt USEPA's free-form style to the Administrative Code Unit's codification rules. The Board attempts to comply with these rules wherever possible. The worst case is the "hanging paragraph", in which USEPA returns to a previous level of subdivision, something which is an absolute no-no in Illinois. This will generally necessitate a complete rewriting of the rule to accomplish the same substance within the codification system.

Some USEPA rules are written from the wrong narrative stance. USEPA is an agency which makes rules, applies them in

unauthorized states and approves state authorization requests. Some of its rules don't make sense as Illinois rules whether one substitutes "Board" or "Agency" for "Administrator." The Board often rewrites these rules to state the substance as applied in Illinois from the Board's regulatory perspective.

A final type of question arises from what appears to be deficiencies in USEPA rules such that they either say something other than what was probably intended, or say nothing at all. The Board attempts to rewrite these so that they say what USEPA probably intended. The Board affords an opportunity for comment as to whether the rule is indeed identical to the substance of the USEPA rule.

In summary, the Board attempts to adopt rules which are as nearly verbatim as possible with respect to the RCRA program as administered by USEPA in states without authorization. However, it is not possible to accomplish this by blindly adopting large blocks of rules verbatim.

This Opinion supports the Board's Final Order of this same day. The Board will withhold filing of the adopted rules for 10 days to allow for final review by the agencies involved in the authorization process. Although this time period is short, there is need to adopt these rules as quickly as possible pursuant to Section 22.4 of the Act.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 16th day of July, 1987, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board