

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

IN THE MATTER OF:)
)
UIC UPDATE, USEPA REGULATIONS) R87-29
(1-1-87 THROUGH 6-30-87))

FINAL ORDER. ADOPTED RULE

OPINION OF THE BOARD (by J. Anderson):

By a separate Order, pursuant to Section 13(c) of the Environmental Protection Act (Act), the Board is amending the UIC regulations found in 35 Ill. Adm. Code 702 and 704.

On August 20, 1987 the Board opened this docket for the purpose of updating the UIC rules to agree with recent USEPA amendments. On September 17, 1987, the Board proposed amendments to 35 Ill. Adm. Code 702 and 704. The proposal appeared October 30, 1987, at 11 Ill. Reg. 17366. As is detailed below, the Board has modified the proposal in response to public comment received.

Section 13 of the Act governs adoption of regulations establishing the UIC program in Illinois. Section 13(c) provides for quick adoption of regulations which are "identical in substance" to federal regulations; Section 13(c) 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 UIC regulations are found at 40 CFR 144 and 146. This rulemaking updates Illinois' UIC rules to correspond with federal amendments during the period January 1 through June 20, 1987. The Federal Register utilized is as follows:

52 Fed. Reg. 20671

June 2, 1987

PUBLIC COMMENT

The proposal appeared October 30, 1987, at 11 Ill. Reg. 17366. The Board received the following public comment:

- PC 1 Department of Commerce and Community Affairs, Small Business Office, (DCCA), Linda Brand, November 30, 1987
- PC 2 Illinois Environmental Protection Agency (Agency), Phillip R. Van Ness, December 28, 1987

On December 28, 1987, the Agency filed a motion for leave to file its comment after the close of the public comment period. In that the late filing was due to a clerical error and has not caused significant delay, the Board will grant the motion.

On November 30, 1987 the Board received a "small business impact analysis" from DCCA. (PC 1) This concludes that there is no impact on small business. The Board has made it a public comment since it includes factual assertions which may be relevant to this rulemaking.

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

On November 3, 1987, the Board received a "State Mandates Act Questionnaire" from the Joint Committee on Administrative Rules (JCAR). The Board declined to respond since the Questionnaire is based on Section 5 of the Administrative Procedure Act (APA), and Section 13(c) of the Act provides that Section 5 of the APA shall not apply to this rulemaking. The Board further noted that this rulemaking imposes mandates on units of local government only to the extent they may be involved in the operation of underground injection wells, which is not a normal governmental activity. The Board further notes that the impacts flow from the statutory "identical in substance" mandate and the USEPA rules, not from a Board substantive initiative.

HISTORY OF RCRA and UIC ADOPTION

The Illinois RCRA 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

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 June 19, 1986; 10 Ill. Reg. 13274, August 8, 1986.
- R86-27 Dismissed April 16, 1987 (No USEPA amendments through 12/31/86).
- R87-29 This Docket (1/1/87 through 6/30/87)
- R88-2 Next Docket (7/1/87 through 12/31/87)

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 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 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. (1/1/87 -- 6/30/87)
- R87-32 Correction to R86-1; September 4, 1987; 11 Ill. Reg. 16698, October 16, 1987.
- R87-39 Opened December 3, 1987. (7/1/87 -- 12/31/87)

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 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 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). Hearings on permanent rules are pending.

DETAILED DISCUSSION

The single USEPA amendment, in the June 2, 1987 Federal Register, contains only technical corrections resulting from amendments to the Safe Drinking Water Act. As it turns out, most of the amended provisions have no Illinois counterpart, affecting USEPA administered programs only. Most of the amendments below are technical corrections to the Board rules, resulting from such things as changes to the APA and codification requirements.

Section 702.104

For the reasons discussed below in connection with the definitions of "radioactive waste" and "total dissolved solids" the Board has added references to 10 CFR 20 and 40 CFR 136 to the table of incorporations by reference. Also, for the reasons discussed in Section 704.122, the Board is adding an incorporation of the primary drinking water standards of 40 CFR 142. This Section was amended in R87-26. The text has been updated to reflect that Docket.

Section 702.110

USEPA has amended the definition of "SDWA" (Safe Drinking Water Act) to include recent amendments. The Board has updated its reference. The Board has also made a number of editorial corrections to the definitions table.

This list of definitions was originally adopted based on the

consolidated permit rules of old 40 CFR 122. At that time it was difficult to tell which definitions applied to the RCRA and UIC programs, and which applied to air and water programs. The Board has reviewed the definition set and deleted definitions with no obvious function in these programs.

The Board has deleted the specific reference to future revisions of the application form from the definition of "application". The definition clearly encompasses forms promulgated in the future by the Agency pursuant to Section 39(a) of the Act even without specifically stating.

In "approved program" the Board has updated a reference to the deconsolidated RCRA rules on program approval. The Board has also added the equivalent UIC reference from 40 CFR 144.3.

New requirements on incorporations by reference have been added to the Administrative Procedure Act (APA). This has caused the Board to look closely to determine whether references to USEPA rules are incorporations by reference which would require compliance with new procedures. The reference in "approved program" is not an incorporation by reference. Rather, the definition is referencing USEPA's decision in approving state programs. The reference to the federal rules and statute serves to identify the USEPA decision being referenced. By way of contrast, an incorporation by reference would be a rule which provided that the Agency or Board decided whether programs were "approved", utilizing the USEPA standards for program approval.

The APA prohibits incorporation by reference of future amendments ("forward incorporations"). In the definition of "approved program" the Board intends that state programs which USEPA might approve in the future based on amended rules would be "approved programs." The point is that USEPA approved a RCRA or UIC program based on its current rules, as opposed to approving, for example, a water quality plan under Section 302 of the Clean Water Act.

The Board has added a date to all references to federal rules and statutes. Where the reference is an incorporation by reference, formal language has been used to so state. Unless so stated, these dates are not intended to cut off future amendments to the rules. Rather, the point is to specify a certain edition so that, in the future, a person can refer to a definite edition of a rule or statute and track it to the present. (PC 2) This should avoid the problems which have risen in this Part from the USEPA renumbering of 40 CFR 122 and 123.

The Board has reviewed all of the definitions below and determined that only three include an incorporation by reference. In those definitions the Board has added a citation to the incorporations by reference Section which contains the information required by the APA.

The Board has modified the definition of "disposal" to more closely correspond with the definition in 40 CFR 270.2. Specifically, the Board has deleted "or into any well", which does not appear in the corresponding USEPA definition. The Agency incorrectly asserts that this phrase is contained in 40 CFR 270.3 (PC 2). This language was adopted in error at an earlier date. The Agency proposal in R81-32 contained the definition with the phrase added. In the adopting Opinion the Board noted the inconsistency with the USEPA definition and indicated that it would strike the phrase. (47 PCB 95, 99). However, this change inadvertently was not made to the rules as actually adopted. (6 Ill. Reg. 12479, 12493).

The existing language appears to make UIC injection a "disposal" subject to the RCRA permit requirement and additional RCRA limitations on "disposal." The RCRA and UIC permit programs are related, federally mandated programs which, in the case of injection of hazardous wastes, potentially overlap. As provided by 35 Ill. Adm. Code 704.203, 724.101(d) and 725.530, a person operating only an injection well is subject only to certain RCRA requirements, which are implemented by way of the UIC, not a RCRA, permit. Associated treatment and storage operations may be subject to the RCRA permit requirement. Inclusion of the reference to wells in the definition is subject to the interpretation that injection is itself disposal subject to the RCRA permit requirement.

The Agency has argued that the Board should follow the definitions in the Act on this point, rather than the USEPA rules. (PC 2) However, Sections 13(c) and 22.4(a) mandate that the Board adopt regulations which are "identical in substance" with the federal UIC and RCRA rules. Replacement of the USEPA regulatory definitions with definitions from the Act would alter the scope of these programs, resulting in programs which were not "identical in substance," and violating Sections 13(c) and 22.4(a). Use of only the federal definition sets with the federally derived rules was an important governing principal decided early in the RCRA/UIC adoption process. (R81-22, Opinion of February 4, 1982; 45 PCB 317, 333).

The definition of "draft permit" has been modified to remove the phrase "revoke and reissue." As was discussed in the Board's Opinion in R85-23 and R86-1, permit revocation is a Board function, which proceeds without a draft permit. The Board has utilized the term "reissuance" to describe the process by which the Agency cancels an old permit and replaces it with a new one. The Board has amended this definition for consistency.

The Board has modified the indentation in the definition of "existing HWM facility" to more closely follow the USEPA rule. Under the codification rules the Board is not allowed to use subsection labels in a definition, but must rely entirely on level of indentation to express subordination. Placing the word "either" in a separate paragraph seems to make the definition

more closely follow the federal intent.

The Board has added the January 31, 1986 date for initial RCRA program authorization to the definition of "final authorization." (PC 2)

The Board has deleted the reference to 35 Ill. Adm. Code 809 from the definition of "manifest." As the term is used in the 700's series, the term seems to be restricted to the Part 722 manifest. Section 700.303 provides that compliance with the Part 722 manifest requirement satisfies the Part 809 requirement.

The Board has deleted the federal references from the definition of "NPDES." Instead the Board will reference only the derivative State program pursuant to Section 12(f) of the Act and 35 Ill. Adm. Code 309. This eliminates several federal references which could be construed as incorporations by reference.

The Board has also replaced the definition of "POTW" with a reference to the definition in the pretreatment rules adopted in R86-44, on December 3, 1987.

The definition of "radioactive waste" appears to be a true incorporation by reference of the NRC standards of 10 CFR 20. The Board has added a reference to Section 702.104, and amended that Section as discussed above.

The Board solicited comment as to whether there is a better State reference for the "Section 404 program." The Board has deleted this definition since it appears to serve no purpose in the RCRA or UIC programs. (PC 2)

The definition of "SIC Code" appears to be a true incorporation by reference. The Board has added a reference to 35 Ill. Adm. Code 720.111, in which the full APA incorporation by reference already exists.

The definition of "total dissolved solids" includes a reference to the USEPA test methods of 40 CFR 136. This appears to be a true incorporation by reference. The Board has added a reference to Section 702.104, and amended that Section as discussed above.

The Board has deleted the federal references from the definition of "UIC." As used in the Board rules, this term refers only to the underground injection control program in Illinois, which program has already been approved.

The Board has corrected a typographical error in the definition of "USDW" (Underground Source of Drinking Water). The reference should be to water with more than 10,000 mg/L total dissolved solids (rather than "solvents"). The Board has also modified the levels of indentation in this definition along the

same lines as is discussed above in connection with "existing HWM facility."

The Board has deleted the definitions of "waters of the U.S." and "wetlands." These are not found in the 40 CFR 144.3 or 270.2 definitions and to serve no direct function in the RCRA or UIC programs.

Section 704.101

This Section is drawn from 40 CFR 144.1, which USEPA has amended to update its reference to the SDWA. As it exists, the Board rule does not have this reference. However, the Board has added references which are appropriate in a State rule.

Section 704.106

This Section is drawn from 40 CFR 144.6, which USEPA has amended. The definition of Class II wells in Section 704.106(b)(1) has been modified to include wells which inject fluids associated with natural gas storage operations. Note that Class II wells are regulated by the Department of Mines and Minerals, rather than the Board. It is necessary for the Board to include a definition of this Class of wells to avoid the implication that wells associated with petroleum and gas production and storage would be Class V wells.

Section 704.122

This Section is drawn from 40 CFR 144.12, which USEPA has amended to update references and to add new requirements resulting from the amendments. Most of these concern enforcement by USEPA pursuant to the SDWA in states without primacy. They are not appropriate in Illinois rules.

Section 704.122(e) has been amended, pursuant to USEPA amendment, to allow the Agency to take emergency action as soon as it learns that contaminants have entered a USDW, without having to wait for entry into a public water supply. The Board has also added a reference to the Agency's seal authority under Section 34 of the Act. This will allow the Agency to act under Section 34(a) of the Act to seal equipment without having to show "an immediate danger to health," as would be required for action under Section 34(b) of the Act in the absence of a Board rule. The Board has modified the language to more closely track Section 34. (PC 2)

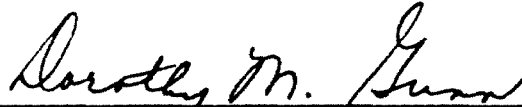
The Board has added a reference to the incorporation by reference of the national primary drinking water standards of 40 CFR 142, discussed above in connection with Section 702.104.

The Board has also corrected an apparent erroneous cross reference at the end of Section 704.122(b).

This Opinion supports the Board's Order of this same day amending 35 Ill. Adm. Code 702 and 704. The Board will withhold filing the adopted rules until February 21, 1988, to allow time for motions for reconsideration by the agencies involved in the authorization process.

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 21st day of January, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board