ILLINOIS POLLUTION CONTROL BOARD
February 5, 1987

IN THE MATTER OF:	)	
	)	
RCRA UPDATE, USEPA REGULATIONS (4-1-86 THROUGH 6-30-86)	)	R86-28
	)	

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 July 11, 1986 the Board opened this docket for the purpose of updating the RCRA rules to agree with recent USEPA amendments.

Section 22.4(a) 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. Neither Title VII of the Act nor Section 5 of the Administrative Procedure Act applies to rules adopted under Section 22.4(a). Because this rulemaking is not subject to Section 5 of the Administrative Procedure Act, it is not subject to 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 April 1 through June 30, 1986. The Federal Registers utilized are as follows:

November 8, 1985	50 Fed. Reg. 46612
April 21, 1986	51 Fed. Reg. 13497
May 2, 1986	51 Fed. Reg. 16443
May 28, 1986	51 Fed. Reg. 19177
May 28, 1986	51 Fed. Reg. 19322

The November 8, 1985, Federal Register amended the Underground Storage Tank program. This was inadvertently omitted from R86-1.

The Board appreciates the assistance of Morton Dorothy, of the Board's Scientific/Technical Staff, in the preparation of the drafts in this proceeding, and of Kathleen Crowley, adminstrative assistant, in the coordination and oversight process.

There are two notable USEPA actions during this period which have not been included in this action. 51 Fed. Reg. 12148, April 9, 1986, includes delistings. As provided in Section 720.122, the Board will not adopt these unless and until a proposal is filed with a showing that the delistings need to be adopted as part of the Illinois program. 51 Fed. Reg. 19300, May 28, 1986, is USEPA's schedule for adopting land disposal restrictions. The Board will adopt USEPA's restrictions as they appear, but sees no need to adopt the schedule applicable to USEPA.

PUBLIC COMMENT

The proposal was published in two issues of the Illinois Register, at 10 Ill. Reg. 18578 and 18974, on October 31 and November 7, 1986. The comment periods have expired. The Board received the following public comments:

PC #1	Illinois Environmental Protection Agency (Agency), December 1, 1986
PC #2	United States Environmental Protection Agency (USEPA), December 10, 1986
PC #3	Chemical Waste Management, Inc., December 15, 1986
PC #4	Waste Management of Illinois, Inc., December 15, 1986
PC #5	American Insurance Association, January 20, 1987
PC #6	Illinois Environmental Protection Agency (Agency), January 20, 1987
PC #7	USEPA, with attached letter from Agency, January 29, 1987

The Agency comment, PC #1, was actually intended as a motion to reconsider R86-19, but was not received in time to delay filing of the rules. The Board docketed the motion as a public comment in this Docket. The subject matter will be addressed below under the heading "Section 722.134." PC #7 concerns the same issues.

The Board also received codification comments from the Administrative Code Unit on December 4, 1986.

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 recently updated the UIC rules:

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

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:

R84-9 64 PCB 427, June 13, 1985; 9 Ill. Reg. 11964, effective July 24, 1985.

R85-22 December 20, 1985 and January 9, 1986; 10 Ill. Reg. 968, effective January 2, 1986.

R86-1 July 11, 1986; 10 Ill. Reg. 13998, August 22, 1986.

R86-19 October 23, 1986; 10 Ill. Reg. 20630, December 12, 1986.

R86-28 This Docket.

R86-46 Opened October 9, 1986.

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 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.

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:

50 Fed. Reg. 46612	Notification requirements for UST
51 Fed. Reg. 13497	Correction to UST rules
51 Fed. Reg. 16443	Amendments to closure and financial assurance requirements (May 2, 1986)
51 Fed. Reg. 19177	Correction to paint filter test
51 Fed. Reg. 19322	Changes to listing of spent pickle liquor

Almost all of the changes are to the closure and financial assurance rules of Parts 724 and 725, the May 2, 1986 amendments.

Chemical Waste Management, Inc., and Waste Management of Illinois, Inc., are involved in an appeal of USEPA's May 2 amendments, Chemical Manufacturer's Association v. USEPA, U.S. Court of Appeals for the District of Columbia. (PC # 3 and 4). Waste Management of Illinois asks that the Board grant it a stay of the amendments pending resolution of the appeal. Chemical Waste Management asks that the Board quickly promulgate revisions following any federal court invalidation of corresponding federal regulations. It is not clear from the comments whether the federal court has granted a stay of the USEPA rules.

Section 22.4(a) requires the Board to adopt identical in substance regulations. The Board would violate this provision if, in anticipation of possible federal court action of this nature, it failed to adopt currently valid USEPA amendments. The remainder of this discussion assumes a stay has been granted, although this has not been demonstrated.

In order to render its regulations effective, the Board must publish them in the Illinois Register and file them with the Secretary of State pursuant to the Administrative Procedure Act (APA). Although the Board could stay its Order, the Board is not aware of any mechanism under the APA whereby a rule can be "stayed" with respect to certain persons once it has been filed. If the Board's "stay" meant that the rules were not to be

filed, they would not be effective with respect to anyone, violating the mandate of Section 22.4(a).

Section 38(b) of the Act provides for automatic stays of new rules if a person files a petition for variance within 20 days after a new rule becomes effective. However, this Section also provides that the operation of any rule which implements in whole or in part the RCRA program "shall not be stayed."

Waste Management cites A. E. Staley v. IEPA and IPCB, 290 NE 2d 892, 8 Ill. App. 3d 1018, Fourth District, December 13, 1972, which held that the Board was required to grant Staley a stay of the original adoption of the water pollution regulations. This was decided before the new APA, at a time when the distinction between the Board's action in adopting a rule and filing was not clear. Indeed, the Illinois Register was not yet in existence. Neither the adoption nor the content of the rules involved were mandated by statute. Section 38(b) of the Act did not include specific prohibitions on stays of the RCRA program, which did not even exist. For these reasons the Board does not regard the Staley decision as a valid precedent for this action.

It might be feasible to write the terms of any federal court stay into the rules the Board has adopted. However, the comments are not sufficiently specific to form the basis of such a rule. The commenters are welcome to file a specific regulatory proposal for such a rule in a new Docket.

The Board could also grant a variance pursuant to Title IX of the Act, assuming specific petitioners could demonstrate arbitrary or unreasonable hardship and consistency with federal law. The Board is prepared to consider costs associated with compliance with stayed federal rules as hardship, and to accept consistency with the terms of any stay granted by federal courts as consistency with federal law.

In the event there is an adverse federal court action, USEPA will presumably adopt modifications to its rules, which the Board will then adopt as quickly as possible. The Board notes, however, that it is presently moving as fast as possible to adopt USEPA amendments within the procedural constraints imposed upon it. Interested persons may propose specific amendments if they need faster action.

The Agency has suggested that the Board need not spell out "RCRA" when the Resource Conservation and Recovery Act is meant (PC #6). The Agency is correct that the acronym is defined in Part 720. However, the term can be confused with the RCRA permit required under Section 21(f) of the Act. The Board has therefore spelled the full name of the RCRA Act out whenever encountered in these amendments. The specific instances noted by the Agency occurred within administrative compliance order references, which, as is discussed below, have been stricken altogether.

Section 702.187

Section 702.187 is drawn in part from 40 CFR 270.42, which was amended at 51 Fed. Reg. 16443. When a facility is sold, the old operator has to continue to provide financial assurance until the new operator demonstrates compliance.

Section 703.155

This Section is drawn from 40 CFR 270.72. The rules for financial assurance upon sale of an interim status facility are basically the same as for a permitted facility

Section 703.183

This Section is drawn from 40 CFR 270.14(b), which was also amended at 51 Fed. Reg. 16443. Section 703.183(n), (o) and (p), have been amended to specify the financial assurance documentation required in the Part B permit application. For new facilities, financial assurance is keyed to initial receipt of waste, rather than the permit application.

Section 720.110

The definitions table has been amended to add or amend the definitions of "active life", "final closure", "hazardous waste management unit" and "partial closure". The definition of "small quantity generator," which appeared in the proposal, was adopted in R86-19.

Section 721.132

The definition of K062, spent pickle liquor, was modified at 51 Fed. Reg. 19322. Note that K117, K118 and K136, which appeared in the proposal, were adopted in R86-19.

Section 722.134 (not amended)

In R86-19 the Board, acting in response to a public comment, modified the provisions concerning extension for 30 days of time periods during which generators can hold hazardous wastes without becoming subject to the storage permit requirement. As amended, a provisional variance or variance is required to extend the storage periods.

As indicated in the R86-19 Opinion, the Board withheld final filing until after November 19, 1986, to allow time for final review by the agencies involved with the authorization process. The Board mailed the rules to the Secretary of State on November 25, and they were received for filing on December 2, 1986. The Board received a final comment from the Agency on December 1, 1986, too late for consideration in that Docket. The Board therefore designated the comment as PC #1 in this Docket.

The Agency estimates that every year it grants about 183 extensions of the storage period. The Agency believes it would cause unnecessary hardship for it and the generators if these were handled as variances or provisional variances, or if the generators were counted as out of compliance and asked to file permit applications pending decisions on variances.

The Board has already granted several provisional variances recommended by the Agency pursuant to this provision. However, the Board refused to grant two provisional variances where it appeared that the Agency had granted a previous 30 day extension. The Board found that it lacked authority to grant extensions totaling more than 30 days, based on an interpretation of the USEPA rule (40 CFR 262.34). The Board stated that it would reconsider if it were demonstrated that USEPA construes its rule as allowing such extensions.

Subsequently the Board received copies of a letter written by the Agency to USEPA on January 9, 1987, and a response from USEPA dated January 26, 1987. The Board has designated these PC #7 in this Docket. USEPA states that it concurs with the Board's interpretation of Section 722.134:

> Additive extensions for the same stored hazardous wastes (i.e., the same storage event) are not acceptable and should not be granted. However, a series of unforseen, temporary and uncontrollable circumstances that would result in more than one extension request for the same facility is acceptable under the regulations if, and only if, they resulted from different storage events.

The Board is not persuaded that the concerns expressed by the Agency's operating staff outweigh the concerns, as expressed in R86-19, that led to the use of the provisional variance mechanism. The Board notes that this mechanism has been used in areas other than RCRA where short term relief is needed quickly. The Board also notes that, if another mechanism is later proposed, it must be consistent both with the Environmental Protection Act and the Administrative Procedure Act.

Section 724.190

The Board amended this Section in R86-1. A typographical error occurred in the date specified in Section 724.190(a)(2). This should have been "July 26, 1982," rather than "July 28, 1982." The Board has corrected this in this Docket.

Section 724.210

The closure and financial assurance requirements were extensively amended at 51 Fed. Reg. 16443, May 2, 1986. Most of the remaining amendments discussed in this Opinion are drawn from this Federal Register.

The amendments to Section 724.210 are minor editorial changes.

Section 724.211

This Section has been amended mainly to add a reference to specific closure requirements to the general standard. In paragraph (c) the USEPA rule references the requirements of "this Subpart", but then cites Sections in other Subparts. The reference has been corrected to read "Part".

Section 724.212

This Section has been amended to greatly increase the specificity of the requirements concerning closure plans. Among other things, the operator is required to plan for closure of individual disposal units within the facility, and to notify USEPA with the closure of each disposal unit.

Section 724.213

This Section has been amended to be more specific as to modification of the time allowed to begin or to complete closure. The USEPA rule requires closure to begin within 90 days and to be completed within 180 days, unless certain conditions are met. When the Board adopted this Section in R83-19, it modified the language to make it clear that the Agency's decision was to be in the context of permit review, and that the time limits were presumptive norms to be applied in the absence of the required showing. These changes are consistent with the present amendments and will be retained.

Section 724.213

There are many places in the proposal at which the Board changed "may" to "shall" so as to make it clear that the Agency is to act as the rule directs if the stated conditions are met. If there are additional factors which the Agency should consider, these should be proposed to the Board so it can amend the rule accordingly. (PC #2)

Section 724.214

This Section has been modified to make the requirements concerning removal or decontamination more specific, and to reference the generator requirements of Part 722.

Section 724.215

This Section has been modified to make the requirements concerning certification of closure more specific. Certification from a professional engineer is required within 60 days after completion of closure of land disposal units, even if the rest of of the facility remains open.

Section 724.216

This Section has been added. It requires the operator to submit a plat to the Agency and to local authorities prior to certification of closure. The USEPA rule requires submission "to the local zoning authority, or the authority with jurisdiction over local land use." In Illinois there may be, in practice, no such authority excercised in rural areas. When the Board originally adopted it, the rule was modified to require filing with "any" local authority, and to require the plat to be recorded with land titles. This is followed in these amendments.

Section 724.217

This Section has been modified to make the requirements concerning the post-closure care period more specific. In R83-19 the Board specified that rulemaking pursuant to Part 102 would be required to shorten or lengthen the 30-year period. Specific procedures for such site-specific RCRA determinations were adopted in R84-10. The amendments are consistent with these procedures.

Section 724.218

This Section has been modified to make more specific the requirements concerning the post-closure care plan. The plan no longer needs to be kept at the facility. The operator must apply for a permit modification at least 60 days prior to a planned change which affects the post-closure care plan, and within 60 days after an unexpected event. Post-closure care plans must be submitted within 90 days after either the Agency or the operator determines that a unit which does not have a contingent post-closure care plan will have to be closed as a landfill.

Section 724.219

This Section has been largely rewritten. Some of the material has been moved to new Section 724.116, or to amended Section 724.220. When it adopted this Section in R82-19, the Board specified the County Recorder and "any" local zoning authority, for the reasons stated above. This has been followed in the present amendments.

The operator now has to submit information on the location of wastes on the facility each time a disposal unit is closed. Procedures have been specified for removal of notations on deeds in the event hazardous wastes are subsequently removed from a disposal unit.

Section 724.220

The former material has been moved to Sections 724.216 and 724.219. This Section now requires a certification from the operator and a professional engineer that post-closure care has

been completed in accordance with the plan. The certification is required within 60 days after completion of post-closure care.

Section 724.241

A definition of "plugging and abandonment cost estimate" has been added. This is the cost estimate prepared pursuant to Section 704.212 for UIC wells injecting hazardous waste. This requirement was adopted in R85-23 on July 11, 1986.

Section 724.242

The requirements for closure cost estimates have been made more specific. Many of the changes are similar to the financial assurance rules adopted by the Board for non-hazardous waste facilities in R84-22. (Order of November 21, 1985; 66 PCB 463) The cost estimate must be based on third-party costs, and cannot include salvage value. The operator can use actual costs instead of inflation factors in revising the cost estimate. The time for adjusting the cost estimate is now keyed to the anniversary date of the financial instruments, rather than the date of the first cost estimate.

Section 724.243

The requirements concerning financial assurance instruments for closure have been modified. The amendments generally concern application of financial assurance during partial closure, finality of orders and inclusion of UIC plugging and abandonment costs in financial tests.

Most of the RCRA financial assurance mechanisms require the operator to create a "standby trust" to receive the proceeds of the mechanism. In R84-22 the Board determined that such standby trusts are expensive and unnecessary under Illinois law. However, the Board has retained the standby trusts in this rulemaking, which is pursuant to Section 22.4(a) of the Act.

The amendments to several provisions trigger application of financial assurance when USEPA issues a "final administrative order". (For example, see Section 724.243(b)(4), (c)(5) and (d)(8).) Since Agency has no comparable power, the existing rules trigger application of financial assurance when the Board or a court orders closure. USEPA lacks authority to issue administrative orders in authorized States (Northside Sanitary Landfill, Inc. v. Thomas, No. 85-2119 (slip op., 7th Cir., October 23, 1986). Such orders will not trigger the closure requirements or application of proceeds of financial assurance instruments in Illinois. Chemical Waste Management provided the Board with the citation to the Northside Sanitary Landfill case. The Agency agrees that USEPA administrative orders are not to be used in Illinois. (PC #3 and 6)

There are other provisions in the proposal which include similar language. The Board has reviewed these and, where necessary, modified them to avoid any interpretation that they authorize administrative orders in Illinois. These Sections include: Sections 724.212(d)(3), 724.243(b)(4), (c)(5), (d)(8) and (e)(8), 724.245(b)(4), (c)(5), (d)(9) and (e)(8), 725.212(d)(3), 725.218(e)(2), 725.243(b)(4), (c)(8) and (d)(8), and 725.245(b)(4), (c)(9) and (d)(8).

The USEPA rules provide that USEPA can withhold payments from a trust to the operator if it "has reason to believe" that the cost of closure will be significantly greater than the value of the trust. The Board has changed this to "determines". For example, see Section 724.243(a)(10). The question on review of such action would be not whether the Agency subjectively had a reason, but whether the cost indeed will be greater than the value of the trust. Similarly, in Section 724.243(i), the Agency is to release the operator unless it "determines" that closure has not been in accordance with the approved closure plan.

The USEPA rules allow operators to provide a single financial assurance package for all facilities nationwide. These provisions were deleted on adoption of Section 724.243(g) in R82-19. However, the rules do not specifically say how the Agency is to deal with multistate operators.

Chemical Waste Management has suggested that the Board allow a federal financial assurance demonstration to satisfy state law requirements. (PC #3) The Board declines to so modify the rules in the context of this rulemaking, which is pursuant to Section 22.4(a) of the Act, but invites proposals as to how to accomplish this result. The Board will point out some of the difficulties with multi-state financial assurance.

First, it should be noted that a USEPA RCRA permit does not allow operation in Illinois. IEPA must issue a RCRA permit pursuant to State authority, following any necessary siting approval under Section 39.2 of the Act. (R83-24, 55 PCB 313, December 15, 1983).

Second, it appears that for the Agency to accept federal financial assurance as complying with State requirements, the financial assurance must be in a form such that the Agency can apply proceeds to sites in Illinois. At a minimum, this should involve the following:

1. Assets pledged to Illinois sites could not be diverted to other sites without the Agency's approval.

2. The operator and financial institution should submit to Illinois Court jurisdiction.

3. The financial assurance documents should be governed by Illinois or federal law, rather than the law of the state where the documents are executed.

4. An Order to close from the Board or an Illinois Court should trigger a default.

5. In the event of a default, the assets should be payable to or controlled by the Agency.

Section 724.244

The requirements for cost estimates for post-closure care have been modified in a manner similar to the closure cost estimates.

There appear to be two errors in the USEPA text. 40 CFR 264.144(a) references Sections 264.228 "and" 264.258 where "or" is obviously intended. Section 264.144(b) references Section 264.145(b)(1) and (2) where an internal reference is intended.

Section 724.245

The requirements for financial assurance instruments for post-closure care have been modified in a manner similar to Section 724.243.

Section 724.247

Paragraph (c) requires the operator to provide technical and engineering information as is "deemed necessary by the Agency to determine" a level of insurance other than the specified dollar amounts. The Board has modified this so it will contain an objective standard on which to judge the Agency's action. Information will be required as "necessary to determine."

Paragraph (d) requires the operator to provide information "within a reasonable time." The Board has modified this to read: "within a time specified by the Agency in the request, which shall not be less than 30 days."

Section 724.251

The financial assurance forms have been modified to allow inclusion of UIC plugging and abandonment cost estimates. The Board has updated the incorporation by reference to include these amendments, but will not adopt the actual language of the forms. Rather, the Agency will continue to promulgate forms in conformity with the federal requirements.

As is discussed in connection with Section 724.243 above, the Board has amended these rules to remove references to USEPA administrative orders as a condition of default in financial

instruments. The Agency needs to review the forms it uses to assure that they are consistent with this change.

Section 725.210

The Part 725 closure and financial assurance rules apply to TSD facilities which do not have RCRA permits. They pose additional problems because of the ambiguity in the USEPA text as to the procedural context in which decisions are made.

Section 725.210 has been modified to specifically mention the post-closure care requirements applicable to certain waste piles and lagoons from which the operator intends to remove wastes at closure.

Section 725.211

The closure performance standard is similar to the standard for permitted facilities. It has also been modified to recite specific closure rules for various types of units. The USEPA rule references closure requirements of this "Subpart", when "Part" is obviously intended.

Section 725.212

The requirements for the closure plan have been revised. The operator no longer needs to keep the closure plan on site, but must have it available for inspections or mailed requests. The rule now specifies plans for the closure of each unit, and for final closure of the facility. There is now a procedure for approval of interim status closure plans. The USEPA rules include a requirement of a statement of reasons to the operator if a plan is not approved, or if a modified plan is approved.

Section 265.112(d)(1) requires submission of the closure plan 180 days prior to closure of the first disposal unit, "or final closure if it involves such a unit, whichever is earlier." This cannot be right, since final closure could never occur before closure of the first disposal unit. The Board has modified Section 725.212(d)(1) to reflect the language for permitted facilities from 40 CFR 264.112, which avoids this problem.

In Section 725.212(d)(3) the existing language requires the owner of an interim status facility to submit a closure plan no later than 15 days after a closure order from a court or the Board. Under the existing language, issuance of a compliance order under RCRA also triggered the requirement to file a closure plan. For the reasons noted above, this has been modified to remove USEPA compliance orders.

Section 725.217

As proposed, this Section would have allowed the Agency to shorten or extend the post-closure care period for interim status facilities. This is not consistent with Part 724, which requires Board action for such decisions. (PC #3). The Board has modified the proposal to require Board action.

Section 725.218

As proposed, and as previously adopted, this Section was apparently unclear as to whether the Board or Agency was to make various determinations concerning modification of post-closure care plans for interim status facilities. (PC #3) The actual text generally specified the Agency. However, the final paragraph, which has no federal counterpart, required a concurrent variance or rulemaking petition filed with the Board to obtain modification of a plan in a manner which would not conform with Board regulations.

The question of Board or Agency authority is more complex in the interim status rules of Part 725 than in the permit rules of Part 724. The interim status rules lack a complete set of procedures which the Agency is to follow. Rather, there are miniprocedures scattered about with the substantive rules.

The Agency has proposed to adopt procedural rules which would govern hearings conducted by the Agency on interim status closure plans. (35 Ill. Adm. Code 166, 10 Ill. Reg. 20353, December 12, 1987.) The Board has commented to the Agency on this proposal. The Agency's Part 166 procedures must be consistent with the procedures specified in Parts 725 and 705.

Section 725.218 as proposed contains several procedures or determinations which could be done or made by the Board or Agency. These include:

725.218(d)(3)	determination that a unit must be closed as a landfill
725.218(d)(4)	request for modification of a plan
725.218(f)	procedures for modification of plan
725.218(g)(1)	standards for modification of plan or length of post-closure care period on petition from public or operator
725.218(g)(2)	standards for tentative decision to modify plan or to propose change in length of post-closure care period by Agency

Interim status facilities are required to have closure and post-closure care plans. However, the Agency does not generally see, review or approve these plans. One aspect of this Section involves a determination by the Agency that the plan does not meet the requirements set by Board rules. The rules set procedures by which the Agency notifies the operator, demands a modified plan and ultimately approves a plan which meets Board rules. This clearly is within the Agency's authority.

The other aspect of this rule involves changes in the length of the post-closure care period, which is set by Board rule. This could be one of two types. The first is a simple shortening or extension of the specified period, a determination which clearly must be made by the Board. The second arises because of the modification of the USEPA rules to focus on closure of individual disposal units within a larger facility. These rules are supposed to form a framework for decision as to whether to shorten or lengthen the post-closure care period for individual units within the active life of the facility plus the post-closure care period for the last disposal unit to be closed. (51 Fed. Reg. 16434, 16446, May 2, 1986).

Paragraphs (d)(3) and (d)(4), which involve requests to modify the plan and determinations that a unit must close as a disposal unit, are no different than actions the Agency would take during review of an actual permit, and are well within the Agency's authority. These provisions remain as proposed, with the Agency making these determinations.

Paragraph (f) specifies the procedures the Agency is to use to modify a plan. Paragraph (f)(2) has been added to reference Board procedures, and to state that the Agency is not to follow its procedures if the Board has already ordered modification of the plan. The Board will already have allowed comparable public participation prior to ordering such modification. Note, however, that the issues on modification of a plan could involve decisions by both the Board and Agency. For example, the Board might order the post-closure care period shortened, but the Agency would still have to approve the engineering aspects of the plan based on the shortened period, and approve reduced financial assurance. In such a case, after the Board Order was entered, the Agency would follow the procedures specified for it. However, the substance of the Board Order would not be subject to modification as a result of the Agency procedure.

Paragraph (g)(1) incudes standards under which changes to the length of the post-closure period or plan would be approved. These could be applied by either the Board or the Agency, depending on the nature of the petition. The Board has therefore struck the references to the Agency in the existing language to avoid possible confusion. Paragraph (g)(1)(B) specifies procedures which the Agency is to follow when it makes this decision. The Board has added a provision referencing the

Board procedures, and providing that the Agency not follow the specified procedures if the Board has ordered the change.

Paragraph (g)(2) includes standards under which the Agency decides to unilaterally modify a plan. These have been left as proposed. Note, however, that the Agency could not modify a plan in any manner other than to make it consistent with Board rules. If the Agency wanted a plan modified in a manner other than as specified in the rules, it would have to propose a change to the Board. Note that the second sentence of Section 725.218(g)(2) says that the Agency shall "propose to extend or reduce the post-closure care period." Although this is taken verbatim from Section 265.118(g)(2), the Board intends a different meaning than that attached to the USEPA rule. The Agency would propose this change to the Board utilizing the procedures of paragraph (i), rather than issuing the equivalent of a draft permit utilizing the procedures which follow in the USEPA rules.

The references to Board procedures have been moved from paragraph (h) to a new paragraph (i). For the time being the Board will continue to require site specific rulemaking as the mechanism for modifying Board-required interim status provisions, including adjustments to the length of the post-closure care period. However, Section 28.1 of the Act now allows the Board to adopt "adjusted standards" procedures which could be used for changing the length of the required post-closure care period, both here and in Part 724, and also with respect to other similar RCRA provisions. Since this would entail a complete review of the RCRA rules, the Board declines to do so at this time under the pressure of a mandated rulemaking under Section 22.4(a) of the Act,and at a time after the opportunity for public comment has passed.

Section 725.240 (not amended)

USEPA amended paragraph (a) at 51 Fed. Reg. 16443, May 2, 1986. The first change was the reference to Section 725.250 instead of Section 725.251. This change has already been made in the Board rules. The second change is to make the Subpart apply to owners "or" operators, instead of "and". This is wrong, and inconsistent with paragraph (b). The financial assurance requirements apply to both the owner and the operator, although action by one generally discharges the other. For these reasons, there is no need to modify existing Section 725.240.

Section 725.241

"UIC cost estimate" has been defined.

Section 725.242

The interim status closure cost estimate has been revised in a manner similar to Section 724.242. The USEPA rule includes a

reference in paragraph (a) to Section 265.178, which does not exist. This appears to be the appropriate location for closure requiremen s for drum storage areas. However, none have been adopted for interim status facilities. Paragraph (b) includes a reference to Section 265.243(e)(3), which has been corrected to read (e)(5).

Section 725.243

The Board has adopted the text of the financial assurance requirements, repealing the incorporations by reference. Section 725.243 is very similar to Section 724.243.

The USEPA interim status rules reference 40 CFR 264.151, which includes the forms for financial assurance. Section 724.251 incorporates the USEPA forms by reference, and directs the Agency to promulgate forms based on the USEPA forms. The Part 725 rules will reference the appropriate form in 40 CFR 264.151, and Section 724.251. Section 725.251 will be repealed in order to maintain better consistency with USEPA.

Section 265.143(d) includes transitional rules which gave interim status facilities 90 days to obtain closure insurance when the rules were adopted in 1981. Similarly, Section 265.143(e)(4) includes transitional rules granting extensions of time to compile financial data during 1981. These have been omitted from the Illinois text, although, of course, this does not result in any ex post facto change in these rules.

Section 725.244

The cost estimate for post-closure care under interim status is similar to Section 724.244. In paragraph (b) a reference to Section 725.245(d)(5) has been corrected to Section 725.245(e)(5).

Section 725.245

The interim status post-closure financial assurance rules are similar to Section 724.245. The Board has set them out in full instead of incorporating them by reference. Section 265.145(c)(9), as amended, refers to "permit requirements". This has been changed to "interim status requirements".

Section 725.247

The Board has adopted the interim status liability insurance requirements in full instead of incorporating them by reference. These are similar to Section 724.247. Paragraph (b)(4) of the USEPA rules includes transitional rules allowing operators time through November, 1983, to obtain liability insurance for nonsudden occurences. Similarly, paragraph (f)(4) allowed additional time for submission of financial data for

operators seeking to self-insure. These have been omitted since the dates have passed.

Paragraphs (c) and (d) allow for adjustment of the amounts of required liability insurance at the instance of the operator or the Agency. The USEPA rules have been modified in a manner similar to the comparable provisions of Part 724.

The adjustments to the interim status insurance requirements require hearings whenever there is a significant degree of public interest, or at the Agency's discretion. The Board has worded this to more closely track the language of Section 705.182(a), which applies to permitted facilities.

The Board received a public comment from the American Insurance Association (PC #5). They state that environmental impairment insurance is currently unavailable and suggest changes to the rules to make it available. The Board is not able to modify the rules in the manner suggested since this rulemaking is pursuant to Section 22.4(a) of the Act. The Association is welcome to propose changes pursuant to 35 Ill. Adm. Code 102 and Section 22.4(b) of the Act.

The American Insurance Association's comments also address closure insurance. The Board has recently addressed closure insurance for non-hazardous waste sites in R84-22. The Board addressed similar comments in that Docket. Closure insurance is more akin to life insurance than liability insurance. Life insurance is available even when the insurer cannot cancel the policy following the death of the insured.

Section 725.414

USEPA inadvertently omitted the USEPA paint filter test from the interim status liquids restriction as amended on July 15, 1985. The Board left the paint filter test in Section 725.414 as amended in R86-1. However, it is now necessary to reletter the subsections to conform with the federal lettering.

Section 731.101

The underground storage tank (UST) rules are drawn from 40 CFR 280. The Board adopted the UST rules in R86-1, effective August 12, 1986. Definitions of "owner" and "operator" were added at 50 Fed. Reg. 46613. These amendments should have been adopted with R86-1, but were inadvertently omitted.

Section 731.103

Notification requirements were added at 51 Fed. Reg. 46612, and amended at 51 Fed. Reg. 13497. Notification was required by May, 8, 1986, which was before the effective date of the authorizing legislation (Section 22.4(e) of the Act), and before the Board adopted the UST program (effective August 12, 1986).

The Board has dropped these dates to avoid a retroactive rule. Notification will be required by State law as of the effective date of these amendments; before that date, notification will be a federal requirement only. Since owners will already have been required to notify under federal law, there is no need for time after the rules become effective.

This Opinion supports the Board's Final Order of this same day. The Board will withold filing the final rules until after March 6, 1987, in order 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 5th day of February, 1987, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board