

ILLINOIS POLLUTION CONTROL BOARD  
August 8, 1991

IN THE MATTER OF: )  
 )  
CERTAIN HAZARDOUS WASTES FROM ) R91-11  
PRIMARY ZINC SMELTING AND ) (Emergency Rulemaking)  
REFINING, 35 Ill. Adm. Code )  
721.104 (b) (7) (U) )

PROPOSED RULE. DISMISSAL ORDER.

ORDER OF THE BOARD (by J. Anderson):<sup>1</sup>

Big River Zinc Corp. filed a petition for variance and motion for stay on April 8, 1991. In that proceeding, docketed as PCB 91-61, Big River sought a variance from the July 1, 1991 termination date of the exemption at 35 Ill. Adm. Code 721.104-(b)(7)(U) for certain of its wastes falling within the hazardous waste listing K066. By its Order of May 6, 1991 in PCB 91-61, the Board denied the stay. We simultaneously opened this docket, by an Order dated May 6, 1991, to receive public comment on the possibility of an emergency rule that might essentially delay the effective date of the termination for as long as the Board felt its authorization would allow.

The Board dismissed the PCB 91-61 proceeding July 11, 1991 on Big River's June 28, 1991 motion to withdraw. That motion also included a motion to strike certain language contained in the Board's May 6, 1991 Interim Order in PCB 91-61. The Board construed that motion as one for reconsideration and deferred it to this docket. The Board will now consider that motion. The Board will also discuss the dismissal of this proceeding.

Motion for Reconsideration

In our Interim Order of May 6, 1991, the Board stated as follows:

Nothing in the [opinion of the federal court in American Mining Congress v. EPA, 907 F.2d 1179 (D.D.C. 1990),] purports to affect the effectiveness of the K066 [hazardous waste] listing.

Interim Order of May 6, 1991 at 12.

Big River Zinc's Motion to Withdraw in PCB 91-61 urged the Board to "at a minimum" strike this language in that Order or in R91-11. In support of this motion, Big River argues in supplemental comments filed June 28, 1991 (P.C.#6) its interpretation of the

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1. The Board appreciates the contributions in this proceeding of Michael J. McCambridge, Board attorney.

June 20, 1991 USEPA comments (P.C.#5). The Agency, by its comments filed July 8, 1991 (P.C.#7), states that it does not support the position of Big River Zinc with regard to the effect of the federal court opinion.

As more fully set forth, the passage in the May 6, 1991 Interim Order reads as follows:

Section 3009 of RCRA provides that a state may delay adopting a RCRA provision where a federal court has delayed or enjoined its effectiveness:

[I]f application of a regulation with respect to any matter under this subtitle is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. . . .

42 U.S.C. § 6929.

Thus, if a federal court were to postpone or enjoin the applicable rule, the Board could engage in some form of action, not necessarily by issuing an order of stay, that would have the effect of delaying the termination of the exclusion. . . .

Examination of the American Mining Congress opinion as to K066 wastes reveals that the court remanded the proceeding to USEPA "for a fuller explanation of its decision to list K066" because "there is no adequate explanation in the 1988 rule for the listing of K066." American Mining Congress v. EPA, 907 F.2d at 1188-89. Nothing in the court's opinion purports to affect the effectiveness of the K066 listing. In fact, the court showed great deference for USEPA's judgement:

In reaching this decision we do not attempt to substitute our judgment for the expert judgment of [USEPA]. We do not conclude that [USEPA] is incapable of adducing sufficient evidence reasonably to support its decision to list the materials at issue. . . .

[USEPA] did not exceed its statutory authority in treating the wastes as . . . subject to RCRA Subtitle C regulation. Nor did it run afoul of the APA notice and comment requirement. However, [US]EPA failed in the 1988 Rule to articulate a rational connection between the data on which it purpor-

tedly relied and its decision to reject the petitioners' admittedly significant challenges. . . .

American Mining Congress v. EPA, 907 F.2d at 1191 & 1192.

In this way, the federal court seems to have avoided affecting the effectiveness of the USEPA K066 listing.

PCB' 91-61 Interim Order of May 6, 1991 at 13-14.

Thus, the assertion merely states that the American Mining Congress decision does not explicitly affect the effectiveness of the K066 listing.<sup>2</sup> It does not set forth any opinion as to the effect of the federal district court's remand of the K066 listing in that case.<sup>3</sup>

The determination of the effect of the remand on the effectiveness of the waste listing is dependent on interpretation of federal administrative law, and neither Big River nor the Agency has cited any federal law to the Board that would assist the Board in making a determination of the effect of such a remand.

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2. A federal court is free within its discretion to deny a stay of a rule while it is under review so as to not interfere with its enforceability. Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56, 87 S. Ct. 1507, 1519, 18 L. Ed. 2d 681, 695-96 (1967). The Board notes that if the District of Columbia court had clearly reversed or vacated the K066 listing with its remand, the listing would be a nullity.

3. The American Mining Congress court concluded that the listing was "arbitrary and capricious." 907 F.2d at 1191. The anomaly created by the lack of a judicial or administrative stay of an "arbitrary and capricious" rule that the court did not outright vacate or reverse raises questions as to its enforceability as federal law.

Moreover, in apparent recognition of the questionable enforceability of the K066 listing, P.C.#5 indicates that although USEPA will not hold the states to the July 1, 1991 deadline for its adoption, it expects that the states will timely remove the six wastes from the Bevill Amendment exemption--i.e., in part, terminate the temporary exemption of 35 Ill. Adm. Code 721.104-(b)(7)(U). The K066 listing, and not removal of certain of the wastes Bevill Amendment exemption, was the subject of the American Mining Congress appeal and ultimate remand. USEPA observes that because the Board has removed the six wastes from the Bevill Amendment exemption, Illinois "is in compliance with the Federal regulations." P.C.#5 at 2.

Further, this is not an issue the Board purported to decide, since this was not an issue necessary to the issue before Board on May 6. All the Board noted in the challenged passage of the Interim Order discussion was that there was no operative express stay or injunction relating to the K066 listing for the purposes of RCRA Section 3009, 42 U.S.C. § 6929.

For the foregoing reasons, the Board will deny reconsideration. The Board will not strike the challenged language in its Interim Order of May 6, 1991.

#### Dismissal of this Proceeding

The USEPA comments (P.C.#5) indicate that USEPA will not require the Board to adopt any of the five smelter listings (K064, K065, K066, K090, and K091) that are the subject of the remand in American Mining Congress v. EPA, 907 F.2d 1179 (D.D.C. 1990). This is because USEPA has not yet issued any "final rule providing the explanation that the Court ordered . . ." P.C.#5 at 1.

USEPA adopted these listings September 13, 1988. 53 Fed. Reg. 35420 (Sept. 13, 1988). The Board followed suit on September 13, 1989, effective November 13, 1989. RCRA Update, USEPA Regulations (8-1-88 through 12-31-88), No. R89-1, 103 PCB 215, 308 (Sept. 13, 1989); see 13 Ill. Reg. 18300 (Nov. 27, 1989).

Contrary to its assertions with regard to the basic K066 waste listing, USEPA states that the Board must update the state RCRA program to remove certain wastes (including certain K066-listed wastes) from the Bevill Amendment exemption. USEPA terminated that exemption on September 1, 1989. 54 Fed. Reg. 36641 (Sept. 1, 1989). The Board adopted an identical-in-substance rule effective August 22, 1990. RCRA Update, USEPA Regulations (7-1-89 through 12-31-89), No. R90-2, 113 PCB 163, 187-89 (July 3, 1990); RCRA Update, USEPA Regulations (7-1-89 through 12-31-89), No. R90-2, 114 PCB 477, 478 (Aug. 9, 1990); 14 Ill. Reg. 14401 (Sept. 17, 1990).

Nowhere during the course of this proceeding or PCB 91-61 has Big River requested that the Board repeal the basic K066 listing.<sup>4</sup> Rather, the focus of the Big River challenge has remained on the termination of the temporary exemption of 35 Ill. Adm. Code 721.104(b)(7)(U), so PCB 91-61 and this docket have focused on this termination of the Bevill Amendment exemption.

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4. Nevertheless, in light of USEPA's comments, the Board is today amending the K066 listing in R91-1 to reflect the American Mining Congress remand. We also amend the Bevill Amendment exemption in that docket, but only to the extent necessary to remove ambiguity as to our intent as to the K066 listing.

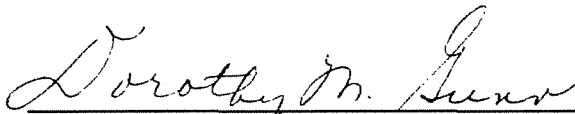
The Board believes that appropriate action is possible, and it today undertakes that action in another docket. R91-1 is the most recent RCRA update docket (for the period July 1, 1990 through December 31, 1990), and the Board is today adopting a final rule in that docket. Since Part 721 is open in that proceeding, the Board has added a Board Note to Section 721.132 at the K066 listing. That Board Note references the remand in the American Mining Congress case, notes that the enforceability of those listings as a matter of federal law is cast in doubt, and essentially states the K066 listing is not enforceable in Illinois until USEPA affirmatively responds to the remand in that case. This approach is consistent with the USEPA assertion that it will not insist that the states adopt these listings--at least until it issues a final order in response to the remand. The overall effect of this Board Note is that the Board will not give the K066 listing any more effect in Illinois than the federal listing has in unauthorized states. The opinion accompanying the Order of the Board in R91-1 will discuss this Note and the Board's rationale more fully.

For the foregoing reasons, the Board determines that there is nothing to be gained at the present time by further pursuit of this emergency rulemaking. Therefore, the Board hereby dismisses this proceeding.

IT IS SO ORDERED.

B. Forcade concurred.

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

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board