

ILLINOIS POLLUTION CONTROL BOARD
December 5, 1986

IN THE MATTER OF:) R86-5
)
AMERICAN NICKELOID)
DELISTING PETITION)

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a December 19, 1985, regulatory proposal by American Nickeloid ("Nickeloid") to exclude certain lagoon sludges from regulation as a hazardous waste. The petition was filed pursuant to 35 Ill. Adm. Code 102.120.

The wastes in question are wastewater treatment sludges impounded in three surface impoundments at the Nickeloid facility in Lima, Illinois. Such sludges are listed as hazardous wastes under generic code F006 - Wastewater Treatment sludges from electroplating operations, except from the following process: (1) sulfuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (segregated basis) on carbon steel; (4) aluminum or zinc-aluminum plating on carbon steel; (5) cleaning/stripping associated with tin, zinc or aluminum plating on carbon steel; and (6) chemical etching and milling aluminum. The listed constituents of concern for F006 wastes are cadmium, hexavalent chromium, nickel and cyanide (complexed) 35 Ill. Adm. Code 721.131, Appendix G, 40 CFR 261, Appendix VII.

On December 18, 1981, in response to a request by Nickeloid, USEPA granted a temporary exclusion from consideration of its waste as hazardous. Nickeloid petitioned the Board for delisting while its petition for final delisting was pending with USEPA.

Pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA), Section 3001(f)(2)(B), Congress commanded the Administrator of USEPA to review all temporary exclusions by November 8, 1986, and provided that all temporary exclusions expire on that date. The exclusions ceased to be in effect on November 8, 1986, absent a final decision to grant or deny the exclusion request.

The USEPA proposed to deny Nickeloid's application for final exclusion as a hazardous waste on October 8, 1986 (51 FR 36024). The comment period ended on October 23, 1986. No final action has been published in the Federal Register but the statutory expiration date of November 8, 1986, has passed. Consequently, Nickeloid's waste is no longer excluded and is considered hazardous under the RCRA program.

The disposition of this regulatory petition hinges on whether Illinois presently has the authority to delist a waste as hazardous, independent of federal delisting action.

On January 30, 1986, USEPA granted Illinois final authorization to operate its hazardous waste program in lieu of the federal hazardous waste program. However, the authorization is subject to the limitations imposed by the HSWA (51 FR 3778). In its response to comments concerning Illinois' final RCRA authorization, USEPA addressed the question of the state's authority to delist hazardous wastes.

"Comment. If Illinois is granted final authorization, would it have authority to delist waste pursuant to Section 720.122 of Title 35 of the Illinois Administrative Code (35 IAC 720.122).

Response. Due to Section 3006(g) and 3001(f) of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984, (HSWA) and amendments made to 40 CFR 260.22 on July 15, 1985, (50 FR 28702), Illinois will not have independent authority to delist hazardous waste. Section 3001(f) of RCRA as amended requires USEPA to examine factors in addition to those that caused the waste to be listed when delisting a waste. Furthermore, USEPA is required to provide the public with notice and comment prior to making a final determination on any petition. These requirements were codified in 40 CFR 260.20 and 260.22 on July 15, 1985. The Illinois regulations, 35 IAC 720.120 and 720.122, do not appear to be equivalent to these new requirements. Furthermore, the Attorney General's Statement is based on an analysis of the State's equivalency to the federal regulations promulgated by July 29, 1984. Since the new Federal rules were promulgated subsequent to that date, USEPA does not believe that the Attorney General has certified to this equivalence. According to Section 3006(g) of RCRA, as amended, until a State receives authorization for any HSWA provision, USEPA is responsible for administering that portion of the program. Since USEPA does not believe that 35 IAC 720.120 and 720.122 are equivalent to new 40 CFR 260.20 and 260.22, and these are HSWA requirements, the State is not authorized to delist waste in lieu of USEPA. Consequently, a company which wants its waste delisted must

comply with both 40 CFR 260.20 and 260.22 and 35 IAC 720.120 and 720.122."

On February 6, 1986, the Board, by Order, posed the following questions to USEPA, the Illinois Environmental Protection Agency, as well as any other participant:

- 1) Are the December 16, 1981, temporary exclusions "federal regulations" under federal law and thus subject to delisting under Section 22.4(a) of the Act?
- 2) During the interim authorization period, did the Board listings in 35 Ill. Adm. Code 721 define the scope of the RCRA hazardous waste program in Illinois?
- 3) Did USEPA authorize Illinois to delist wastes pursuant to interim authorization?
- 4) Will delisting authority change with future phases of authorization, particularly HSWA related?

USEPA responded with written comments for the record in this proceeding on March 17, 1986. In pertinent part, those comments state:

"During Interim Authorization, the State of Illinois had the authority to delist hazardous waste since 35 IAC 721 was part of the interim authorized program. However, due to Sections 3006(g) and 3001(f) of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), and amendments made to 40 CFR 260.22 on July 15, 1985, (50 FR 28702), Illinois no longer has the authority to delist hazardous waste. The new amendments add paragraph (f) to Section 3001, establishing specific criteria and procedures for delisting petitions. This subsection requires USEPA to consider additional factors, such as constituents other than those for which the waste was listed, if the Administrator has a reasonable basis to believe that such additional factors could cause the waste to be a hazardous waste. The amendments also require the Administrator to provide notice and an opportunity for comment on the additional factors considered before granting or denying a petition.

The State of Illinois did not receive authorization for delisting with its Final Authorization on January 31, 1986. Consequently, a facility must comply with both 40 CFR 260.20 and 260.22 and 35 IAC 720.120 and 720.122. However, the State may have the authority to delist hazardous waste that USEPA has already delisted, pursuant to the procedures listed in its regulations. If a temporary exclusion is granted by the Board, the exclusion is only good until November 8, 1986, since all temporary exclusions granted to facilities that have not yet received a final determination, will expire on November 8, 1986. Any exclusion granted beyond that date may result in making the Illinois program less than equivalent to the Federal program which is not acceptable."

Since this March 17, 1986, comment, USEPA has promulgated regulations pursuant to HSWA which deal with delisting and the Board, pursuant to Section 22.4(a) of the Act, has updated its regulations accordingly (R86-1, RCRA Update, Opinion and Order, 7/11/86). The Board is not aware of any Attorney General certification of equivalency for these particular regulations and no USEPA action granting HSWA authorization to Illinois has occurred. Volume 51 of the Federal Register, dated November 14, 1986, states at 41307 that:

"As a result of enactment of the Hazardous and Solid Waste Amendments of 1984, any state which had delisting programs prior to the Amendments must become reauthorized under the new provisions. To date only one state [Georgia] has received approval for their delisting program."

Illinois had a delisting program during interim status prior to the HSWA. While Illinois did receive final RCRA authorization on January 31, 1986, Illinois is not HSWA authorized. Consequently, Illinois must be specifically reauthorized under HSWA before it can independently delist a hazardous waste. This specific reauthorization for the delisting program, or any aspect of HSWA has not occurred yet. Presumably this reauthorization will be noticed in the Federal Register.

The Board finds that it does not presently have authority to independently delist a hazardous waste absent final federal action delisting the waste. The Board takes notice of the fact that its authority in this area will change as the HSWA authorization process progresses. The Board does have authority to delist a waste where USEPA has delisted such a waste. R85-2, Amoco Oil Company, April 24, 1986.

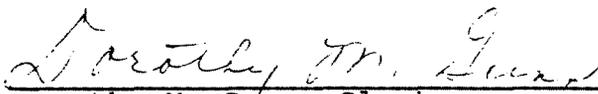
The Board dismisses Nickeloid's delisting petition. Nickeloid's temporary federal exclusion expired on November 8, 1986. USEPA proposes to deny Nickeloid's final delisting petition. The Board does not have the authority, at this time, to delist Nickeloid's waste.

ORDER

The regulatory proposal of American Nickeloid Company is dismissed and the Clerk of the Board is directed to close the docket.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of December, 1986, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board