ILLINOIS POLLUTION CONTROL BOARD
May 6, 1991

BIG RIVER ZINC CORP.,	)	
	)	
Petitioner,	)	PCB 91-61
	)	(Variance)
v.	)	
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

INTERIM ORDER OF THE BOARD (J. Anderson):

This matter comes before the Board on the April 8, 1991 Petition for Variance and Motion for Stay of Big River Zinc Corp. The Agency filed its response to Big River Zinc's Motion for Stay on April 17, 1991. Big River Zinc filed a supplement to its petition for variance on April 23, 1991, as well as a motion for leave to file a reply to the Agency's response. Also on April 23rd, the Agency moved for leave to file a reply to Big River's April 23rd filing. The Agency filed a motion for extension of time to file its recommendation on May 1, 1991, and Big River Zinc filed its response on May 2, 1991.

The nature of this proceeding raises four areas for Board determination: the motions for leave to file supplemental briefs, the appropriateness of a stay of the effectiveness of the relevant Board rule, the filing of the supplement to the variance petition and Agency motion for extension of time to file its recommendation, and the adequacy and propriety of the Petition for Variance. Due to the complexity of the issues raised by the Petition for Variance and the Motion for Stay, the Board divides consideration of the issues raised.

As an initial matter, the Board notes that both Big River Zinc and the Agency cite "35 Ill. Adm. Code 721.104(b)(7)(A)(vi)" as the operative exclusion that Big River Zinc wishes to extend. This became 35 Ill. Adm. Code 721.104(b)(7)(U) in R90-10, at 14 Ill. Reg. 16472, effective September 25, 1990. The Board refers only to Section 721.104(b)(7)(U) throughout the course of this Order, and the Board reads all incorrect citations as referring to this provision.

Motions for Leave to File Supplemental Briefs

35 Ill. Adm. Code 101.Subpart H governs motions practice before the Board. Section 101.241 permits a motion and a response as a matter of right; however, it only allows the filing of reply and supplemental response briefs on leave of the Board. The April 23, 1991 motions for leave to file of Big River Zinc

and the Agency essentially seek to file a reply brief and a supplemental response brief, respectively.

All moving and responding parties are given a single opportunity as of right to plead their relative positions on the relief sought from the Board. Since we expect the parties to brief the Board on the relevant facts and law in the initial motion and response, the Board discourages prolonging the pleadings with an ongoing succession of motions, responses, replies, supplemental replies and responses, etc. Nevertheless, where particular, unusual facts or circumstances so warrant, especially where new facts or law have become apparent subsequent to the initial pleadings or where a responsive pleading interposes new issues, the Board has allowed or ordered such supplemental filings.

As described later in detail, this case involves questions concerning the inter-relationship of the state and federal RCRA programs which have been the subject of ongoing discussions between the parties and employees of USEPA, Region V. These conversations are contained in the parties supplemental filings, as well as discussion of the Board's ability to grant the requested stay and the sufficiency of Big River Zinc's petition.

As this case raises some matters of first impression, the Board hereby grants both Big River Zinc's motion for leave to file a reply and the Agency's motion leave to file a supplemental response (called a "reply to a reply" by the Agency).

Big River Zinc's Motion for Stay

In its motion for stay, Big River Zinc requests that the Board stay the delayed effective date of July 1, 1990 for K066 wastes recited at 35 Ill. Adm. Code 721.104(b)(7)(U), promulgated in R90-2, effective August 22, 1990. The July 1, 1991 effective date actually takes the form of the termination of an exemption for certain K066 wastes from regulation as listed wastes which runs by it terms until June 30, 1991. The Board added this delayed date upon request by Big River, after adoption of the Final Order in that matter but before the Board had filed the rules with the Secretary of State. The effect of that date was to delay the time when certain of Big River's operations come under RCRA facility standards. The essence of Big River's request is that the Board grant a further delay of the effectiveness of the K066 listing until the Board can determine Big River's petition for variance on its merits.

Big River states that, subsequent to Board adoption of R90-2, it learned that imposition of an July 1, 1991 effective date would impose an arbitrary and unreasonable hardship on it. Big River states that a federal court has remanded the corresponding federal regulations back to USEPA for further consideration. Big

River asserts that there is a significant likelihood that the federal appeal will result in the reversal of the corresponding federal rule that terminated the exemption. If this were to happen, Big River asserts that it would have needlessly spent several thousands of dollars on compliance. Big River further states that its three primary domestic competitors in sister states would not similarly be required to comply by that date because the three states involved have not yet adopted the now "unexempted" K066 listing, thus placing Big River at a competitive disadvantage. Petition for Variance at 28-29; Motion for Stay at 8-9.

Big River Zinc argues that the Board can grant the requested stay consistent with federal law. It argues that the K066 listing does not become state, or federal, law until approved by USEPA, and USEPA has not approved this amendment. Big River maintains that until federal approval occurs, the Board is free to grant a stay without affecting the state's federal RCRA authorization. Petition for Variance at 29; Motion for Stay at 9.

Finally, Big River Zinc argues that if it would apply for a variance within 20 days of the June 30, 1991 delayed compliance date earlier granted by the Board, it would be entitled to an automatic stay as a matter of right, under Section 38(b) of the Act, Ill. Rev. Stat. 1989 ch. 111½, par. 1038(b). In so arguing, Big River implies that the K066 rule is not even a "RCRA" rule, as RCRA is used and defined under Illinois law.

Automatic Stay

Section 38(b) of the Act expressly states that an automatic stay arises whenever a person files a petition for variance within 20 days of the effective date of a rule. However, by its terms, this provision does not apply as to any regulation that implements the Illinois RCRA program. Ill. Rev. Stat. 1989 ch. 111½, par. 1038(b). The Board does not believe that this provision applies to the listing of hazardous waste number K066 (Section 721.132) nor to the termination of the exclusion for certain K066 wastes (Section 721.104(b)(7)(U)).

Far more than 20 days have transpired since the effective dates of both of the above-cited relevant provisions. The 35 Ill. Adm. Code 721.132 K066 hazardous waste listing, which gave rise to RCRA regulation of Big River Zinc's units, became effective in Illinois on November 13, 1989. See 13 Ill. Reg. 18300 (Nov. 27, 1989). Following a September 1, 1989 USEPA action, the Board amended Section 721.104(b)(7)(U) to include a temporary exclusion of certain K066 wastes until June 30, 1991. July 1, 1991 represented the latest date by which federal regulations required the Board to modify its RCRA program to incorporate the September 1, 1989 USEPA amendments. See 40 CFR

271.21(e)(2)(ii) (1989); 54 Fed. Reg. 36,633 (Sept. 1, 1989). The Section 721.104 amendments that granted the temporary exclusion to K066 wastes became effective August 22, 1990. See 14 Ill. Reg. 14401 (Sept. 17, 1990).

Big River Zinc, however, argues that the termination of an exclusion is the functional equivalent of the effective date of the underlying rule from which the exclusion existed. Big River Zinc cites the Citizens Utilities Co. of Illinois v. Pollution Control Board, 134 Ill. App. 3d 111, 479 N.E.2d 1213 (3d Dist. 1985) appeal involving a site-specific rule for this proposition. In that case, the Board had denied a site-specific rule without having made certain statutory findings as to the prospective costs and benefits of the proposed site-specific rule. The Board had faulted the economic impact study submitted in that matter and determined that the record did not allow it to make any determination as to the economic reasonableness of maintaining the general standards for the area in question. The Board had denied the site-specific relief, so it felt that it had not adopted a "new regulation" for the purposes of Section 27(b) of the Act. See Ill. Rev. Stat. 1989 ch. 111½, par. 1027(b). Therefore, the Board felt that it did not need to make an economic determination. The court remanded the case for further Board consideration, stating that the Board could not avoid the necessary economic determinations simply because it was denying, rather than granting, the requested site-specific relief. 479 N.E. 2d at 1216.

At first blush, the issue of whether the Board must make economic determinations under Section 27(b) in denying site-specific relief is inapposite to the issue of whether the automatic expiration of a regulatory exclusion triggers the 20-day clock for an automatic stay under Section 38(b). However, Big River Zinc argues that the Citizens Utilities court held that a denial of site-specific relief is the "functional equivalent" of reimposition of the rule of general applicability. In fact, Big River Zinc expands this further to assert that the courts in analogous situations have upheld the proposition that "the termination of an exclusion is the functional equivalent of the effective date of the general rule." Reply brief at 1-2. However, careful examination of the Citizens Utilities case does not allow the Board to go so far.

The Citizens Utilities court held only that the Board must make a Section 27(b) economic determination in denying site-specific relief where the deficiency in the economic record is through no fault of the party seeking relief. Nowhere in its discussion of this issue does the court actually hold that the denial of a site-specific rule is the functional equivalent of reimposing the general rule that applies. Rather, the closest the court comes to such an assertion is dicta:

> The intent [of the general assembly, in imposing the economic impact determination requirement of Section 27(b),] is to inject into the Board's decision-making equation a cost/benefit factor. Where, as here, the <u>rejection of substitute regulations</u> is in effect the adoption of a previously existing regulatory framework, the same economic accountability should be brought to bear. . . . The Board cannot avoid the statutorily required economic determination . . ..
>
> <u>See</u> <u>Citizens Utilities</u>, 134 Ill. App. 3d at 116, 479 N.E.2d at 1217 (emphasis added).

The <u>Citizens Utilities</u> court sought only to effectuate the intent of the General Assembly in all Board regulatory determinations, including in <u>denials</u> of regulatory relief on their merits. The court did not hold that the automatic termination of an exclusion from regulation is the functional equivalent of the reimposition (or effective date) of the general rule. Further, the Board has not denied Big River Zinc any form of regulatory relief on the merits, as it did in the <u>Citizens Utilities</u> case. The Board cannot accept Big River Zinc's "functional equivalent" of the effective date argument.

Even if for the sake of argument the Board were to assume, by whatever means, that the effective date of these regulations is July 1, 1991, the date upon which the temporary exclusion ends, Big River Zinc is not entitled to a Section 38(b) automatic stay. The relevant regulations, Sections 721.104 and 721.132, are RCRA regulations for the purposes of Section 38(b). This is despite Big River Zinc's somewhat disingenuous argument that it would be entitled to an automatic stay if it were to file a petition for variance within 20 days of July 1, 1991. Big River Zinc argues that because USEPA has not yet approved these rules, they are not state RCRA rules. <u>See</u> Reply brief at 2; Motion for Stay at 9-10. Big River Zinc cites the USEPA in support of this proposition:

> States are not authorized to carry out any regulations providing coverage similar to today's proposed [sic] rule <u>as RCRA requirements</u> until such regulations (or modifications to regulations) are <u>submitted to [U.S.] EPA and approved</u>.
>
> Reply Brief at 2 (citing 54 Fed. Reg. 36633 (Sept. 1, 1989) (emphasis added in brief).

This argument has major inherent flaws. Primary are (1) that Illinois RCRA program regulations would be ineffective for an extended period of time because USEPA has never approved a Board rule intended to implement the state RCRA program within 20 days of Board adoption; rather, USEPA approval can follow Board

adoption by more than two years,[1] and (2) that the plain words of Section 38(b) do not require "USEPA-approved RCRA regulations," but rules or regulations adopted pursuant to Section 22.4(a) to implement the state's RCRA program. Further, Big River Zinc's argument ignores the context of federal law (versus state law) ir which USEPA made its assertions.

More fully cited, the USEPA Federal Register discussion accompanying the adoption of the termination of the exclusion makes it clear that Illinois, as an authorized state, must adopt the termination by July 1, 1991. USEPA actually stated as follows in this passage:

> This final rule is not effective in authorized States, because its requirements are not being imposed pursuant to the Hazardous and Solid Waste Amendments of 1984 [(HSWA)]. . . . In authorized states, the reinterpretation of the regulation of non-excluded process wastes will not be applicable until the State revises its program to adopt equivalent requirements under state law and receives authorization for these new requirements. (<u>Of course the requirements will be applicable as a State law if the State law is effective prior to authorization</u>).
>
> <u>States that have final authorization are required</u> (40 CFR 271.21(e)) <u>to revise their programs to adopt equivalent standards</u> regulating non-Bevill mineral processing wastes that exhibit hazardous characteristics as hazardous <u>by July 1, 1991</u> . . . . Once [US]EPA approves the revision, the State requirements become RCRA subtitle C requirements in that State. States are not authorized to carry out any regulations

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[1] The usual procedure in identical in substance regulatory proceedings is for the Board to withhold filing of its rules with the Secretary of State (and thereby adopting them in the sense of the Administrative Procedure Act, Ill. Rev. Stat. 1989 ch. 127, par. 1001 <u>et seq.</u>) for up to 30 days after final adoption for post-adoption comment. The rules become effective upon filing with the Secretary of State. <u>See</u> Ill. Rev. Stat. 1989 ch. 127, par. 1005.01(c). The Agency later submits a package containing the rules to USEPA for approval. <u>See</u> Ill. Rev. Stat. 1989 ch. 111½, par. 104(l). USEPA approval necessarily follows USEPA review of that package. The most recent USEPA approval of Board RCRA rules occurred on June 3, 1991, which includes Board amendments effective in Illinois on November 30, 1987 and January 29, 1988 (corresponding to USEPA amendments of 1986 and 1987). <u>See</u> 56 Fed. Reg. 13595 (Apr. 3, 1991). The next-preceding USEPA approval of April 30, 1990 primarily included Board rulemakings effective in Illinois in 1986. <u>See</u> 55 Fed. Reg. 7320 (March 1, 1990).

> providing coverage similar to today's proposed [sic] rule as RCRA requirements until such regulations or modifications to regulations) are submitted to [US]EPA and approved. Of course, States with existing standards may continue to administer and enforce them as a matter of law.
>
> [O]nce authorized, a State must revise its program to include an equivalent provision according to the requirements and deadlines provided at 40 CFR 271.21(e).

54 Fed. Reg. 36633 (Sept. 1, 1989) (emphasis added).

Examination of the applicable federal statutes and rules clarifies USEPA's intent in this passage. First, the Board must look at the meaning and import of USEPA authorization of a state RCRA program. Then, the Board must examine the status of state hazardous waste rules at the various stages of their development.

Section 3006 of RCRA provides for federal authorization of state programs of hazardous waste management in lieu of the USEPA standards:

> Any state which seeks to administer and enforce a hazardous waste program pursuant to this subtitle may develop and . . . submit to [USEPA] an application . . . for authorization of such program. . . . [After authorization, [s]uch State is authorized to carry out such program in lieu of the Federal program under this subtitle in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . .. In authorizing a State program, [USEPA] may base [its] findings on the Federal program in effect one year prior to submission of a State's application . . ..

RCRA Section 3006(b) (42 U.S.C. § 6926(b)).

Having federal authorization means, first, that the state administers its own RCRA program in lieu of USEPA administering the federal program in the state. Second, it means that, once approved by USEPA, the regulations of an authorized state have the same force and effect under federal law within that state as do the federal regulations in unauthorized states--i.e., they become federally enforceable law. Similarly, as a matter of federal law, state administrative actions have the same force and effect within an authorized state as USEPA actions have in unauthorized states. Third, the federal regulations do not apply within authorized states.

This answers questions as to the status of federal RCRA regulations in authorized and unauthorized states. It also answers the status of state regulations as federal law once the state is authorized and the rules approved by USEPA. However, it does not answer the question as to what is the status of state regulations prior to federal approval. The RCRA preemption provision provides that answer.

RCRA clearly does not preempt any but less stringent state regulations, and the RCRA preemption provision, together with the state authorization provisions of Section 3006, strongly encourages the states to acquire and maintain USEPA-authorized programs at least as stringent as the federal rules. The RCRA federal preemption provision clearly states this as follows:

> Upon the effective date of regulations under this subtitle no State or political subdivision may impose any requirements less stringent than those authorized under this subtitle respecting the same matter as governed by such regulations . . .. Nothing in this title shall be construed to prohibit any State or political subdivision thereof from imposing any requirements . . . which are more stringent than those imposed by such regulations. . . .

RCRA Section 3009 (42 U.S.C. § 3009).

Thus, federal law can preempt only those state law provisions that are less stringent than the corresponding federal provisions, and the state is free to impose its own more stringent requirements. Therefore, after adoption by the Board, Illinois RCRA rules become effective as Illinois law upon filing with the Secretary of State, Ill. Rev. Stat. 1989 ch. 127, par. 1005.01(c), although they are not enforceable as federal law until approved by USEPA. Once USEPA approves an Illinois program revision, the approved Illinois RCRA rule becomes enforceable under federal law as federal law. See RCRA Section 3006(b) (42 U.S.C. § 6926(b)). The rule retains its prior status as effective Illinois law.

In this scheme, a new federal non-HSWA RCRA provision is a nonentity as to both federal and Illinois law prior to state action--even after its USEPA-recited effective date. First, it does not yet exist in Illinois law until adopted by the Board. Further, it does not apply in Illinois, as long as Illinois is an authorized state, because the Illinois RCRA program applies in Illinois in lieu of the federal regulations. See RCRA Section 3006(b) (42 U.S.C. § 6926(b)). Thus, until the Board adopts an identical in substance provision to correspond with the new federal rule, that rule is not enforceable in Illinois. However, the existence of the new federal rule places Illinois under the

burden of a deadline for adoption of such an identical in substance rule.

Other federal RCRA statutory and regulatory provisions indicate that authorized states bear a certain burden in order to maintain their authorized status. There are principal conditions to initial authorization and subsequent federal approvals of state RCRA programs:

(1) the state program must be equivalent to the federal program;

(2) the state program must be consistent with the federal program and the programs of other states;

(3) the state program must provide adequate enforcement of compliance of the requirements of RCRA; and

(4) the state program provisions relating to any specific matter must be no less stringent than the federal requirements;

(5) the state must update its program within certain time-frames in response to revisions in the federal rules; and

(6) the state must seek federal authorization of its periodic updates within certain time-frames or it could lose federal authorization for its entire program.

RCRA Sections 3006 & 3009 (42 U.S.C. §§ 6926 & 3009); 40 CFR 271.21.

Thus, Illinois is required under federal law to timely update its RCRA program on a periodic basis with provisions no less stringent than those adopted by USEPA in order to maintain federal authorization.

This means that the Board must adopt its Illinois RCRA updates prior to certain deadlines included in the federal rules. The deadline for any single rule is generally on July 1st of each year for the 12 month period concluded the previous June 30th. 40 CFR 271.21(e)(2)(ii) (1989); but see Ill. Rev. Stat. 1989 ch. 111½, par. 1007.2(b) and 1022.4(a) (requiring the Board to adopt rules identical in substance to the federal RCRA rules within one year of USEPA promulgation; that is September 1, 1990 for a federal promulgation occurring September 1, 1989.) The Agency must then submit the modifications to USEPA for approval of the changes within 60 days of the deadline for adoption. 40 CFR 271.21(e)(4)(ii); Ill. Rev. Stat. 1989 ch. 111½, par. 1004(l). If Illinois does not update its program by this deadline, USEPA may initiate withdrawal of state program authorization. 40 CFR 271.21(g)(2). This makes it important that Illinois promptly

comply with RCRA and adopt the corresponding provision to each new federal RCRA rule.

In this regulatory scheme, the meaning of the USEPA Federal Register assertion cited by Big River Zinc becomes clear, and that meaning does not support Big River's argument that the 35 Ill. Adm. Code 721.104(b)(7)(U) exclusion is not a rule that falls under the automatic stay exclusion of Section 38(b). All the USEPA assertion means is that Illinois is not allowed to carry out the termination of the exclusion as federal RCRA law until approved by USEPA. It does not mean that Illinois cannot enforce this provision as a matter of Illinois law; it does not mean that Illinois need not have adopted the termination prior to July 1, 1991; and, finally, it does not mean that this is not a rule that implements the Illinois RCRA program, as intended by Section 38(b) of the Act.

As to the identity of what are the RCRA regulations under Illinois law for the purposes of Section 38(b), the Board can only conclude that this applies to the rules contained in 35 Ill. Adm. Code 702, 703, 720, 721, 722, 723, 724, 725, 726, and 728, to the extent they are identical in substance to USEPA RCRA regulations. The Act does not directly define "RCRA regulation," but the Board has defined this phrase in its RCRA rules using the above approach. The Board rules define RCRA rules as follows:

> Board rules which are intended to be identical in substance to those USEPA rules adopted pursuant to the Resource Conservation and Recovery Act (42 USC 6901 et seq.). This includes Parts 720, 721, 722, 723, and 725.
>
> 35 Ill. Adm. Code 700.260 (1987).

They also define them more specifically and fully by the relevant Part numbers:

> 35 Ill. Adm. Code 702, 703, 720, 721, 722, 723, 724, 725, 726, and 728.
>
> 35 Ill. Adm. Code 102.101 (as amended at 14 Ill. Reg. 9210 (June 8, 1990), effective May 24, 1990) (procedural rule); See 35 Ill. Adm. Code 104.120(a).

Thus, the Board has clearly understood and enunciated what is a "RCRA regulation," and one of the Board's segments of the "state RCRA program" is the body of those rules. However, the statutory authority under which the Board has adopted its RCRA rules is more persuasive that the body of rules falling within the Board's definition of "RCRA regulation" are those rules that "implement" the "state RCRA program" for the purposes of Section 38(b).

The Board adopts its RCRA rules pursuant to Section 22.4(a) of the Act:

> [T]he Board shall adopt regulations which are identical in substance to federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency to implement Sections 3001, 3002, 3003, 3004, and 3005, of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended.
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> Ill. Rev. Stat. 1989 ch. 111½, par. 1022.4(a).

To the extent the Board adopts regulations pursuant to this statutory provision, which essentially authorizes the Board to do nothing more than implement Subtitle C of RCRA, those regulations implement the state RCRA program within the meaning of Section 38(b). If the Board adopts hazardous waste regulations that go beyond implementing the state RCRA program, it must look to other statutory authority in Title VII of the Act, which is referenced in Section 22.4(b).

Sections 721.104 and 721.132 are both regulations that the Board adopted pursuant to Section 22.4(a) of the Act. See 35 Ill. Adm. Code 721 Authority Note; 13 Ill. Reg. 18300 (Nov. 27, 1989) (statutory authority citation); 14 Ill. Reg. 14401 (Sept. 17, 1990) (statutory authority citation). Thus, both sections are "RCRA regulations," for the purposes of Big River Zinc's argument, and they are both each a "rule or regulation adopted by the Board which implements, in whole or in part, a State RCRA . . . program [which] shall not be stayed" for the purposes of Section 38(b) of the Act. See Ill. Rev. Stat. 1989 ch. 111½, par. 1038(b).

For these reasons, Big River Zinc cannot obtain and could never have obtained an automatic stay of the effect of Sections 721.104 or 721.132 pursuant to Section 38(b) of the Act. The Board must now consider whether it can grant Big River Zinc a discretionary stay.

Discretionary Stay

In order for the Board to grant a discretionary stay, it must have some authority for doing so. No such authority is apparent to the Board, so the Board must deny a stay. See LaClede Steel Co. V. IEPA, PCB 89-202 (Dec. 20, 1989); GSF Energy, Inc. v. IEPA, PCB 90-219 (Dec. 4, 1990).

Four points support this conclusion. Initially, as has been discussed, Section 38(b) does not mandate a stay. Second, the Board cannot find authority for such a stay in federal RCRA, which seems to go further to prohibit any delay in the

termination of the K066 exemption. Third, neither Section 38(b) nor any other provision of the Act or the Illinois Administrative Procedure Act, Ill. Rev. Stat. 1989 ch. 127, par. 1001 et seq. authorizes a Board stay of the effectiveness of a rule. (That is, to either stay the effectiveness of either the Section 721.104(b)(7)(U) termination date or the Section 721.132 K066 hazardous waste listing.) Finally, the Illinois APA would seem to preclude a stay of a filed and effective rule.

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. However, nowhere do the briefs or any court opinion indicate that any court has taken any of the above-noted actions.

In its briefs, Big River Zinc asserts only that the court in American Mining Congress v. EPA, 907 F.2d 1179 (D.D.C. 1990), remanded the matter of K066 wastes to USEPA; that the American Mining Congress is presently pursuing another appeal of the USEPA withdrawal of the K066 exemption, in Solite Corp. V. EPA, No. 89-1629 (D.D.C); and that Big River Zinc anticipates "a significant possibility" that the court will strike down the withdrawal. 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 purportedly relied and its decision to reject the petitioners' admittedly significant challenges. . . .
>
> American Mining Congress v. EPA, 907 F.2d at 1191 & 1192.

The court's decision does not appear in any way to undermine the Federal Register discussion and the relevant federal regulations cited above that appear to require that the Board have an effective termination on July 1, 1991 if the Illinois RCRA program is to comply with federal law.

In examining the Act and the APA for authority for a stay, the Board found nothing relevant. The Illinois Administrative Procedure Act provides for an automatic stay of sorts as to licensing (i.e., permitting), but that provision only maintains the effectiveness of a prior permit until disposition of a timely subsequent application for renewal. See Ill. Rev. Stat. 1989 ch. 127, par. 1016(b). The Board has certain inherent authority to grant a stay under certain circumstances, but none of those circumstances apply here. As discussed earlier, the Board can delay the filing of rules it has formally adopted by vote because those do not become effective as Illinois law until filed with the Secretary of State. See Ill. Rev. Stat. 1989 ch. 127, par. 1005.01. In contested cases, the Board may stay or alter the effectiveness of its own orders. The Board can grant a type of stay of the effectiveness of some RCRA rules (for example hazardous waste storage rules under certain circumstances if one interprets a provisional variance as a type of stay), but such a grant occurs as provided by the RCRA rules themselves. See 35 Ill. Adm. Code 722.134(b). No provision of RCRA authorizes any other form of immediate, summary delay in the effect of a rule without full consideration of the merits of the petition for relief after a public hearing, such as occurs in a rulemaking, a variance, or an adjusted standard proceeding.

The general tenor of the Illinois APA and the Environmental Protection Act would seem to preclude a summary stay of an adopted rule. In order to delay the termination date of the exclusion, the Board would have to issue "a statement of general applicability that implements, applies, interprets, or prescribes law or policy" as meant under the Illinois APA. Such is defined as a "rule" under that statute. Ill. Rev. Stat. 1989 ch. 127, par. 103.09. For such an action, the Illinois APA would require a formal rulemaking and filing with the Secretary of State. See Ill. Rev. Stat. 1989 ch. 111½, par. 1007.2, 1022.4 & 1027

(Environmental Protection Act); Ill. Rev. Stat. 1989 ch. 127, par. 1005 & 1005.01 (Illinois APA). Otherwise, the Board would have to engage in a full variance or adjusted standard proceeding.

In conclusion, state law and federal law operate as barriers to the Board granting a stay of the termination of the Section 721.104(b)(7)(U) exclusion in the way sought by Big River Zinc. Further, both the Act and federal RCRA regulations require that the Board retain the termination date. Sections 7.2(b) and 22.4(a) mandated that the Board adopt rules identical in substance to the federal rules within one year of the federal promulgation. See Ill. Rev. Stat. 1989 ch. 111½, par. 1007.2(b) and 1022.4(a). 40 CFR 271.21(e) requires that the Board adopt the termination date of the exclusion by July 1, 1991. See 42 U.S.C. §§ 6926 & 6929; 40 CFR 271.21(e). To remain identical in substance under the state mandate, the termination date must comply with this federal law. In the absence of a reversal, a federal stay, an injunction, or some other federal court action, or without some USEPA action that has the effect of delaying the effectiveness of the expiration of the temporary exclusion, the Board has no authority under the Act or under federal RCRA to grant a discretionary stay of the federally and State mandated RCRA-implementing expiration of 35 Ill. Adm. Code 721.104(b)(7)(U).

For the foregoing reasons, the Board hereby denies Big River Zinc's motion for stay. However, the Board will open an alternative route for relief to the extent both state and federal law allow.

Alternative Form of Relief

The Board is not unmindful of Big River Zinc's arguments that it could be forced to spend considerable sums on compliance with the RCRA T/S/D facility standards, only to have USEPA or a federal court later withdraw or otherwise terminate the effectiveness of those rules. In its petition for variance, Big River Zinc asserts that it will be forced to spend $ 2,000,000 per year for increased disposal costs, $ 1,900,000 for capital improvements, and $ 120,000 per day in the event of any production shutdown, in order to comply with the applicable RCRA requirements within nine months of when they begin planning improvements. Big River also asserts that a nine-month variance would save it a total of about $ 463,000. Petition for Variance at 16-22.

Again, as earlier stated, USEPA promulgated the K066 hazardous waste listing on September 13, 1988 with an exclusion for certain K066 wastes, 53 Fed. Reg. 35420 (Sept. 13, 1988), and it terminated that exclusion on September 1, 1989. 54 Fed. Reg. 36641 (Sept. 1, 1989). The Board adopted the K066 listing and

exclusion on September 13, 1989 (R89-1), 13 Ill. Reg. 18300 (Nov. 27, 1989) (effective Nov. 13, 1989), lifted the exclusion on July 3, 1990, then reconsidered and placed a future termination date on the exclusion on August 9, 1990. 14 Ill. Reg. 14401 (Sept. 17, 1990) (effective Sept. 17, 1990 (R90-2)). During this time, the United States Court of Appeals for the District of Columbia Circuit remanded the K066 listing to USEPA on July 10, 1990, without staying either the listing or the termination of the exclusion. See American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990).

Big River Zinc states that it has been negotiating the listing with USEPA during this time. Motion for Stay at 5. Although Big River Zinc does not sufficiently explain its need to wait until only 90 days before the termination date to file for immediate, unusual emergency relief, Big River Zinc asserts that it spent considerable sums of money to comply with the listing and termination by July 1, 1990, only to find that on July 10, 1990 the termination date shifted until July 1, 1991. See Motion for Stay at 5. It further asserts that, if necessary, it is ready to begin expenditures in May, 1991 in order to comply with the July, 1991 deadline.

The Board notes that the Agency's filings do not challenge Big River's assertions that it has made good faith efforts to achieve compliance in a difficult situation, and do not challenge the specifics of its cost calculations. The Agency also does not challenge Big River Zinc's assertion that it alone of its three main competitors will be subject to the expenses flowing from the K066 waste listing, since Illinois is the only state which has adopted regulations equivalent to the challenged USEPA rule. In essence, Big River Zinc has asked the Board to maintain the status quo during the period in which the Board is processing its variance request. The Board believes that Big River has presented sufficient justification for a "stay" of the rule pending resolution of its variance petition.

One possible form of temporary emergency relief is available upon sufficient justification. That form of temporary relief is an emergency rulemaking.

Section 5.02 of the Administrative Procedure Act defines an "emergency" as "the existence of any situation which the agency finds reasonably constitutes a threat to the public interest, safety or welfare." Ill. Rev. Stat. 1989 ch. 127, par. 1005.02. The same language is repeated in Section 27(c) of the Act. Under this provision, if the Board were to find that an emergency exists that required a summary rulemaking, and if the Board could assemble "a statement of the specific reasons" for the emergency, the Board could adopt a rule which is immediately effective upon filing with the Secretary of State.

Through an emergency rule, the Board could possibly alter the effect of the July 1, 1991 termination date, but the maximum period of effectiveness for an emergency rule is 150 days, and the maximum delay in the effective date of an emergency rule is 10 days after filing. Therefore, it may be desireable or necessary to orchestrate the timing of such a rule to some extrinsic events as yet unknown to the Board.

An additional factor in granting any form of relief from the July 1, 1991 termination date is the timing imposed on the Board by RCRA and USEPA rules. As discussed above, July 1, 1991 represents the last date upon which the termination of the K066 exclusion could become operational under Section 3006 of RCRA, 42 U.S.C. § 6926, and 40 CFR 271.21(e), if the Board is to maintain the consistency of the state's RCRA program with the provisions for state authorization. <u>The Board will not knowingly jeopardize the federal authorization of the Illinois RCRA program to effect any form of relief.</u> The Board can only delay the effectiveness of the termination until such delay renders the Illinois RCRA program "not equivalent to the Federal program," within the meaning of Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), or it renders the Board RCRA rules "less stringent" than the USEPA rules, as this phrase is used in Section 3009, 42 U.S.C. § 6929 and Section 7.2 of the Act. Ill. Rev. Stat. 1989 par. 1007.2.

Therefore, in the interest of giving Big River Zinc some relief, the Board will by separate Interim Order in R91-11 suggest a draft emergency rule.

Section 721.104 Exclusions

. . .

b) Solid wastes which are not hazardous wastes. The following solid wastes are not hazardous wastes:

. . .

7) Solid waste from the extraction, beneficiation and processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium ore. For purposes of this subsection, beneficiation of ores and minerals is restricted to the following activities: crushing, grinding, washing, dissolution, crystallization, filtration, sorting, sizing, drying, sintering, pelletizing, briquetting, calcining to remove water or carbon dioxide, roasting, autoclaving

or chlorination in preparation for leaching (except where the roasting or autoclaving or chlorination)/leaching sequence produces a final or intermediate product that does not undergo further beneficiation or processing), gravity concentration, magnetic separation, electrostatic separation, floatation, ion exchange, solvent extraction, electrowinning, precipitation, amalgamation, and heap, dump, vat tank and in situ leaching. For the purposes of this subsection, solid waste from the processing of ores and minerals will include only the following wastes:

. . .

U) Until ~~June 30, 1991~~the first date upon which this exclusion renders the Board RCRA program "not equivalent to the Federal program," within the meaning of Section 3006(b) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b), or it renders the Board RCRA rules "less stringent" than the USEPA rules, as this phrase is used in Section 3009, 42 U.S.C. § 6929 and Section 7.2 of the Act, Ill.Rev. Stat. 1989 ch. 111 1/2 par. 1007.2, process wastewater, acid plant blowdown and wastewater treatment plant solids from primary zinc smelting and refining, except for wastewater treatment plant solids which are hazardous by characteristic and which are not processed.

. . .

As noted in the Board's separate Order today in R91-11, the Board will delay consideration of this draft emergency rule until May 14, 1991, to allow interested parties to comment on this matter. The Board is particularly interested in any comment by USEPA. In the event that filing of this rule would in any way jeopardize the State's RCRA program authorization, or the rule would fail to give the petitioner effective relief, the Board would intend not to pursue action on the emergency rule.

Supplement to Petition for Variance and Extension of Time to File Recommendation

The April 23, 1991 Big River Zinc supplement to its petition for variance reiterates Big River Zinc's assertion that the petition for variance is not a petition for a RCRA variance. It states that Big River Zinc is waiving a hearing, and it includes an affadavit pursuant to 35 Ill. Adm. Code 104.124. In the supplement, Big River Zinc notes that it did not comply with 35 Ill. Adm. Code 104.126, applicable to RCRA variance petitions, because it does not believe that the petition is for a RCRA variance.

The Board holds that this supplement does not constitute an amended petition for the purposes of 35 Ill. Adm. Code 101.109, 101.144, 104.160, 104.180, 104.181, 104.200, and 104.220 and Ill. Rev. Stat. 1989 ch. 111½, par. 1038(c), although the Board has not yet found the original petition sufficient for the purposes of 35 Ill. Adm. Code 104.125 and 35 Ill. Adm. Code 104 generally or accepted this matter for hearing pursuant to 35 Ill. Adm. Code 104.160(b)(3) or (b)(4).

As to the May 1, 1991 Agency motion for extension of time to file its recommendation, and the May 2, 1991 Big River Zinc response, the Agency basically asserts that it cannot file its recommendation until the Board has determined whether the petition is one for a RCRA variance. The Agency requests that the recommendation be due 30 days after the Board has made such a determination.

Big River Zinc responds with the assertion that time is of the essence in this matter and requests an expedited decision. Big River raises the possibility of an amended petition in the future based on extrinsic events. It states that it would have no objection to the Board requiring the Agency recommendation 30 days after and amended petition if the Board determines that this is a proceeding for a RCRA variance.

Because the Board determines that the petition is one for a RCRA variance, the Board hereby grants the Agency thirty days from the filing of an amended petition by Big River Zinc to file its recommendation pursuant to 35 Ill. Adm. Code 104.180(a).

Sufficiency of the Petition for Variance

As the foregoing discussions have made clear, the Board adopted Sections 721.104 and 721.132 pursuant to Section 22.4(a) of the Act, so these are RCRA regulations for the purposes of Section 38(b) of the Act. Big River Zinc's arguments notwith standing, the Board has found that these rules are also RCRA rules, as defined at 35 Ill. Adm. Code 102.101. Even without such a determination, the Board must conclude that the Big River

Zinc's Petition for Variance is a "petition for a RCRA variance," as such is defined in the Board's procedural rules:

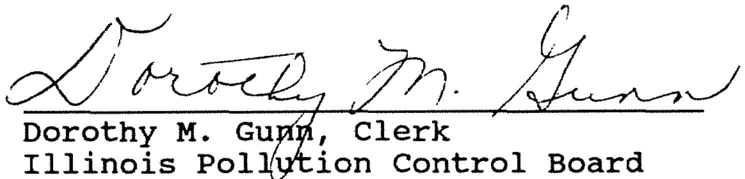
> It requests a variance from 35 Ill. Adm. Code 703, 720, 721, 722, 723, 724 or 725 . . ..
>
> 35 Ill. Adm. Code 104.120(a)(1).

The Board's procedural rules include specific provisions for a petition for RCRA variance. See 35 Ill. Adm. Code 104.104(b), 104.126, 104.142, 104.182, 104.183 & 104.221. After examination of Big River Zinc's petition in light of the relevant rules, including the April 23, 1991 supplement, the Board concludes that the petition is generally deficient.

The Board will not spell out the deficiencies, but instead refers Big River Zinc to the above-cited Part 104 rules, and to the Agency's April 17 filing. If an amended petition satisfying the requirements of the RCRA variance rules is not received within 45 days of the date of this Order, this petition will be subject to dismissal. The filing of an amended petition will restart the Board's timeclock for decision in this matter, although the Board will expedite processing of this petition consistent with its resources and workload.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Interim Order was adopted on the 6th day of May, 1990, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board