

ILLINOIS POLLUTION CONTROL BOARD
May 14, 1991

IN THE MATTER OF:)
)
CERTAIN HAZARDOUS WASTES FROM) R91-11
PRIMARY ZINC SMELTING AND) (Emergency rulemaking)
REFINING, 35 Ill. Adm. Code) (see also PCB 91-61)
721.104(b)(7)(U))

SECOND INTERIM ORDER OF THE BOARD by J. Anderson):

On May 6, 1991, the Board adopted an Interim Order authorizing the circulation of a draft emergency rule, with a request for comment by noon, May 13, 1991, particularly from the United States Environmental Protection Agency (USEPA), the Illinois Environmental Protection Agency (Agency) and Big River Zinc Corp (Big River Zinc). It was thought that the emergency rule might potentially grant relief to Big River Zinc, as was explained in the PCB 91-61 Interim Order of May 6, 1991, in which the Board denied Big River's motion for stay. Comments were received from the Agency, which included a May 9, 1991, letter to the Agency from Marc M. Radell, Associate Regional Counsel, Region 5, USEPA (PC#1); Big River Zinc (PC#2); and the USEPA, Region 5, by William E. Muno, Associate Director for RCRA Waste Management Division (PC#3). The Board will rely on Mr. Muno's comment to the Board (PC#3) as the formal comment of the USEPA, Region 5.

In its May 6, 1991 Interim Order, the Board stated, "The Board's intent in taking the unusual step of circulating a draft order prior to formal action is to seek guidance in an unusual situation." The situation remains unusual, as well as unclear. After reviewing the comments, we have concluded that further clarifying comments are needed from the Agency and Big River Zinc, particularly in response to the USEPA's comment. In so saying, we wish to state that we recognize that comments filed simultaneously and on short notice risk a certain amount of "talking past each other", as appears to have occurred here.

We believe that USEPA's comment has served to clarify one issue of great concern to the Board, i.e. that the "draft emergency rule is acceptable", that it "will not conflict with the Federal program and that it will not provide for less stringent standards than the Federal rules." (PC#3, p. 1,3). We also believe that the USEPA's underlying reasoning and its assessment of Big River Zinc's situation provides a focus for the questions still remaining.

First, however, we wish to make the following comments from our perspective.

The Board will not change the language of the draft emergency rule for two reasons: (1) it is acceptable to the USEPA, and (2), the fast-track provisions in Sections 22.4 and 7.2 of the Environmental Protection Act (Act) require the Board to adopt rules identical in substance to the federal regulations, no more and no less, irrespective of the timing of the authorization process. It stands to reason that the Board will not construe the status of a federal regulation differently from that of the USEPA.

In its comment, USEPA states its position on the status of the K066 wastes resulting from the court's remand of American Mining Congress v. EPA, 907 F. 2d 1179 (DC 1991). USEPA asserts that "Thus, this decision did not result in a court rejection of the regulation. Because of this, U.S. EPA Region V assumes the regulation has not been stayed." PC#3, p. 2, emphasis in original. We construe the USEPA's statement as meaning that it has concluded that the rule terminating the K066 exclusion is still "alive", but that whether the rule is effective and thus must be complied with during the remand, specifically by July 1, 1991, is based on an assumption. USEPA also states, "Although it is not clear whether or not the Federal regulation has been stayed, U.S. EPA Region V agrees that, in either event, the language of the emergency rule would not be in conflict with, or in contravention of, the Federal RCRA program." PC#3, p.2.

We believe that the only relief that might flow from the emergency rule is directly related to the federal "stay" question. The draft emergency rule would do away with the "lag" time between a change in the status of the effectiveness of the federal rule and the time the Board can amend the separately enforceable identical in substance state rule. The USEPA stated it precisely as follows: "If the Federal regulation is stayed, then the [draft] language, as constructed, would delay the termination of the exclusion until the stay was lifted or the regulation was withdrawn. If the rule was eventually withdrawn, the language allows the extension of the exclusion to continue." PC#3, p.2 The only other circumstance we can suggest that might delay the termination of the exclusion is if the USEPA were to reverse its assumption that the rule has not been stayed. In any event, we note that this relief would only last for 150 days, the time limit of an emergency rule.

Now to the questions. Where a specific request to respond is made, it is not intended to restrict others from responding.

1. Has the issue of whether or not there is a stay been raised before the court in the American Mining Congress case or any other case? If not, has the time to raise this issue

elapsed? We request Big River Zinc in particular to address this question.

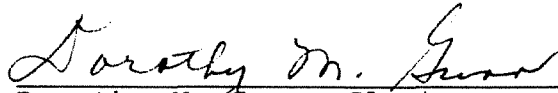
2. Has the need for, and justification for, an emergency rule changed in light of the USEPA PC#3 and the Board comments above?
3. Why does the draft emergency rule have any environmental effects? Since it is drafted so as to be neither more nor less stringent than the USEPA rule, would not environmental effects flow from the status of the federal rule? We request the Agency in particular to address this question.
4. What advantage would a 150 day emergency rule have over the Board Opinion in R90-2, p. 1 and 2, August 9, 1990, where it states: "However, the Board views the federal court opinion as applying to the derivative Board rule pending Board action in adopting the USEPA revisions resulting from the court opinion. (R86-44, 12/3/87, 84 PCB 89, 127)...This exclusion will terminate on June 30, 1991, the last day on which the Board can adopt the "Bevill amendment" exclusions consistent with federal law...In the event the remand uncertainty is not resolved by that date, the Board will regard the decision in American Mining Congress as binding to the extent applicable to the Bevill amendment exclusions." Would this language be more suitable with some extra "wordsmithing"? We request Big River Zinc in particular to address this question.*
5. Does the support for the emergency on p. 1 of the draft order as regards the "uniqueness" of Big River's situation need to be changed or eliminated?

The comments must be filed by noon, Tuesday, May 21. As before, we authorize the filing of comments by telefax, provided that any telefax filing is followed by the filing of a typescript original and 9 copies.

IT IS SO ORDERED.

* Discussions of Big River Zinc in other RCRA Update Opinions are: R89-1, 9/13/89, p. 17,18; R89-1, 10/18/89; R90-2, 7/3/90, p. 9,13,14; R90-10, 8/30/90, p. 12,13.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Second Interim Order was adopted on the 14th day of May, 1991, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board