PPC 9444.1986(31)

SPENT PICKLE LIQUOR FINAL RULE REGARDING SCOPE
OF THE K062 LISTING, CORRECTION NOTICE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DEC 11 1986

Mr. Randy M. Mott
Heron, Burchette, Ruckert
and Rothwell
Suite 700
1025 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Dear Mr. Mott:

Thank you for your November 5, 1986, letter regarding the September 22, 1986, correction notice (51 FR 33612) for the spent pickle liquor final rule (51 FR 19320, May 28, 1986). You stated that the correction notice dramatically changed the spent pickle liquor final rule without prior notice and comment. You, therefore, argued that the Agency violated the Administrative Procedure Act because the Agency did not provide notice and comment, §4, 5 U.S.C. §553 (1966). You also argued that adoption of the correction notice by the State of Tennessee violates the Tennessee Administrative Procedure Act.

We disagree with your argument that our action has violated the Administrative Procedure Act. We think that the Agency's intent throughout the rulemaking process has been to list, as a hazardous waste, spent pickle liquor from steel finishing operations from facilities within the iron and steel industry, and that the Agency stated the intention clearly and repeatedly. In fact, until your letter, there has never been any question, or even assertion, that the listing is limited to only those facilities actually producing iron and steel. Thus, in the September 10, 1985, proposal that led to the May 1986 final rule, the Agency explained that the whole debate revolved around the question of whether the Agency's existing K062 listing applies to pickle liquor generated by any steel finishing operation or only from those steel finishing operations in the iron and steel industry. See, e.g. 50 FR 36966/1; 36967/1; 36967/2.

The Agency laid out several options to resolve the issue, including whether the listing "applies only to K062 wastes generated by the iron and steel industry". (id. at 36968/1). The reference to the "iron and steel industry" referred to facilities in Standard Industrial Codes (SIC) Codes 331-332, as shown by the Agency's reference to those

SIC codes (id. at 36966/1), as well as, the regulatory language in §261.3(c)(2)(ii).

The final regulation adopted the option of narrowing the K062 listing to wastes from facilities within the iron and steel industry. In particular, we stated:

> "The Agency believes that the petitioners and the commenters to the September 10, 1985, proposed rule have a valid argument that the listing should be read to apply only to those facilities within the iron and steel industry." [emphasis added] (51 FR 19321/2)
>
> "Therefore, in light of the comments received and arguments made, the Agency had decided to modify its interpretation and narrow the scope of the spent pickle liquor listing to apply to those facilities within the iron and steel industry." [emphasis added] (51 FR 19321/2)
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> "This amendment will have no adverse economic impact on small entities since the rule will reduce the hazardous waste requirements to those persons who generate spent acid in non-iron and steel industries." [emphasis added] (51 FR 19322/1)
>
> "The majority of commenters strongly supported the petitioner's claim that the plain language of the listing for spent pickle liquor from steel finishing operations...indicates that the listing applies only to facilities within the iron and steel industry."

The final rule mistakenly applied to facilities producing iron and steel. The preamble to the final rule also occasionally referenced this error. The rule did not reflect the Agency's intent and could not reasonable be viewed as doing so. The Agency (as shown above) did not propose such a limited construction, and received no comments suggest such a restricted listing nor was the regulatory language consistent with the preamble language cited above.

It should also be noted that the May 1986 regulatory language contradicted the language of another regulation regarding waste K062 and so did not reflect the Agency's intent and could not reasonably be viewed to do so.. In particular, lime stabilized waste pickle liquor sludge from the iron and steel industry liquor (SIC codes 331-332) had been exempted from the "derived from" rule under §261.3(c)(2)(ii). See 49 FR 23284, June 5, 1984. Thus, a listing of pickle liquor only from facilities producing iron and steel

would have made the listing narrower than the parallel exclusion for sludges derived from treating the listed waste. We repeat that such a factual contradiction could not be deemed to reflect the Agency's intent, and so could be changed by means of a technical correction. The Agency indeed noted the contradiction in making the technical correction. 51 FR 33612/2.

Therefore, the Agency believes that it has not violated the Administrative Procedure Act. We believe that the regulated community is clear on the issues involving the pickle liquor listing as evidenced by the comments received on the Septebmer 1986, proposed rule. Also, the Agency believes that the commenters and the regulated community understand that the iron and steel industry is defined as SIC codes 331 and 332 (as stated in the June 5, 1984, final rule).

In support of this position, the Agency received numerous calls from the regulated community and State officials questioning the contradictory language in the preamble and final rule. Many of these callers indicated that the preamble language of the final rule indicated that the listing applies to all facilities within the iron and steel industry while the rule addresses facilities that "produce" iron and steel. The Agency recognized the contradiction as pointed out by callers and responded with the September 22, 1986, correction notice.

Thus, in light of the phone calls received by the Agency addressing the contradictory language in the preamble and regulatory language of the May 1986, final rule, the Agency concludes that the regulated community understands that the Agency made an error in the final rule, and that it did not have a "belated change of heart in the nature of the rule" as you allege. Furthermore, the Agency has difficulty understanding the practical consequences to your client of the corrected regulatory language. You indicate that Bristol recycles all pickle liquor and rinse water. We would be interested in an explanation of what operations at Bristol are regulated and which regulations would apply.

I trust that this letter adequately addresses your concerns. If you have questions, please contact Matthew Straus or Jacqueline Sales at (202) 475-8551.

Sincerely,

Original Document signed
"Jack W. McGraw for"

J. Winston Porter
Assistant Administrator