

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
by KWAME RAOUL, Attorney General)	
of the State of Illinois,)	
)	
Complainant,)	
)	
v.)	PCB No. 2022 - 034
)	(Enforcement – Water)
CITY OF HOOPESTON, an Illinois municipal)	
corporation,)	
)	
Respondent.)	

MOTION TO STRIKE OR DISMISS COMPLAINT

NOW COMES the Respondent, CITY OF HOOPESTON, by and through counsel David K. Cox, pursuant to 35 Ill. Adm. Code §101.506, and files its MOTION TO STRIKE OR DISMISS COMPLAINT, stating as follows:

Introduction

1. The Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois, filed a Complaint with the Illinois Pollution Control Board (“Board”) on January 13, 2022, against the Respondent (“City”) for allegedly violating the Board’s permitting standards and regulations. The Respondent City of Hoopeston was served on January 19, 2022, by certified mail.

2. The Complaint seeks a civil penalty of \$10,000 for each day of the alleged violation, in addition to costs and attorney fees.

3. The City moves to strike or dismiss the Complaint based on the fact that it promptly corrected and came into compliance with the Illinois Environmental Protection Act (“Act”) after it was notified of the violation and had therefore corrected the issues well before the Attorney General filed this Complaint almost 2 years later.

Motion to Strike or Dismiss Count I

4. The Complainant alleges in Count I that the City failed to timely apply for a National Pollutant Discharge Elimination System (“NPDES”) Permit Renewal as required under the Illinois Environmental Protection Act.

5. *Park Crematory, Inc. v. Pollution Control Bd.*, 264 Ill.App.3d 498 (1994) is instructive as to why the Complaint should be stricken or dismissed in this cause.

6. In *Park Crematory*, the Environmental Protection Agency (“Agency”) brought an enforcement action before the Board against Park alleging several violations of the Act. After the administrative hearing, the Board determined that Park committed several of the alleged violations and imposed a fine of \$9,000. On appeal, Park contended that the \$9,000 fine was excessive in light of the fact that Park was not alleged to have caused any actual pollution and had corrected all permit violations almost 10 months before the original complaint was filed with the Board.

7. At issue in *Park Crematory* was the installation of a second incinerator at its facility. Based on an initial inspection, the Agency determined that Park did not have an operating permit for the original incinerator and had not yet applied for a permit for the second incinerator. In February 1982, the Agency sent Park the necessary application forms for the permit and a warning letter outlining the permit violations. By July 1982, the Agency had not yet received Park’s permit application and subsequently sent another warning letter demanding the submission of the application within 15 days. Park submitted an application for the first incinerator to the Agency but failed to submit one for the second incinerator. In September 1982, the Agency issued a permit for the first incinerator.

8. By contrast, the City submitted a permit renewal application 61 days prior to the permit's expiration. Here, the problem is not that the City failed to apply for a permit at all, but rather according to the Attorney General, it failed to do so 180 days prior to the expiration date set forth in 35 Ill. Adm. Code 309.104(a).

9. In *Park Crematory*, the permit required that Park keep a maintenance record for each item of air pollution control equipment and that this record be available for inspection at any time. There were also various preheating requirements under the permit. In 1990, two years after submitting a permit application for the first incinerator but not the second, the Agency conducted another inspection of Park. While no pollution was found, the inspector made note that the second incinerator was still not permitted nor was there a maintenance log available.

10. Following this inspection, the Agency sent Park a letter outlining the violations. In the letter, the Agency instructed Park to submit a letter within 15 days explaining the reasons for the violations and what steps it had taken to prevent further recurrence of the violations. In October 1990, Park finally submitted an operating permit application for the second incinerator. Park also notified the Agency that a maintenance log had been created per the permit's requirements. In December, the Agency issued an operating permit to Park for the second incinerator.

11. Similar to *Park Crematory*, the Agency here sent the City a warning letter regarding its failure to reapply for a NPDES permit. The City subsequently submitted its application for renewal 61 days before the expiration date.

12. Despite Park's compliance with the Agency's inquiry regarding the second incinerator and thus had corrected the apparent violations, the Agency sent Park an Enforcement

Notice Letter in January 1991, notifying Park that the matter had been referred to the Attorney General.

13. Likewise, despite the City's compliance with the Agency's letter regarding renewal of the NPDES permit, 2 years later the Attorney General filed an enforcement action before the Pollution Control Board.

14. In *Park Crematory*, the Attorney General requested the Board assess Park a civil penalty of \$50,000 for each violation of the Act, an additional \$1,000 for each day during which each violation continued prior to July 1, 1990, and an additional \$10,000 for each day of each violation after July 1, 1990. The Board found against Park and Park subsequently filed a petition for direct review before the First District Appellate Court.

16. The Appellate Court first noted that the Act clearly authorizes the Board to assess civil penalties for any violation of the Act regardless of whether those violations resulted in actual pollution. However, under *Southern Illinois Asphalt Co., Inc. v. Pollution Control Board*, 60 Ill.2d 204, 207, 326 N.E.2d 406, 408 (1975), "the Illinois Supreme Court explained that the criminal penalty was 'obviously intended to be punitive,' and that the provision allowing for civil penalties 'was to provide a method to aid the enforcement of the Act and that the punitive considerations were secondary.' Therefore, a violation of the Act does not warrant the imposition of a civil fine unless such a fine would aid in the enforcement of the Act." Moreover, "Where cooperation has been shown, compliance with the Act has already come about, and the imposition of a civil penalty would in no way aid the enforcement of the Act, it has been held that a fine is improper." *High Lake Poultry, Inc. v. Pollution Control Board*, 25 Ill.App.3d 956, 960, 323 N.E.2d 612, 615 (1975).

18. The Appellate Court also found that Park's prompt cooperation with the Agency after being notified of the problems demonstrated that the violations were not "willful, knowing or repeated." Here, the same can be said of the City's course of action, in that it promptly complied with the Agency's warning letter regarding the NPDES permit.

19. The Appellate Court held that the Board erred in imposing such a substantial penalty in *Park Crematory*. It stated:

The evidence shows that, at all times, Park's owner acted in 'good faith.' (See *Harris-Hub*, 50 Ill.App.3d at 612, 8 Ill.Dec. at 688, 365 N.E.2d at 1074 (good faith is a factor to be considered in mitigation).) The Board concluded that the violations were not 'willful, knowing or repeated' and were probably due to the fact that Park's owner did not 'fully understand the permitting requirements and procedures.' Additionally, Park's owner was extremely cooperative and, upon being notified of the violations, acted promptly to correct them. In fact, Park was in full compliance with the Act prior to even being notified that the matter had been referred to the Attorney General for enforcement and at least 11 months before the complaint was filed with the Board.

Park Crematory, at 505.

In its opinion, the Appellate Court closed by saying a complaint should have never been filed against Park. The purpose of the Act is to maintain the purity of the air in order to protect the health and welfare of the people of Illinois. "The provision providing for civil penalties for violations of the Act is merely a sword for the Agency to wield in its battle to enforce the Act's requirements. In this case, there was no need for that sword to be unsheathed." *Ibid*.

20. Even if the Board does not find *Park Crematory* compelling, its own regulations must be considered in light of the City's actions. When determining an appropriate civil penalty, the Board should consider evidence in mitigation and aggravation, including but not limited to:

(1) the duration and gravity of the violation;

(2) the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the violator because of delay in compliance with requirements;

(4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

(5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator.

415 ILCS 5/42(h).

21. While the City technically failed to comply with 35 Ill. Adm. Code 309.104(a) which requires permittees to file for a new permit 180 days before the expiration of the existing date, there was no “willful, knowing, or repeated” violation by the City. The City promptly corrected and came into compliance with the Act after it was notified of the violation and the violation was certainly corrected well before the Attorney General filed its complaint almost 2 years later.

22. Count I of the Complaint should be stricken or dismissed because the City was in full compliance with the Act’s requirements before the matter was referred to the Attorney General for enforcement and 2 years before the Complaint was filed. Therefore, the Agency had succeeded in its purpose of assuring compliance with the Act. The imposition of the fine in this case is unjust, inequitable and would be purely punitive.

WHEREFORE, the City respectfully requests that the Board enter an order striking or dismissing Count I of the Complaint.

Motion to Strike or Dismiss Count II

23. The Complainant alleges in Count II that the City failed to conduct acute toxicity tests of effluent and to submit results of such tests to the Agency in accordance with the schedule required by Special Condition 14 of the Permit, and thereby violated Section 305.102(b) of the Boards' regulations.

24. Count II further alleges that the City failed to submit to the Agency semi-annual reports of sludge generated and disposed of in accordance with the schedule required by Special Condition 15 of the Permit, and thereby violated Section 305.102(b) of the Board's regulations.

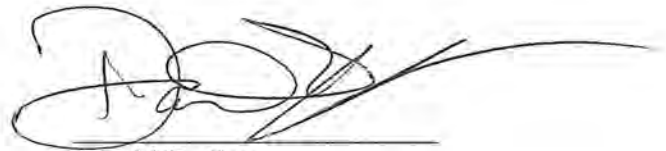
25. Count II also alleges that the City discharged contaminants from a point source into waters of the State in violation of Special Conditions 14 and 15 of the Permit, and thereby violated Section 309.102(b) of the Board's regulations.

26. There is no evidence that the City actually contributed to the environmental pollution of Illinois waters. In *Park*, the facility conceded the violations for which it was assessed \$9,000 fine against it (\$1,000 per year of violation) and the Attorney General conceded that the case did not involve any actual environmental pollution. However, Park argued, "The Illinois Pollution Control Board is without authority to impose a \$9,000 fine upon a non-polluter which has voluntarily acted to correct all technical permit violations even before the section 31(d) Letter was sent." *Park Crematory* at 501.

27. While the City may have committed a technical violation by not conducting acute toxicity tests of effluent, not submitting results of such tests to the Agency, and failing to submit to the Agency semi-annual reports of sludge generated and disposed of, it would be pure speculation to argue that because of these violations, the City caused, threatened, or allowed the discharge of a contaminate into waters of the State.

28. The Appellate Court in *Park* further noted that, “[T]he penalty imposed must be commensurate with the impediment the company poses to the effective implementation of the Act.” *Id.* at 505. The City is not impeding the effective implementation of the Act by virtue of the fact that it is fully in compliance with the Act. The penalty that the Complainant seeks would contribute nothing to the Agency’s purpose and mission of assuring compliance with the Act.

WHEREFORE, the City respectfully requests that the Board enter an order striking or dismissing Count II of the Complaint.

A handwritten signature in black ink, appearing to read 'D. Cox', with a long horizontal flourish extending to the right.

David K. Cox
Attorney for Respondent

David K. Cox
Attorney at Law
110 North Charter Street
Monticello, Illinois 61856
Phone: (217) 762-3800
Fax: (217) 762-3790
Email: mayorcox@cox-lawfirm.com

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the MOTION TO STRIKE OR DISMISS COMPLAINT was served on:

Kevin D. Bonin
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
500 South 2nd Street
Springfield, Illinois 62701

by placing the documents in an envelope, properly addressed and with proper postage affixed, and placing the envelope in the United States Mail box located in Monticello, Illinois, on the 15th day of February 2022.

A handwritten signature in cursive script, appearing to read "Kevin D. Bonin", is written over a horizontal line.

David K. Cox
Attorney at Law
110 North Charter Street
Monticello, Illinois 61856
Phone: (217) 762-3800
Fax: (217) 762-3790
Email: mayorcox@cox-lawfirm.com