

ILLINOIS POLLUTION CONTROL BOARD
March 3, 2005

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 05-32
) (Enforcement - Air)
GTC, INTERNATIONAL, an Illinois)
corporation,)
)
 Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

On January 19, 2005, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a motion to deem facts admitted and for summary judgment in this enforcement action (Mot.). For the reasons below, this order grants the People’s motion and directs the parties to hearing on the issue of remedy.

BACKGROUND

On August 18, 2004, the People filed a ten-count complaint against GTC, International (GTC). *See* 415 ILCS 5/31(c)(1) (2002); 35 Ill. Adm. Code 103.204. The People allege that GTC violated Sections 9(a) and (b), 39.5(5)(x), 39.5(6)(b) of the Environmental Protection Act (Act), Sections 201.142, 201.302(a), 203.201, 203.203(a), 203.301(b), (d), 205.300(b)(1), 205.310, 218.926(b)(1), and 302.302(a)(1)(D) of the Board’s air pollution regulations, and Sections 254.303 and 254.132(b) of the Environmental Protection Agency’s (Agency) air pollution regulations. The People further allege that GTC violated these provisions by: (1) constructing an emission source and a new major source without permits; (2) failing to timely submit Clean Air Act Permit Program (CAAPP) permit and Emissions Reduction Market System (ERMS) applications; (3) failing to show compliance with and violating New Source Review requirements; violating its permit and Board regulations by using non-compliant coatings; and (4) submitting inaccurate annual and seasonal emission reports. The complaint concerns GTC’s mirror manufacturing facility located at 6401 West 65th Street, Bedford Park, Cook County.

On September 2, 2004, the Board accepted this complaint for hearing. Counsel for the respondent appeared at one conference call with the hearing officer on September 30, 2004. Subsequently, respondent has not appeared nor filed an answer to the complaint. On January 27, 2005, counsel for the respondent withdrew its appearance.

THE BOARD’S PROCEDURAL RULES

Section 103.204(d) of the Board's procedural rules for enforcement actions provides in part:

Except as provided in subsection (e) of this Section, the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. 35 Ill. Adm. Code 103.204(d).

Subsection (e) of Section 103.204 states that the 60-day period to file an answer will be stayed if a respondent timely files a motion attacking the sufficiency of the complaint under Section 101.506 of the Board rules. 35 Ill. Adm. Code 103.202(e); *see also* 35 Ill. Adm. Code 101.506

Section 103.204(f) provides:

Any party serving a complaint upon another party must include the following language in the notice: "Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney." 35 Ill. Adm. Code 103.204(f).

Section 101.516(b) of the Board's procedural rules for enforcement actions provides:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516(b).

BOARD AIR POLLUTION REGULATIONS

Under Section 201.142 of the Board rules, any person constructing a new emissions source or new air pollution control equipment, or modifying any existing emission source must first obtain a construction permit from the Agency. 35 Ill. Adm. Code 201.142.

Section 201.302(a) of the Board's regulations requires any owner or operator of an emission unit to submit annual reports to the Agency. Section 203.201 prohibits the construction of a new major stationary source or major modification that is major for the pollutant for which the area is designated a non-attainment area. In areas that are out of attainment for ozone, the prohibition applies to such sources that emit volatile organic materials

(VOM) or nitrogen oxides. Section 203.203(a) requires a permit before constructing a major new source or major modification.

Section 203.302(a)(1)(D) of the Board rules prohibits the operation of any new emission source or new air pollution control equipment that would require a construction permit, without an operating permit from the Agency. 35 Ill. Adm. Code 203.302(a)(1)(D). Section 205.300 requires each owner or operator of a participating source that produces VOM from less than 10 units to submit seasonal emissions reports to the Agency by October 31 of each year. 35 Ill. Adm. Code 205.300. Section 205.310(a)(2) also requires each owner or operator of a participating source that first becomes a participating source because its VOM emissions increase to 10 tons or greater during any seasonal allotment period before 1999, to submit an Emissions Reduction Market System application on or before December 1 of the year its emissions first surpass 10 tons. 35 Ill. Adm. Code 205.310(a)(2).

Section 218 governs organic material emissions standards for the Chicago area. Section 218.926(b)(1) requires each owner or operator of a fabricated product manufacturing process emission unit to use coatings that do not exceed 0.42 kg VOM/1 (3.5 lbs VOM/gal) as applied. 35 Ill. Adm. Code 218.926(b)(1).

Section 254.132(b) clarifies that a failure to submit seasonal emission reports constitutes violations of both this Part and 35 Ill. Adm. Code 205.300. 35 Ill. Adm. Code 254.132(b). Section 254.303 sets forth the information that must be included in annual emissions reports. 35 Ill. Adm. Code 254.303.

STATUTORY BACKGROUND

Section 9(a) of the Act is a prohibition against air pollution. 415 ILCS 5/9(a) (2002). Section 9(b) prohibits the construction or operation of equipment that may contribute to air pollution or equipment that is designed to prevent air pollution, without a permit from the Agency. 415 ILCS 5/9(b) (2002). Section 39.5(6)(b) of the Act prohibits operating a CAAPP source without a CAAPP permit unless the permit or renewal application has been timely submitted to the Agency. 415 ILCS 5/39.5(6)(b) (2002).

After the Board finds a violation, the Board considers all facts and circumstances involved in the enforcement order including, but not limited to, the factors set forth in Section 33(c) of the Act to devise an appropriate remedy for the violation. *See* 415 ILCS 5/33(c) (2002). Section 33(c) of the Act provides in part:

In making its orders and determinations, the Board shall take into consideration:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;

- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2002).

The maximum civil penalties the Board may assess are established by Section 42(a) of the Act, which provides in part:

[A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable to a civil penalty not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues 415 ILCS 5/42(a) (2002).

In determining the appropriate civil penalty, the Board may consider any mitigating and aggravating factors of record including those set forth in Section 42(h) of the Act:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of the Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the respondent because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the respondent and other persons similarly subject to the Act;
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
6. whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
7. whether the respondent has agreed to undertake a “supplemental environmental project” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform. 415 ILCS 5/42(h) (2002).

MOTION TO DEEM FACTS ADMITTED

The People contend that the Board must deem factual allegations in the second amended complaint admitted for two reasons: (1) GTC is not represented by an attorney; and (2) the complaint was filed five months ago and GTC has not since responded. Mot. at 4. The People ask the Board to deem all material allegations admitted and grant summary judgment in their favor.

The record shows that counsel for the respondent has appeared at a single conference call with the assigned hearing officer on September 30, 2004, at which time he made an oral motion for an extension of time to file an answer, until December 20, 2004. Respondent has not appeared since and, to date, has not filed an answer.

Both the complaint and the Board's order accepting it for hearing explained the consequences of failing to answer the complaint. 35 Ill. Adm. Code 103.204(f). GTC received the complaint but never filed an answer or a motion challenging the complaint, which may have stayed the 60-day period for filing an answer. GTC is more than five months late in filing an answer. The Board therefore grants the People's motion to deem facts admitted. Accordingly, the Board deems admitted the material allegations alleged in the complaint.

MOTION FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment is a drastic means of disposing of litigation, and therefore it should only be granted when the movant's right to the relief is clear and free from doubt." Dowd, 181, Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489, N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The People's Arguments

The People contend that should the Board deem all the material allegations of the People's complaint against GTC admitted, there remains no general issue of material fact for review. Mot. at 5. The People contend that, accordingly, the Board should grant the People's motion for summary judgment on all ten counts of the complaint. The People further ask the Board to order GTC to cease and desist from further violations of the Act and Board regulations. *Id.* The People request that the Board set a date for hearing on the remedy, or set deadlines by which the parties must brief the issue of remedy. The People seek a civil penalty

of \$50,000 for each violation of the Act and Board regulations, and an additional civil penalty of \$10,000 per day for each day the violation continues. *Id.* In addition, the People request the Board to award litigation costs, including reasonable attorney, consultant, and expert witness fees, and any other relief the Board deems appropriate.

DISCUSSION

The Board finds that the allegations deemed admitted pursuant to 35 Ill. Adm. Code 103.204(d) are sufficient to prove that the People are entitled to a judgment as a matter of law under 35 Ill. Adm. Code 101.516(b). Below the Board discusses how the admitted facts support each of the ten counts of the complaint in turn.

Count I – Constructing an Emission Source Without a Permit

In count I, the People contend that Economy Plating violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.142 of the Board rules (35 Ill. Adm. Code 201.142) by constructing and operating an electric oven at the facility. The People assert GTC constructed the oven in 1887 and 1998 without having obtained a construction permit, and has continued to operate the oven without a permit since that time. Compl. at 4-5.

Count II – Failure to Timely Submit CAAPP Application

The People contend in count II that GTC violated Section 39.5(6)(b) of the Act (415 ILCS 5/39.5(6)(b) (2002)) by not applying for a CAAPP permit within one year of commencing operation at the facility. The People assert that from 1997 or 1998 when GTC began operating the facility, until September 12, 2003, excluding the period covered by the lifetime operating permit, respondent operated a CAAPP source without submitting a CAAPP permit application to the Agency. Compl. at 9-10.

Count III – Failing to Demonstrate Compliance with New Source Review Requirements

In count III, the People state that GTC violated Section 9(a) of the Act (415 ILCS 5/9(a)) and Section 203.301(b) and 203.302(a)(1)(D) of the Board regulations (35 Ill. Adm. Code 203.301(b), 203.302(a)(1)(D)) by failing to demonstrate compliance with the lowest achievable emissions rate and by failing to provide emission offsets in the required ratio of 1.3-1. Compl. at 12-13.

Count IV – Violating New Source Review Requirements

The People contend that GTC violated Section 9(a) of the Act and Section 203.201 of the Board's air pollution regulations for failing to secure the required construction permit or demonstrate compliance with the new source review requirements described in count III. Compl. at 15-16. The People contend that because GTC is located in a non-attainment zone, GTC must show it is not major for the pollutant for which the area is designated a non-attainment area. *Id.*

Count V – Constructing a New Major Source Without a Permit

According to the People, GTC violated Section 9(a) of the Act and Section 203.203(a) of the Board's air pollution regulations by constructing the facility, a new major source, and the electric oven, a new emission source, without the required permits. Compl. at 17.

Count VI – Failure to Timely Submit an Emissions Reduction Market System Application

In count VI, the People state that GTC failed to submit its Emissions Reduction Market System (ERMS) application by the required deadline and remained out of compliance for approximately two years. As a result, the People assert GTC violated Section 9(a) of the Act and Section 205.310 of the Board's air pollution regulations. Compl. at 20-21.

The People assert that GTC has owned and operated a new participating source in an ozone non-attainment area, and that new participating source had seasonal VOM emissions of at least 10 tons of VOM in the 2000 season. Section 205.310 of the Board's regulations required GTC to submit its ERMS baseline application by December 1, 2000. Accordingly, the People contend that GTC remained out of compliance from December 1, 2000 through 2002. Compl. at 21.

Count VII – Use of Non-Compliant Coatings – Permit Violation

The People contend in count VII that GTC violated Section 9(b) of the Act and condition 2 of its operating permit No. 99030044 by using coatings with VOM content that exceeds their permit limit. The People assert that from 1999 through the present, respondent has used coatings with a VOM content above 15% by weight, a limit included in condition 2 of its operating permit. Compl. at 22.

Count VIII – Use of Non-Compliant Coatings – Regulatory Violation

The People contend in count VIII that GTC violated Section 9(a) of the Act and Section 218.926(b)(1) of the Board's air pollution regulations by using a coating with VOM content above the regulatory limit. According to the People, from 1999 until November 2002, respondent used at least one coating with a VOM content of 3.6 pounds per gallon (lbs./gal.), whereas Section 218.926(b)(1) limits glass coatings to a maximum of 3.5 lbs./gal. VOM, as applied.

Count IX – Submission of Inaccurate Annual Emission Reports

According to the People, GTC violated 9(a) and Sections 201.302(a) and 254.303 of the Board's air pollution regulations by submitting inaccurate Annual Emissions Reports (AERS) for its facility for the calendar years 1999 through 2001. The People contend that the AERS reported emissions of VOM lower than actual emissions from the facility. Compl. at 28.

Count X – Submission of Inaccurate Seasonal Emission Reports

The People allege in count X that GTC violated Section 9(a) and Sections 205.300(b)(1) and 254.132(b) by failing to accurately and timely report seasonal VOM emissions from its facility for the years 2000, 2001, and 2002. Compl. at 31-32. Under the Board's regulations, the "seasonal allotment period" is the period from May 1 through September 30 of each year. Also, the "seasonal emissions" is the actual VOM emissions at the source that occur during a seasonal allotment period. 35 Ill. Adm. Code 205.130. According to the People, GTC failed to accurately report during the seasonal allotment periods. Further, Board rules require the seasonal reports to be generated by October 31 of each year. 35 Ill. Adm. Code 254.137(b). The People contend GTC did not meet that deadline for 2000, 2001, and 2002. Compl. at 32.

Board Analysis

The Board deems all of the facts contained in the People's complaint admitted. Accordingly, the Board finds that GTC violated Sections 9(a), (b), and 39.5(6)(b) of the Act and Sections 201.142, 201.302(a), 203.201, 203.203(a), 203.302(a)(1)(D), 205.300, 205.310, 218.926(b)(1), 254.132(b), and 254.303 of the Board's air pollution regulations as alleged in the People's five-count amended complaint. 415 ILCS 5/9(a), (b), and 39.5(6)(b); 35 Ill. Adm. Code 201.142, 201.302(a), 203.201, 203.203(a), 203.302(a)(1)(D), 205.300, 205.310, 218.926(b)(1), 254.132(b), and 254.303. The Board grants the People's motion for summary judgment on all ten counts.

REMEDY

In their motion for summary judgment, the People did not analyze the 33(c) or 42(h) factors regarding an appropriate remedy, including civil penalty, if any. If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. *See* 415 ILCS 5/33(c), 42(h) (2002). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an ongoing violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

Accordingly, the Board further directs the hearing officer to advise the parties that at hearing or in briefs, each party should: (1) discuss whether to impose a remedy, if any, including a civil penalty, for the violations and support its position with facts and arguments

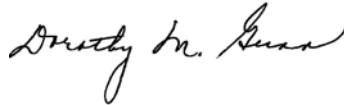
that address any or all of the Section 33(c) factors; and (2) propose a civil penalty, if any, including a specific dollar amount, and support its position with facts and arguments that address any or all of the Section 42(h) factors.

CONCLUSION

Accordingly, the Board deems all facts in the complaint admitted and grants the People's motion for summary judgment on all ten counts of the complaint. The Board further directs the parties to hearing on the issue of remedy.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 3, 2005, by a vote of 5-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board