

ILLINOIS POLLUTION CONTROL BOARD
September 16, 2010

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 00-211
)	(Enforcement – Air, RCRA)
TOYAL, INC. f/k/a ALCAN-TOYO)	
AMERICA, INC. a foreign corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.K. Zalewski):

This order denies respondent's contested motion for stay pending appeal of the Board's order directing payment of a civil penalty for air violations found. This denial leaves respondent free to seek a stay in the appellate court.

PROCEDURAL HISTORY

In its July 10, 2010 67-page opinion and order, the Board found that respondent had violated the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (2008) and the Board's rules requiring control of emissions of volatile organic materials (VOM) and prohibiting air pollution. That order resolved the last of the allegations contained in the May 31, 2000 seven-count complaint filed by the People of the State of Illinois (People or complainant) against Toyal America, Inc. f/k/a Alcan-Toyo America, Inc. (Toyal or respondent).¹ The complaint concerns Toyal's operation of an aluminum products manufacturing facility located at 17401 South Broadway, Lockport, Will County, Illinois.

The Board entered an order directing Toyal to cease and desist from violations, and to pay a civil penalty. As requested by the People, the Board levied a total civil penalty of \$716,440, consisting of \$316,440 in costs to be recovered for the economic benefits Toyal received through non-compliance, and an additional \$400,000 (\$50,000 per year of violation). The Board did not award of attorney fees, as the People waived them, instead asking the Board to take the waiver into account in assessing a penalty.

On August 12, 2010, Toyal filed a 3-page motion pursuant to Illinois Supreme Court Rule 335(g)² and the Board's procedural rule at 35 Ill. Adm. Code 101.906(c), requesting the

¹ By order of July 12, 2001, the Board accepted the parties proposed settlement and stipulation of facts concerning the RCRA violations alleged in Counts III through VII of the complaint. People v. Toyal America, Inc. f/k/a Alcan-Toyo America, Inc., PCB 00-211 (July 12, 2001).

² Illinois Supreme Court Rule 335(g) provides in its entirety:

Board to stay enforcement of the penalty portion of its July 15, 2010 order pending appeal (Mot.). In the motion, Toyal recited that it had filed a petition for review of the Board's order with the Appellate Court for the Third District of Illinois on August 6, 2010; Toyal provided a copy of the petition, docketed by the court as Toyal America, Inc. f/k/a Alcan-Toyo America, Inc. v. Illinois Pollution Control Board and People of the State of Illinois ex. rel. Lisa Madigan, No. 3-10-0585 (3rd Dist. filed Aug. 6, 2010). Mot. at 1, and Attach. A.

The People filed a 3-page response in opposition on August 23, 2010 (Resp.). On August 30, 2010, Toyal filed a 2-page reply to the People's response (Reply). The Board's procedural rule at 35 Ill. Adm. Code 101.500(c) provides that the movant has no right to reply, except as permitted by the Board or hearing officer following a timely filed motion for leave to file. Here, Toyal has not requested leave to reply to the People's response. But, the Board will exercise its discretion to consider the arguments Toyal presents in its short reply to the People's response.

THE PARTIES' ARGUMENTS

Toyal's Motion

In support of its motion, Toyal states that Section 101.906(c) of the Board's procedural rules (35 Ill. Adm. Code 101.906(c)) provides that stays pending appeal are governed by Illinois Supreme Court Rule 335. Rule 335(g) states that a stay pending appeal shall ordinarily be sought in the first instance from the administrative agency. Mot. at 2. Toyal seeks stay only of the portion of the order requiring payment of the penalty; Toyal does not seek stay of the "cease and desist" order. *Id.* at 3.

Toyal argues that:

The Board often grants stays of its orders with respect to payment of penalties. *See e.g., IEPA v. Northern Illinois Service Co.*, PCB 05-40 (Apr. 19, 2007) [sic]³; People of the State of Illinois v. Blue Ridge Construction Corp., PCB 02-115 (Dec. 16, 2004); IEPA v. Piolet Bros. Trading, Inc., PCB 80-185, *aff'd sub nom*

Application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. A motion for stay may be made to the Appellate Court or to a judge thereof, but the motion shall show that application has been made to the agency and denied; with the reasons, if any, given by it for denial, or that the application to the agency for the relief sought was not practicable. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavit. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the Appellate Court. The court may condition relief under this rule upon the filing of a bond or other appropriate surety.

³ Toyal has incorrectly cited the docket number of this case, which should read AC 05-40.

Pielet Bros. Trading Co. v. PCB, 110 Ill. App. 3d 752, 442 N.E. 2d 1374 (5th Dist. 1982).

Further, the Board has previously held that when granting a stay with respect to the payment of penalties that “[p]ayment of monetary penalty can be delayed without prejudice to the public and it has been our practice to allow such motions pending appeal.” IEPA v. Northern Illinois Service Co., PCB 05-40, slip. op. at 3 (Apr. 19, 2007) citing Citizens for a Better Environment v. Stepan Chemical Co., PCB 74-210, 74-270, 74-317, slip. op. at 1 (June 25, 1975).

This motion to stay does not raise any concern regarding potential harm to the public or the environment. See People of the State of Illinois v. Community Landfill Company Inc. et. al., PCB 03-191 (Nov. 5, 2009); Panhandle Eastern Pipeline Co., v. IEPA, PCB 98-102 (July 8, 1999). As this Board noted in its ruling in this matter, Toyal has been in compliance since 2003. People v. Toyal, PCB 00-211 slip. op. at 10 (July 15, 2010). Mot. at 2-3.

The People’s Response in Opposition

In the response to Toyal’s motion, the People first stated that under Supreme Court Rule 305(a), the respondent is not entitled to a stay of the judgment, unless it provides "an appeal bond or other form of security" (Sup. Ct. R. 305(a)), to ensure that respondent will pay what is owed if the judgment is affirmed, citing Estate of Hoellen, 367 Ill. App. 3d 240,245 (1st Dist. 2006). Mot. at 1. The People assert that, as of the time of their response, Toyal had not deposited any surety with the Court. Resp. at 1-2.

Moreover, argue the People:

If the Board denies the requested stay, Toyal is not prevented from continuing with its appeal, because the denial of a stay of judgment does not affect the *right* to appeal. See, e.g. Jack Springs, Inc. v. Little, 50 Ill. 2d 351, 355 (1972). The absence of a stay merely allows the State to execute the underlying judgment, if it so chooses. Toyal may forestall execution simply by securing the judgment with a bond or other acceptable surety. However, the State should not be prevented from enforcing the Board's Final Order without a guarantee that Toyal's assets will not be dissipated or diverted during the pendency of an appeal.

Finally, if denied a stay by the Board, Toyal may request a stay from the Appellate Court. Toyal may decide to arrange for an appropriate security in support of such a Motion. Resp. at 2.

Toyal’s Reply

In reply, Toyal argues that the Board’s rules by their terms do not require the filing of a surety pending appeal. Toyal contends that:

Complainant raises no concerns and makes no argument with respect to any risk of ongoing or future pollution. Where no concerns are raised as to ongoing or future pollution, the Board has granted similar requests to stay orders with respect to payment of penalties without posting an appeal bond. *See e.g., IEPA v. Northern Illinois Service Co.*, PCB 05-40 (Apr. 19, 2007)[sic]⁴; *People of the State of Illinois v. Blue Ridge Construction Corp.*, PCB 02-115 (Dec. 16, 2004); *IEPA v. Piolet Bros. Trading, Inc.*, PCB 80-185, *aff'd sub nom Piolet Bros. Trading Co. v. PCB*; 110 Ill. App. 3d 752, 442 N.E. 2d 1374 (5th Dist. 1982).

Complainant has failed to provide any evidence or even suggest a reason which would lead the Board to conclude that Toyal's assets would be dissipated or diverted during the appeal. Nevertheless, the only argument raised by Complainant is that the State should not be prevented from enforcing the Board's final order without a guarantee that Toyal's assets will not be dissipated or diverted during the pendency of an appeal.

Toyal contends that Complainant's uncertainty over unspecified future developments that may impact Toyal's economic position do not warrant a denial of the stay pending appeal requested by Toyal. Reply at 1-2.

DISCUSSION

The Board denies Toyal's motion for stay of the penalty payment portion of the Board's July 15, 2010 order. Although the Appellate Court acquired jurisdiction of this case once a notice of appeal was filed with the court, the Board retains jurisdiction to determine "matters collateral or incidental to the judgment. A stay of judgment is a matter that is collateral to the judgment because it neither affects nor alters the issues on appeal." *Sears Holdings Corp. v. Maria Pappas*, 391 Ill. App. 3d 147, 158-59, 908 N. E. 2d 556, 566-567 (1st Dist. 2009) (citations omitted).

The Board has, as Toyal has argued, granted a stay of monetary, statutory penalties as recently as 2007, in an appeal of an administrative citation, where the stay was not contested by the complainant. *IEPA v. No. Ill. Serv. Co.*, AC 05-40 (Apr. 19, 2007). But, more recently, the Board has denied stay requests, suggesting that the respondent apply for stays to the appellate court.

Among the most recent of the cases cited to the Board by Toyal is *People of the State of Illinois v. Community Landfill Company Inc. et. al.*, PCB 03-191 (Nov. 5, 2009). In that case, after analyzing various factors to be considered in the granting of a stay, the Board denied a request to stay an order consisting of requirements to "cease and desist" from violations, directions to upgrade financial assurance, and assessment of substantial civil penalties payments. The Board had earlier quoted the respondents' statement in support of their stay claims that:

⁴ Toyal has mis-cited the docket number of this case, which should read AC 05-40.

The Illinois Supreme Court has addressed factors that should be considered in ruling on a motion for stay pending appeal. Stacke v. Bates, 138 Ill. 2d 295, 304-05, 562 N.E.2d 192, 196 (1990). One consideration is "whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful." Stacke, 138 Ill. 2d at 305, 562 N.E.2d at 196. Other equitable factors should be balanced, and include whether the *status quo* should be preserved, the respective rights of the litigants, and whether hardship on other parties would be imposed. Stacke, 138 Ill. 2d at 305-06, 309, 562 N.E.2d at 196, 198. -Another consideration is whether there is a "substantial case on the merits" (not likelihood of success on the merits), but this should not be the sole factor." Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198. People of the State of Illinois v. Community Landfill Company Inc. et. al., PCB 03-191, slip op. at 3rd of 4 unnumbered pages.

In Community Landfill, the Board found, among other things, that respondents did "not have 'a substantial case on the merits' within the meaning of Stacke, supra." People of the State of Illinois v. Community Landfill Company Inc. et. al., PCB 03-191, slip op. at 4th of 4 unnumbered pages. See, also People of the State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 97-193 and PCB 04-207(cons.), slip op. at 3 (Dec. 17, 2009) (denying request to stay Aug. 20, 2010 order requiring \$250,000 penalty payment).

The Stacke court explained:

The granting of a stay pending appeal is preventive or protective and seeks to maintain the status quo pending appeal. We believe that in all cases, the movant although not required to show a probability of success on the merits, must, none-the-less, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing on the merits. Thus, a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party. Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198.

Here, the Board does not find that Toyal has a "substantial case on the merits" that the Board wrongly imposed the civil penalty for eight years of uncontested violations. The Board believes that there would be a "hardship on other parties" (*i.e.* the People of the State of Illinois) if payment of the penalty is stayed on appeal. Again, as requested by the People, the Board levied a total civil penalty of \$716, 440, consisting of \$316, 440 in costs to be recovered for the economic benefits Toyal received through non-compliance, and an additional \$400,000 (\$50,000 per year of violation).⁵ At federal behest, the Illinois Environmental Protection Agency has been

⁵ The Board's concluding summary of its analysis of the factors leading to its penalty determinations in light of the factors of Sections 33(c) and 42(h) of the Act, 415 ILCS 5/33(c) and 42(h) was that:

proposing, and the Board has been adopting, increasing regulatory controls of VOM emitting sources in non-attainment areas, to better air quality and to achieve the goals of the Federal Clean Air Act. In this case, maintaining the status quo works only to reward non-compliance. If Toyal is allowed to keep or invest the economic benefit of its delay in compliance, other companies who timely complied by expending funds to control VOM emissions will continue to be placed at an economic disadvantage during the prevailing economic downturn. This is a disincentive to the “voluntary compliance” which is the aim of the Act, and is detrimental to the interests of the People in prompt compliance and better air quality.

Here, Toyal has failed to persuade the Board that “the balance of the [Stacke] equitable factors weighs in favor of granting the stay.” People of the State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 97-193 and PCB 04-207(cons.) slip op. at 3 (Dec. 17, 2009). The Board therefore denies the request for stay. Respondent Toyal may of course apply to the Appellate Court for a stay if Toyal continues to believe a stay is warranted.

IT IS SO ORDERED.

Member Johnson dissented.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 16, 2010, by a vote of 4-1.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board

The Act authorizes the Board to assess civil penalties amounting to several million dollars against the respondent, because the Lockport facility was in violation of VOM control requirements in an ozone non-attainment area for eight years. The violations unreasonably interfered with public health and welfare, and the RACT requirements for control of VOM emissions for this source are technically practicable and economically reasonable. The Board notes that aggravating factors, specifically, the duration and gravity of the violation, the absence of due diligence on behalf of the respondent, the economic benefit to the respondents by not complying, and the need for deterrence, support an imposition of a substantial penalty under Section 42(h). As previously stated, sources of VOM emissions must be encouraged to be aware of the requirements of the regulatory climate in which they operate, and must be deterred from believing that they can operate with impunity under a compliance timetable not approved by Board rule or other site-specific order. People v. Toyal America, Inc. f/k/a Alcan-Toyo America, Inc., PCB 00-211, slip op. at 65 (July 15, 2010).