

PROCEDURAL HISTORY

On May 12, 2009, the People filed a nine-count complaint against Apollo. Specifically, the People allege that, at various times beginning in 2001, respondent violated Sections 9(a), 9(b), 9.8(b), 39.5(6)(b) of the Act, 415 ILCS 5/9(a), 9(b), 9.8(b), 39.5(6)(b) (2006), and Sections 201.142, 201.143, 205.150(c)(1), 201.302(a), 205.300(b)(1), 205.300(b)(2), 205.310, 218.204(n)(1), 218.211(c), 254.132(a) and 254.137(a) of the Board's air pollution regulations, 35 Ill. Adm. Code 201.142, 201.143, 205.150(c)(1), 201.302(a), 205.300(b)(1), 205.300(b)(2), 205.310, 218.204(n)(1), 218.211(c), 254.132(a) and 254.137(a). The People further allege that respondent violated these provisions by failure to a) obtain requisite permits before construction of emission units, b) obtain a Clean Air Act Permit Program permit, c) comply with the Board's VOM limitations regulation for plastic parts coating operations, d) maintain required records, e) timely submit an Emission Reduction Market System (ERMS) baseline application, f) submit annual emission reports, g) submit seasonal emission reports, and h) hold allotment trading units.

As previously stated, settlement negotiations have been ongoing since the Board accepted the case. *See People v. Apollo Plastics Corporation*, PCB 09-108, hearing officer orders (June 18, 2009), (July 29, 2009), (Oct. 30, 2009). As part of these negotiations, Apollo has alleged financial difficulty, and has submitted supporting tax returns and financial data. *See, e.g.* Mot. at 1,3. On May 20, 2010, the parties participated in a meeting where Apollo's accountant answered questions and furnished a multipage financial analysis to the People and the Agency. At a June 17, 2010 status conference, the parties were still waiting for the completion of Agency review of Apollo's financial documents. At a status conference on September 1, 2010, the People stated that that it wished to move forward in these proceedings, including having Apollo file its answer, notwithstanding incomplete Agency review of the financial documents. PCB 09-108 hearing officer order (Sept. 1, 2010).

On September 8, 2010, Apollo filed its motion to stay the proceedings and on September 23, 2010, the People filed its response. Apollo neither sought nor was granted leave to file a reply, and no reply was filed.

The Board will first summarize Apollo's arguments made in the motion to stay, then the People's response before moving on to the discussion of the Board's decision.

APOLLO'S MOTION TO STAY

In the motion to stay, Apollo noted that it is a small, family owned business that was newly formed in December 2000 to buy the operating assets of a similar business being sold by owners unrelated to Apollo's ownership. Mot. at 1. Apollo began operating the assets at a plastic part coating plant on North Elston Avenue in Chicago in January 2001. *Id.*

Apollo believed that no air permits were required, as the operations historically used less than 5000 gallons a year of VOM-containing coatings. The conclusion was supported by a 1991 IEPA letter, and a 2002 inspection with the same conclusion. Mot. at 2 and Exh. A.

In 2004, Apollo made changes to accommodate additional business. Apollo made changes to accommodate use of over 5000 gallons of coatings per year, and installed new

pollution control equipment. Apollo sought and received an air construction permit for the expansion, which included installation of \$500,000 of new pollution control equipment. Apollo also applied for a Federally Enforceable State Operating Permit (FESOP) as a minor synthetic source. Apollo concludes that, apparently on account of disclosures in the FESOP application, the Agency issued a Violation Notice in June of 2007. The Notice stated that due to increase in Apollo's potential to emit VOM made it a major source, that it should have had permits earlier. Apollo eventually received a FESOP. Mot. at 2 and Exh. B.

Apollo reports that discussions with the Agency and People in 2007 led to resolution of "all operational and compliance-related issues, including payment of an administrative penalty of \$9220.05 for excess ERMS emissions during emissions years 2005 through 2007. But, Apollo states, the Agency continues to seek a "very substantial administrative penalty". Apollo states that due to the nationwide economic situation since 2007, that its business has "suffered very materially, and it cannot absorb a high penalty of the sort the Agency has insisted on [seeking]." Mot. at 2.

Apollo states that Apollo and the People have been engaged in "serious negotiations" of a settlement of the outstanding penalty in this matter during which "Apollo has indicated that it is in serious financial difficulty." Mot. at 3. Apollo explains that the "concept of 'inability to pay' is a long standing policy concern not only for settlement, but for financial decisions of adjudicating bodies such as the Board" and is an "expressed factor of concern under the Illinois Environmental Protection Act." *Id.* To prove financial difficulty, Apollo submitted a "great deal of financial documentation" and met with the People to discuss the financial documentation submitted by Apollo. *Id.* At a meeting on May 25, 2010 with the People's financial analyst and representatives for the People and Apollo, Apollo's "accountant answered questions and furnished a comprehensive multi-page financial analysis to the People." *Id.*

At the June 17, 2010 status conference, the parties were still waiting for the People's analyst's review of Apollo's financial documents. At a status conference on September 1, 2010, the People stated that that it wished to move forward in these proceedings, including having Apollo file its answer, notwithstanding the People's incomplete review of the financial documents. PCB 09-108, hearing officer order (Sept. 1, 2010).

As previously stated, on September 8, 2010, Apollo filed its motion to stay the proceedings. In its motion, Apollo states that the People's "reviewer has not completed his analysis," that "the Agency does not apparently have the capability to mandate that this be done timely", and that the People have decided to "proceed to active enforcement, because they do not know when the analyst will complete his work." Mot. at 3. Apollo explains that "the financial hardship analyst for the [People] is reportedly an academic and acting in the capacity of a contractor available to the [Agency] on a limited basis through the State's Central Management Services agency." *Id.*

Apollo queries:

If delay [of the People's analyst's review] is due to increased workloads and the use of furloughs and other means for the state to keep its cost down, is it not the

height of irony, indifference to present economic realities, and poor judgment for the State to insist a respondent to suffer the State's economic troubles?" Mot. at 4.

Apollo concludes that "Apollo will be unfairly prejudiced legally and financially if its financial hardship situation is not honored" since "the expense of mounting of a defense is significant and would imperil Apollo's economic capacity to function as a business" and asks the Board to stay the proceeding "until the Agency's analysis of [Apollo's] financial condition is completed, and the parties have had a reasonable opportunity to further negotiate a resolution by mutual agreement." Mot. at 4.

THE PEOPLE'S RESPONSE

In their response, the People explain that they have decided to no longer pursue negotiations with Apollo and instead have "concluded that the most efficient way to resolve this matter is to proceed with discovery and hearing thereafter." Resp. at 1. The People state that "settlement negotiations have occurred in this case . . . and that the People and Apollo have exchanged several offers and counteroffers which have been rejected." *Id.* at 2. With regard to the certain financial documents submitted for the People's review, the People have "reviewed those documents, concluded that there was no basis to reduce its settlement offer further, and so advised the Respondent on writing." *Id.*

The People note that Apollo "fails to cite any legal authority as to why its claim provides any basis for a stay under Board Rule 101.514." Resp. at 1. Further, the People explain that the People are "under no duty to honor the Respondent's claimed financial position" and that "while inability to pay is a mitigating factor, it is not a bar to penalty." Resp. at 1-2, citing Standard Scrap Metal Company v. Pollution Control Board, 142 Ill. Adm. 3d 655, 491 N.E.2d 1251, 1258 (1st Dist. 1986).

The People remark that:

In effect, [Apollo's] motion, seeks to have the Board stay the enforcement of this case until the [People] agrees to settle its case on [Apollo's] terms. Logically, a settlement can only occur if the parties voluntarily agree to a mutually acceptable outcome. The Board cannot order the parties to negotiate indefinitely or force the [People] to settle the case on [Apollo's] terms." Resp. at 2.

The People agree that Apollo has presented what Apollo characterizes as supplemental information so that the People "could reconsider, yet again, its settlement position." Resp. at 2. The People decline to do so, but instead have concluded that "the most efficient way to resolve this matter is to proceed with discovery and hearing thereafter", and that "the decision of whether to resolve an enforcement case via settlement or trial is a matter of prosecutorial discretion." Resp. at 3.

DISCUSSION

Section 101.514(a) of its procedural rules addresses motions for stays:

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion. (*See also* Section 101.308 of this Part.) 35 Ill. Adm. Code 101.514(a).

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” *See People v. State Oil Co.*, PCB 97-103 (May 15, 2003), *aff’d sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2nd Dist. 2004). The Board has in some past cases held that “settlement efforts constitute a compelling justification for a time-limited stay,” citing *Stepan Company v. IEPA*, PCB 01-72 (Jan 4, 2001) and *People v. Old World Industries, Inc.*, PCB 97-168 (Dec. 18, 1997). A stay for pending negotiations is reserved for parties which can prove active negotiation. *See Commonwealth Edison Company v. IEPA*, PCB 04-215 (Aug 21, 2008).

Upon review of the facts and arguments presented here, the Board determines that a stay is not appropriate or justified. The People and Apollo have exchanged several offers and counteroffers which have been rejected. While Apollo argues that the additional financial information provided to the People evidence that settlement is still proceeding, the People have made it clear that they are no longer interested in pursuing negotiations.

With regard to certain financial documents submitted for Complainant’s review, the People have “reviewed those documents, concluded that there was no basis to reduce its settlement offer further, and so advised the Respondent on writing.” Resp. at 2. A recent status hearing only further reconfirms the People’s stated desire to go forward with prosecuting the case, notwithstanding any incomplete review of the financial documents. PCB 09-108, hearing officer order (Sept. 1, 2010). As the People point out, the Board cannot order the parties to further negotiate a potential settlement, as this is truly a matter of prosecutorial discretion.

The facts in this case compare unfavorably with those in the *Commonwealth Edison* case, where the parties filed a joint motion asking for three-month stay based on their “mutual interest in reaching a negotiated settlement and the belief that the settlement efforts will continue”. *Commonwealth Edison Company v. Illinois Environmental Protection Agency*, PCB 04-215, slip op. at 3 (Aug 21, 2008). Here, the People have stated on the record more than once that they are no longer interested in pursuing settlement. As the People point out, “a settlement can only occur if the parties voluntarily agree to a mutually acceptable outcome and that the Board cannot order the parties to negotiate indefinitely or force the Complainant to settle the case on the Respondent’s terms.” Resp. at 2.

As previously stated, Apollo has argued that it would be “unfairly prejudiced legally and financially if its financial hardship situation is not honored by the People.” Mot. at 2. The Board finds that the People correctly state that the People are “under no duty to honor the Respondent’s claimed financial position” and that “while inability to pay is a mitigating factor, it is not a bar to

penalty.” *See, Standard Scrap Metal Company v. Pollution Control Board*, 142 Ill. Adm. 3d 655, 491 N.E.2d 1251, 1258 (1st Dist. 1986).

The Board reminds Apollo that the Board can and must consider financial circumstances and hardship as a factor when fashioning a remedy for a found violation under Section 33(c) of the Act, and as a factor in mitigation of during penalty considerations under Section 42(h) of the Act. 415 ILCS 5/33(c) and 42(h)(2010). However, a claim of financial hardship does not justify a stay of proceedings.

In summary, the Board finds that a stay of these proceedings is not warranted, and therefore denies the motion for stay. The hearing officer is directed to proceed expeditiously to require the filing of the answer, and then discovery and hearing.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 21, 2010 by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board