ILLINOIS POLLUTION CONTROL BOARD
June 7, 2012

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-16
	)	(Enforcement - Air)
PACKAGING PERSONIFIED, INC.,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by D. Glosser and C. K. Zalewski):

We respectfully dissent from the Board's June 7, 2012 order directing additional proceedings in this enforcement action concerning "economic benefit" as it relates to the penalty issues in the case. *See* People v. Packaging Personified, Inc., PCB 04-16 (June 7, 2012). We believe that the People's motion for reconsideration of the Board's March 1, 2012 order should have been granted, and continue to believe that the Board's September 8, 2011 final opinion and order finding violations and imposing a civil penalty should be reinstated. In that September 8, 2011 decision, after hearing on the People's twelve count complaint, the Board found that Packaging violated numerous air pollution control requirements including the "flexographic printing rule" (35 Ill. Adm. Code 218.401), and imposed a $456,313.57 civil penalty. *See* Packaging, PCB 04-16, (Sept. 8, 2011).

The People moved for reconsideration of the Board's March 1, 2012 decision granting in part Packaging's motion for reconsideration. The People argued that the Board erred in finding that 1) non-operation of press No. 4 and shift of its production operations to press No. 5 could represent the 'lowest cost alternative' for compliance and 2) press No. 5 could be deemed compliant in the absence of compliance testing. The People additionally contend the Board's March 1, 2012 Order conflicts with prior Board decisions. We believe that the People persuasively demonstrated that the majority's March 1, 2012 order was incorrect and we believe the majority has misconstrued, failed to address, or is misguided in their construction of the People's arguments, resulting in the wrong outcome. Below we articulate our concerns with the majority's June 7, 2012 Order.

Lack of Reasonable Explanation To Reopen Record

The majority opinion states that the People did not contest, and so the Board majority need not revisit, the Board's March 1, 2012 determination "that there was a reasonable explanation for Packaging's failure to present the company's new economic benefit position" prior to issuance of the Board's September 8, 2011 final opinion and order. Packaging, PCB 04-16, slip op. at 5 (June 7, 2012).

We again voice our concerns with the majority's finding that there exists a "reasonable explanation" to explain Packaging's failure to present all economic benefit arguments during the original proceedings, or that as a result the Board may have erred in applying the law on economic benefit under Section 42(h)(3) of the Act. 415 ILCS 5/42(h)(3)(2010). As stated in our March 1, 2012 dissenting order, we do not agree with the majority's articulated "reasonable explanation," or its application to the case at hand to support the finding that the Board may have erred in applying the law on economic benefit under Section 42(h)(3) of the Act. 415 ILCS 5/42(h)(3)(2010).

Repeating the rationale of our March 1, 2012 dissenting order, we believe that Packaging did not present "newly discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993). Likewise, we find no reasonable explanation consistent with Board precedent, and therefore believe that Packaging's motion for reconsideration should have been denied in its entirety. Packaging, PCB 04-16, slip op. at 3 (dissenting opinion of D. Glosser and C.K. Zalewski) (Mar. 1, 2012). We repeat this point again here, because without this reasonable explanation argument, the majority has no means to grant Packaging's motion for reconsideration.

"Press No. 4 Non-Operation "Discussion

One disputed issue concerns the found facts regarding two presses: No. 4 and No. 5. As articulated by the majority order,

> Packaging's new economic benefit calculation is based upon the position that the lowest cost alternative for Packaging to comply with the flexographic printing rule would have been to shift all of press 4's production to press 5 and then demonstrate press 5's compliance with the rule's capture and control requirements. Packaging, PCB 04-16, slip op. at 6 (June 7, 2012).

It is undisputed that the VOM rules applied to operations of both, that neither press had capture and control of it, and that neither had been shown to be in compliance with them as a result of a stack test. The majority goes on to acknowledge that press No. 4 was in fact shut down in 2002, prior to the start of this enforcement action, which ended its non-compliance. *Id.* Packaging offers that it can show an "alternative for achieving compliance" based on the logic chain that *if* press No. 4 had not been shut down, and *if* all of its operations had been shifted to press No. 5, and *if* press No. 5 could be shown to be in compliance without installation of a capture and control device, and *if* the Board had found that an "informal" stack test could be used to demonstrate compliance, then the Board should have considered this option in determining economic benefit. The majority "declines to find that as a matter of law that if two printing lines at a facility are operating in violation of the flexographic printing rule, then shutting down one line and shifting its operation to the other cannot be considered part of any 'alternative for achieving compliance ' with the rule." While that may be hypothetically true in some future case, we believe that Packaging's shutdown of press No. 4 cannot be a potential lowest cost alternative under the proven *facts* of this case.

The majority would allow Packaging to make arguments based on sheer hypothesis and facts contrary to those in evidence here. We doubt that this is the sort of "lowest cost alternative" scenario that the legislature had in mind when drafting the language of Section 42(h)(3). Moreover, this is inconsistent with Board precedent as discussed below in the "Hypothetical Compliance" section, *infra* at p.4.

"Retroactive Compliance" of Press No. 5 Absent A Stack Test

The majority states in its "retroactive compliance" discussion that it agrees with the People that the sole method for demonstrating compliance with the capture and control requirements of the flexographic printing rule is through testing of the regenerative thermal oxidizer, which did not occur. Packaging, PCB 04-16, slip op. at 7 (June 7, 2012). The majority states that it would not deem press No. 5 "retroactively compliant." *Id.* Yet, the majority goes on to state that

> [evidence] on whether a formal stack test of the press 5 tunnel dryer system would have demonstrated compliance, a subject of the supplemental hearing, may bear upon the lowest cost compliance alternative, which is a matter of penalty, not violation. *Id.* at 7-8, and n.3).

We question the premise of the purpose for the supplemental hearing. The majority directs the parties to hearing on the question:

> Would a formal stack test of the press 5 tunnel dryer system have demonstrated compliance with the capture and control requirements of 35 Ill. Adm. Code?

Putting aside questions of why Packaging had not previously submitted any such information, we simply doubt that this hypothetical question can ever have a real world answer. There is no way to recreate the precise conditions of 1995 and run the stack test to prove that the shift/shutdown method could work and is therefore a viable lowest cost alternative. In our view, the purpose of the supplemental hearing is fruitless and it should not be held.

Assuming arguendo the propriety of allowing "proof" of a fact not in evidence, we are curious as to the purpose to which such information would be put. We wonder if the Board *were* to determine at the conclusion of the supplemental hearing that the shift/shutdown theory were a viable cost alternative, would *other* Section 42 (h) factors also be brought back into consideration. For instance, if such a low-cost, easily accessible option were "found" to be available but not utilized, would Packaging be "held" liable for an aggravated civil penalty for failing to utilize such a relatively convenient and relatively inexpensive alternative?

Hypothetical Compliance

We believe that the majority's decision is inconsistent with, and in derogation of, the Board's 2001 decision in People v. Panhandle Eastern Pipe Line Co., PCB 99-191 (Nov. 15,

2001). In Panhandle, the Board found that respondent received economic benefit of roughly $500,000, based upon avoided or delayed capital and operating costs for emission controls. The Board rejected arguments that this amount should be offset by the costs of retrofitting units, since such costs would be greater than installation of controls when the units were constructed.

The majority states "the supplemental hearing directed by the Board is to address, among other things, costs avoided or delayed," but later acknowledges that "the Board finds that determining the lowest cost "alternative" for a respondent to comply may include consideration of hypothetical compliance alternative, where supported by evidence." Packaging, PCB 04-16, slip op. at 9 (June 7, 2012).

We believe that for the Board to consider such hypothetical compliance, alternatives would surely be contrary to the Panhandle holding. In Packaging the Board stated that it did not wish to

> encourage companies to put off compliance or at least not be as diligent as they should be in monitoring compliance [where] any penalty that a company might face if it gets caught in violation could be diminished because the company did not spend money to comply when it should have. The deterrent effect of civil penalties is compromised if the violator gets "credit" for ignoring its legal obligations. Panhandle, PCB 99-191, slip op. at 34.

The majority opinion claims that "the People's motion for reconsideration fails to state what constitutes the Panhandle or Toyal[1] economic benefit credit that would undermine deterrence in this case." PCB 04-16 slip op at 9. However, we believe that the People persuasively did so.

The People explained, "the non-compliant press did operate, uncontrolled, for at least seven years." People's March 28, 2012 motion to reconsider, p. 12. Moreover, the People argued, "Packaging Personified installed a control device costing $250,000 [to press No. 5] to return its facility to compliance" and that "annual operating costs for this control device were avoided for at least seven years." *Id.* In Toyal, the Board did not afford credit to the respondent who purchased but never installed a $1 million chiller control unit. In Panhandle, the Board did not afford credit to the respondent who could have, but did not install, control equipment when the emissions units were installed, rather than having to retrofit them. Similarly, here the Board should not afford credit to respondent for a compliance alternative involving a never-performed stack test on press No. 5 after the never-performed shifting of production from press No. 4 which ceased operations in 2002. Contrary to the admonitions in Panhandle and Toyal, the majority holding here will compromise the deterrent effect of civil penalties by giving credit for hypothetical occurrences. Allowing for a supplemental hearing on this issue is in conflict with Panhandle and Toyal precedent.

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[1] People v. Toyal America, Inc., PCB 00-211, slip op. at 60 (July 15, 2010), *aff'd sub nom.* Toyal America, Inc. v. IPCB and People, 2012 Ill. App (3d) 100585 (affirming $716,440 civil penalty imposed by Board).

For all these reasons, we respectfully dissent from the majority opinion. We would have granted the People's motion for reconsideration of the March 1, 2012 order, reinstated the Board's September 8, 2011 final opinion and order, and closed this case.

Deanna Glosser

Carrie K. Zalewski

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the the above concurring opinion was submitted on June 7, 2012.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board