ILLINOIS POLLUTION CONTROL BOARD
October 5, 2006

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

ORDER OF THE BOARD (by T.E. Johnson):

This air enforcement action was initiated by the Office of the Attorney General, on behalf of the People of the State of Illinois (People), on its own motion and at the request of the Illinois Environmental Protection Agency (Agency). On August 3, 2006, the People filed a seven-count complaint against Packaging Personified, Inc. (Packaging), a film processing and printing facility located in Carol Stream, Du Page County. Today, the Board rules on a motion and interlocutory appeal concerning a discovery dispute.

The complaint alleges violations of the Environmental Protection Act (Act) (415 ILCS 5 (2004)), as well as various Board air regulations. According to the People, these violations include Packaging's alleged construction and operation of four presses and a curing oven without permits; failure to timely submit annual emissions reports; operation of a major source without a Clean Air Act Permit Program (CAAPP) permit; violation of New Source Review rules; Emissions Reduction Marketing System (ERMS) rule violations; and failure to demonstrate compliance with flexographic printing rules in 35 Ill. Adm. Code 218.

In this order, the Board grants Packaging's August 29, 2006 motion for leave to file an interlocutory appeal of a June 28, 2006 hearing officer order denying a motion to compel the People to respond to various discovery requests. Some of the requested discovery concerns the rulemaking process in which the Board adopted the flexographic printing rules: Omnibus Cleanup of the Volatile Organic RACT Rule Applicable to Ozone Nonattainment Areas: Amendments to 35 Ill. Adm. Code Parts 203, 211, 218, and 219, R93-9 (Sept. 9, 1993). This requested discovery includes public record information, as well as information about communications between the Agency and other companies and agencies. Other requested discovery concerns adjudicatory proceedings in which the Board considered and granted requests for relief from the R93-9 rules, including records of variances and adjusted standards, or actions to enforce the R93-9 rules.

As to the R93-9 rulemaking material, Board affirms the hearing officer's order, finding that the information sought is irrelevant under the terms of Sections 29 and 41 of the Act (415 ILCS 5/29, 41 (2004)), which prohibit challenges of rules in enforcement proceedings of issues

"that could have been raised in a timely petition for review" under those sections. 415 ILCS 5/41(c) (2004). As to the information related to past relief from or enforcement of the flexographic printing rules, the Board finds that any relevance these materials may have is outweighed by the burden to complainant of reviewing and copying. In summary, complainant need not provide the requested discovery.

STATUTE AND REGULATIONS

The hearing officer order at issue relates to the discovery process. Section 101.616(a) of the Board's procedural rules provides:

> All relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130 [protecting trade secrets and other non-disclosable information specified by the Act]. 35 Ill. Adm. Code 101.616(a).

Regarding interlocutory appeals of hearing officer orders, Section 101.518 of the Board's procedural rules provides:

> Interlocutory appeals from a ruling of the hearing officer may be taken to the Board. The Board may consider an interlocutory appeal upon the filing of a written motion. 35 Ill. Adm. Code 101.518.

Section 29 of the Act addresses judicial review of regulations adopted by the Board:

> a) Any person adversely affected or threatened by any rule or regulation of the Board may obtain a determination of the validity or application of such rule or regulation by petition for review under Section 41 of this Act.
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> b) Action by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VIII [enforcement], Title IX [variances] or Section 40 [permit appeals] of this Act. 415 ILCS 5/29(a), (b) (2004).

Section 41 of the Act provides, in pertinent part in subsections (a) and (c):

> a) Any party to a Board hearing, . . . [and] any party adversely affected by a final order or determination of the Board . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order . . . was served upon the party affected . . . under the provisions of the Administrative Review Law . . . except that review shall be afforded directly in the Appellate Court . . . .

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c) No challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of this Act [penalties] as to any issue that could have been raised in a timely petition for review under this Section. 415 ILCS 5/41(a), (c) (2004).

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DISCOVERY REQUESTS AND HEARING OFFICER ORDER

The introduction section of Packaging's motion describes the background for its motion to bring an interlocutory appeal of the hearing officer's June 28, 2006 order as follows:

> On January 14, 2005, Packaging served Complainant with its Discovery Requests. In a nutshell, Packaging's discovery requests were designed to obtain information regarding the Flexographic Printing Rules, 35 IAC 218.401 *et seq*., which resulted from the rulemaking proceeding designated R93-9. A primary component of Packaging's defense in this concerns the issue of the availability of an adjusted standard for certain of Packaging's emissions. While several other companies with virtually identical issues were allowed to apply for, and received, site-specific relief, such relief was denied to Packaging on the basis of lack of timeliness in applying for such relief. Packaging's motive for requesting this discovery was to determine if other companies received notice or other documents regarding the Flexographic Printing Rules that Packaging did not receive, and if other companies were able to participate in R93-9 at a level of involvement that was not available to Packaging. Motion at 2.

The contested discovery involves both interrogatories and document requests. Packaging's requests are too lengthy to set forth here. But, in summary:

> Interrogatories 6 through 12 ask for identification of all entities on the Board's R93-9 notice and service lists; identification of all entities receiving correspondence from or engaging in communications with the Agency regarding R93-9 or the flexographic printing rules; for each of the above-identified entities, identification of any such communications with the Agency and description of the type of business, its processes, and its control equipment; identification of all communications between the Agency and the companies that received adjusted standards from the flexographic printing rules; identification of all Chicago area flexographic or rotogravure printers; identification of all communications between the United States Environmental Protection Agency (USEPA) and the State of Illinois or any Illinois agency relating to the flexographic printing rules, including promulgation, State Implementation Plan (SIP) approval, and enforcement of, and variances and adjusted standards from, the flexographic printing rules; identification of all communications between the Agency, USEPA, and recipients of adjusted standards relating to USEPA approval, as SIP revisions, of the adjusted standards from the flexographic printing rules granted to those companies;

> Document Requests 13 through 18 seek copies of all documents relating to R93-9, including written comments in R93-9; any notices from the Agency or the Board to Packaging regarding R93-9; all documents relating to Board cases AS 00-11, AS 00-12, AS 00-13, PCB 99-165, PCB 99-167, and PCB 99-170; all documents relating to the flexographic printing rules, including promulgation, variances and adjusted standards from the rules, and enforcement of the rules by USEPA, the State of Illinois, or any other entity with administrative or judicial enforcement authority with respect to the rules; and documents related to USEPA approval of adjusted standards as SIP revisions. *See* People v. Packaging Personified, Inc., PCB 04-16, Hearing Officer Order at 3-4 (June 28, 2006).

Complainant declined to provide the requested discovery. Packaging moved the hearing officer to compel discovery. Complainant opposed the motion, and Packaging filed a reply. *Id*. at 1.

On June 28, 2006, the hearing officer issued his order on Packaging's motion to compel. The order summarized the contested discovery requests. After reciting the parties' arguments, the hearing officer order contained the following discussion:

> Section 101.616 of the Board's procedural rules state that all relevant information and information calculated to lead to relevant information is discoverable.
>
> The rulemaking process itself is immaterial and irrelevant to the violations alleged in the complaint at bar. Moreover, the requested information would be overly burdensome to the Complainant, much of which is in the Board's public file. [Packaging's] motion to compel is denied. Packaging Personified, PCB 04-16, Hearing Officer Order at 4.

PARTIES' ARGUMENTS: MOTION AND RESPONSE

Relevance

Packaging's motion for interlocutory review of the hearing officer order argues that the requested discovery would produce information relevant to Packaging's defense, in that:

> similarly-situated Flexographic printers that had not complied with the regulations . . . nevertheless were allowed to pursue variances and adjusted standard relief with the apparent approval by the [Agency], and without any enforcement actions being brought by Complainant. Thus, the questions of notice, who was involved in rack (sic) regulations, subsequent IEPA discussions with similarly situated Flexographic printers, and the decisions to authorize relief without accompanying enforcement actions is directly relevant to Packaging's defense to the enforcement action brought in this case, including but not limited to the issue of the gravity and appropriateness of the demanded penalty. Motion at 5 (emphasis in original).

In response, the People argue that, "[a]bsent a claim of administrative procedural irregularities, or claims of constitutional violation . . . the enactment of a regulation has no

relation to whether or not it was subsequently violated." Response at 3. Compliance by other companies is not relevant, complainant argues, because Packaging "provides no basis for its extraordinary claim that it was prevented from seeking or obtaining regulatory relief . . . and [Packaging] did not apply for or seek an adjusted standard, either before or after this case was filed." *Id*. at 5 (emphasis in original). The People cite as authority for their position TTX Company v. Whitley, 295 Ill. App. 3d 548, 692 N.E.2d 790 (1st Dist.1998) (reversing an order requiring the Department of Revenue to disclose information in other taxpayers' returns).

Scope and Nature of Information Requested

Packaging's second argument is that the requested discovery is narrowly tailored, and is not unduly burdensome to complainant. In response to complainant's assertion that it would be required to evaluate the records of various rulemakings and other proceedings over the course of some 37 hours, Packaging states, without elaboration, that its discovery is narrowly tailored, reasonable, and directly relevant. Packaging contends that any burden on complainant "is a direct result of the baseless allegations raised in the Complaint . . . seeking thousands and thousands of dollars in penalty as a result of allegations raised in 12 counts in a 40-plus page Complaint." Motion at 6.

In response to the second argument, complainant contends that the requests are overbroad and unduly burdensome, particularly since complainant has already spent time searching and providing thousands of pages of documents. Complainant asserts that much of the information, which complainant does not concede is relevant, is information maintained in the files of others, including USEPA, the Board, or other agencies. Complainant argues that in the "absence of nexus to any legitimate claim or defense in this case, such requests can only result in harassment, by attempting to compel Complainant to expend State resources searching for irrelevant information." Response at 6.

BOARD DISCUSSION AND RULING

The Board grants Packaging's motion for interlocutory review. On review, the Board affirms the hearing officer and determines that complainant need not provide the requested discovery.

Packaging's motion clarifies that its discovery requests are limited to information within complainant's possession:

> The notion that Packaging expected or was entitled to compel Complainant to produce documents not with its possession, custody or control was never raised or suggested by Packaging, and is simply specious. Motion at 6.

This clarification eliminates any issue that complainant is being requested to conduct original research or provide material not contained in Agency files. Most of the information requested appears to be public information contained in the Board's files in various named dockets.

As to relevance, Packaging in essence argues that the information it seeks regarding the adoption of R93-9 should be discoverable to prove that it was treated differently by the Agency than other companies during the rulemaking process. Complainant argues that the validity of the Board's enactment of the flexographic printing regulations is irrelevant in the context of this proceeding. That principle is explicitly contained in Section 41(c) of the Act, which provides that:

> No challenge to the validity of a Board order shall be made in any enforcement proceeding under Title XII of this Act as to any issue that could have been raised in a timely petition for review under this Section. 415 ILCS 5/41(c) (2004); *see also* 415 ILCS 5/29(b) (2004).

The time, if at all, for Packaging to raise objections about the validity or application to it of the R93-9 rules elapsed 35 days after the Board's adoption of the rules on September 9, 1993—more than 13 years ago. The Board's records show these rules were never appealed. Information concerning the process of adopting the R93-9 rules is therefore irrelevant.

This brings the Board to consideration of Packaging's request for information concerning other companies' requests for relief from, and prosecutions for violations of, the R93-9 flexographic printing rules. Packaging argues such information is relevant to, or calculated to lead to information relevant to, its theory of defense. This theory seems to be that Packaging has been subjected to selective prosecution, or treatment differing from that of other companies that may have been advised by the Agency or otherwise made aware of the flexographic printing rules earlier than was Packaging, so as to mitigate either liability or the amount of any penalty to be imposed.

The Board agrees with complainant that the TTX decision is instructive here. The First District Appellate Court reversed an order granting a company discovery of information in other companies' tax returns, finding the requested information irrelevant. Specifically, the court held that:

> TTX alleged in its complaint that it properly applied the single factor transportation formula . . . . The issue before the circuit court was whether TTX qualified as a transportation company . . . . Whether other companies unrelated to TTX calculated their income taxes as transportation companies, and whether they were audited for doing so, is irrelevant to the issue of whether TTX should be designated a transportation company for income tax purposes. The relevant question is not whether TTX was treated differently from other companies, or whether the Department [of Revenue] is interpreting correctly [the tax code] with regard to other companies.
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> ***
>
> TTX asserts that if it obtains evidence during discovery that would establish a basis for an equal protection claim, TTX could amend its complaint to add that claim. TTX has not alleged a single fact that would support an equal protection claim, and fails to show how the information sought in the interrogatory would state a constitutional violation. Whether the Department violated TTX's equal

> protection rights by allowing other companies to use the single factor formula is purely speculative. The information requested by TTX is not discoverable on the basis of a potential future, unsubstantiated equal protection claim. TTX, 692 N.E.2d at 797.

Based on its relevancy finding, the TTX court did not address arguments that the discovery order was unduly burdensome and oppressive. *Id*.

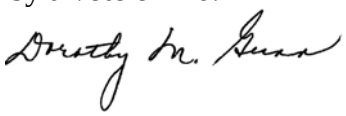
Here, as in TTX, the Board's purpose is not to determine whether the Agency treated other companies differently. It is long-settled that the Board has no jurisdiction to hear allegations of any Agency misfeasance, malfeasance, or nonfeasance in its enforcement of the Act and Board rules. *See* Landfill, Inc. v. PCB, 74 Ill. 2d 541, 367 N. E.2d 258 (1978). But, in contrast to TTX, the Board is not prepared to find that the Agency's enforcement experience with any other flexographic printers may not be relevant to penalty concerns under Section 33(c) or 42(h) of the Act (415 ILCS 5/33(c), 42(h) (2004)).

Much of the information sought, however, is already available to Packaging from the Board's files. The issue here, then, appears to be which entity will bear the burden of inspecting and copying. Packaging has failed to convince the Board that these discovery requests are either narrowly tailored or that the burden of production is reasonable. As the information is contained in public records, the Board finds that the financial and personnel burden of analyzing and copying materials already available to Packaging is not warranted here.

In summary, after accepting Packaging's interlocutory appeal, the Board affirms the June 28, 2006 hearing officer order, with the result that complainant need not produce the requested discovery. The hearing officer is directed to expeditiously move the parties toward resolution of this matter, consistent with the Board's earlier order in the case.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 5, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board