BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	PCB No. 00-211
	)	
v.	)	(Enforcement-Air)
	)	
	)	
TOYAL AMERICA, Inc. formerly known as ALCAN-TOYAL AMERICA, INC., a foreign corporation,	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 29tht[h] day of April, 2009, the Complainant filed its Reply Brief with the Illinois Pollution Control Board, by electronic filing. A true and correct copy of the document so filed is attached and herewith served upon you.

PEOPLE OF THE STATE OF ILLINOIS, *by* LISA MADIGAN
Attorney General of
State of Illinois

By: _____

Christopher Grant
Assistant Attorney General
69 W. Washington Street, #1800
Chicago Illinois, 60602
(312)814-5388

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COMPLAINANT'S REPLY BRIEF

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby submits its Reply Brief.

I. INTRODUCTION

Complainant submitted its Closing Argument and Post-Hearing Brief ("Post Hearing Brief") on February 20, 2009. Respondent Toyal America, Inc. ("Toyal") filed its Response on April 10, 2009, and amended its Response on April 23, 2009.

In its Amended Response, Toyal admits violations of the Illinois Environmental Protection Act ("Act") and volatile organic material ("VOM") regulations, but fails to accept responsibility. Incredibly, despite eight years of violations, Toyal claims that "[t]he model behavior shown by Toyal ...should be encouraged rather than discouraged"[1]. Toyal attempts to offset the financial benefit from its violations with unrelated plant projects, requests penalty credit for poor business decisions, and asks for supplemental environmental project credit for

[1]Toyal Amended Response, p. 44.

routine plant efficiency expenditures.

The Board has repeatedly articulated the purposes of imposing penalties, particularly their role in encouraging voluntary compliance and aiding in enforcement of the Act. In making its penalty recommendation, Complainant has followed the Board's guidance. The State believes that there cannot be a clearer case for a substantial penalty than in this matter. In this case, Toyal, a major manufacturing company located in an ozone noncompliance area, continued operations for eight years in knowing violation of Board Air Pollution regulations. The penalty assessed by the Board must be sufficient to advise similarly situated entities that continued operations in violation of the law will result in a significant penalty, and that 'after the fact' excuses will not be considered in mitigation[2].

II. TOYAL'S VIOLATIONS HAVE BEEN CLEARLY ESTABLISHED

In its Post-Hearing Brief, Complainant established the violations alleged in the Complaint. In its Amended Response, Toyal admits noncompliance from 1995 through 1998, as well as its failure to demonstrate compliance through April 2003[3]. However, Toyal has also admitted that as of April 18, 2001, eighty-three (83) of its VOM emission sources were not in compliance with 35 Ill. Adm. Code 218.986(a)[4]. These emission sources were part of units that

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[2]Clearly, Toyal does not understand the deterrent value of civil penalties imposed under the Act, as it maintains that "...to impose a substantial penalty in this matter would deter future facilities subject to these rules from making the good faith efforts demonstrated by Toyal as it strove to achieve full compliance". Amended Response, p. 28. The penalty in this case must send the message that compliance is expected when required by regulation, not eight years thereafter.

[3]Toyal Response, p.12

[4]Complainant's Exhibit 17, Admitted Facts No. 34-53.

represented most or all of Toyal's aluminum paste and flake production process[5]. Clearly, Toyal failed to control VOM emissions throughout the relevant period.

Also, because demonstration of compliance with the 81% VOM reduction was a required element of the Subpart TT regulations[6], there is no question that Toyal was in violation from March 15, 1995 until April 30, 2003, for a total noncompliant period of eight years[7].

III. TECHNICAL ISSUES DO NOT EXCUSE TOYAL'S LACK OF DILIGENCE

In its Post-Hearing Brief, Complainant presented substantial evidence showing Toyal's want of diligence throughout the noncompliance period. The technical issues raised by Toyal in its Amended Response do not counter these arguments.

A. Failure to Seek Regulatory Relief

Throughout its Amended Response, Toyal attempts to excuse its noncompliance by claiming that its facility had 'unique' issues affecting compliance, including a claimed "overall complexity of its operations, and delays caused by the fires and explosions...."[8],[9].

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[5]Tr., 12/10/08, p.118

[6]35 Ill. Adm. Code 218.991(a)

[7]Toyal claims that it first learned of the Subpart TT rules in February, 1995 but did not realize it was subject until February, 1996. This is contradicted by the Record. Toyal has admitted actual VOM emissions in excess of 25 tons per year as early as 1990 (Complainant's Exhibit 17, Admitted Fact 9), making them subject to the 81% control requirement as soon as the Board promulgated the regulations in January, 1994. The regulations required demonstration of compliance, which Toyal knew it had not successfully performed. Toyal's violations were 'knowing' as of March 15, 1995.

[8]Toyal Amended Response, p.13

[9]While unfortunate in each instance, it appears that fires and explosions are an inherent and accepted risk in Toyal's manufacturing process. In its Amended Response, Toyal reports twelve separate fires and/or explosions between 1999 and August, 2008.

Toyal's "unique technical issues" defense is simply an attempt at avoiding responsibility. However, even if Toyal's "unique technical issues" argument is taken at face value, another serious deficiency becomes evident: Toyal's failure to seek regulatory relief. Toyal's failure to seek relief pursuant to the Board's regulatory relief mechanisms while operating in noncompliance for eight years, demonstrates its wilful indifference to the requirements of the Board Air Pollution Regulations[10].

To obtain a variance, a regulated entity must provide data to the Board that supports its arguments of unreasonable hardship, as well as compliance alternatives and a description of the environmental impact of noncompliance[11]. The burden of proof is on the person seeking the variance[12].

However, Toyal never sought a variance from the Board, and consequently never provided a basis for excusing its noncompliance. Notably, Toyal did not seek relief after its initial failure to adequately control VOM emissions, nor even after it received a violation notice from the Agency. In fact, Toyal raises these issues to the Board for the first time in its Amended Response, fourteen years after it became subject to the 81% control requirements of Subpart TT.

Toyal is requesting, in essence, a 'retroactive variance' from the Board in an obvious effort to escape a penalty. Such an untimely request is improper: the Board commonly rejects

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[10] Section 35 of the Act allows the Board to grant individual variances from regulatory requirements in cases where it is found "...upon presentation of adequate proof, that compliance with any rule or regulation, requirements or order of the Board would impose an arbitrary or unreasonable hardship.

[11] 35 Ill. Adm. Code 104.204

[12] 35 Ill. Adm. Code 104.238(a)

requests for retroactive variances, and has also held that "*one cannot qualify for a variance simply by ignoring a compliance date....*"[13]. Clearly, if Toyal had been diligent in evaluating its obligations under Subpart TT and reasonably identified any genuine hardship in attaining compliance, it would have sought relief over fourteen years ago.

B. Delayed Compliance Expenditures

Despite its awareness of the VOM control requirements applicable to its facility, Toyal only began evaluating control of VOM sources after it submitted its CAAPP Permit application on March 5, 1996. Although Toyal was required to submit a CAAPP application (under Section 39.5 of the Act), this requirement was separate and distinct from its obligations to control VOM under Subpart TT of the Board Air Pollution regulations.

Similarly, instead of addressing its failure to control VOM emissions in 1998, Toyal again delayed serious work on VOM control until 2001, when it began work on obtaining a FESOP permit. By this time, Toyal had been operating in noncompliance with Subpart TT for six years. Additionally, because Toyal had previously submitted its CAAPP permit application, the FESOP project was a voluntary undertaking, while controlling 81% VOM had been required since 1995.

In an attempt to meet FESOP standards, Toyal expended substantial resources during this period. At about the same time, Toyal was expanding/replacing its "B unit" production process. However, Toyal continued to operate its facility in violation of the Subpart TT regulations.

During this same period, Toyal also obtained several extensions on a construction permit

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[13]*Community Landfill Corporation v. Illinois EPA*, PCB 95-137 (September 21, 1995)(slip op. at 3)

for an RTO control unit to replace the existing RCO[14]. Despite seeking and obtaining these extensions, Toyal never even purchased or installed the RTO. The FESOP work and continued permit extensions caused Toyal to continue delaying compliance.

IV. TOYAL'S "HOMEMADE" ECONOMIC BENEFIT ANALYSIS MUST BE REJECTED

While it is understandable that any defendant would want to avoid payment of a civil penalty, Toyal's twisted economic benefit analysis strains credulity. In an attempt to totally avoid the consequences of its actions, Toyal seeks to offset real, tangible cost savings from noncompliance with unrelated capital projects and engineering mistakes. There is no support for these arguments in either fact or law, and the Board must summarily reject Toyal's obvious attempt to avoid a deserved civil penalty.

A. Toyal's $1,000,000.00 'Mistake' Should not Reduce its Economic Benefit

Toyal claims that the purchase of a $1 MM 'vacuum chiller' (also referred to as a 'skid mounted condenser') should be credited against its admitted economic benefit, thereby creating a negative number. In its Amended Response, Toyal asserts that the purchase of this emission unit was for "compliance purposes". Hearing testimony, however, proves that this expenditure was actually made to advance its voluntary FESOP permit work, and had nothing to do with attaining required compliance with the Subpart TT regulations.

As identified in its 1996 CAAPP application, most of the VOM sources which were

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[14]Toyal states that "Illinois EPA even granted Toyal several extensions during the noncompliance period to complete modifications ...and other compliance efforts" (Toyal Response, p.2). Illinois EPA simply granted extensions of the construction permit. Illinois EPA never agreed to toll the compliance deadline for the Subpart TT regulations. In fact, by the time the extensions were granted, the complaint in this matter (which alleged continuing violations) had already been filed.

proposed to be controlled by the vacuum chiller (had it ever been installed) already complied with the Subpart TT regulations[15]. For example, sources MSO-17, MSO-20, MSO-32, MSO-47, MSO 52, MSO-63, MSO-67, and MSO-81 are all listed as "exempt" from control under 35 Ill. Adm. Code 218.986 in Toyal's CAAPP Permit Application[16]. Therefore, control of these sources was not necessary for compliance with the Subpart TT regulations.

Toyal witness Steve Anderson testified that he advised Toyal that these sources would need to be controlled to obtain a FESOP[17]. However, the type of operating permit chosen by a particular stationary source is unrelated to substantive emission standards applicable to a source- in this case the Subpart TT regulations. Therefore, the vacuum chiller expenditure was not intended for compliance with Subpart TT, and must not be categorized as a compliance expenditure.

Also, the term "economic benefit of noncompliance" has been defined as the "...after tax present value of avoided or delayed expenditures on necessary pollution control measures" (emphasis supplied)[18]. Thus, because the vacuum chiller was never used for VOM control, it cannot be considered a "necessary pollution control measure". In addition, while the vacuum chiller was never installed and never used, it is reasonable to conclude that it is still available for resale, parts, or scrap. Therefore, this unnecessary expense should not be applied to avoid

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[15]Complainant's Exhibit 21, "Emission Units Compliance Information".

[16]See: Complainant's Exhibit 22, showing emission units to be "controlled" by vacuum chiller.

[17]Tr., 12/11,08, p.114

[18]*Friends of the Earth v. Laidlaw*, 890 F. Supp. 470, 480 (D.S.C. 1995)

Toyal's full economic benefit of noncompliance.

Toyal's Vice President of Operations (Barry Van Hoose) testified that the purchase of the vacuum chiller was a 'mistake'[19]. The Board must not allow Toyal to subtract the cost of equipment purchased as a 'mistake', but available for other purposes, from its demonstrated, actual economic benefit of noncompliance. The State should not be asked to subsidize Toyal's $1,000,000.00 error.

Finally, the linchpin of Toyal's argument is the opinion of its financial expert that the vacuum chiller's costs should be offset from the calculated economic benefit. Complainant strenuously objects to Toyal's arguments related to Christopher McClure's testimony on this topic. The Board must take note that Mr. McClure's testimony was not timely disclosed prior to hearing, and as a result, the proposed revision in his opinion related to the vacuum chiller issues was excluded by the Hearing Officer[20]. Although this written opinion was accepted as an offer of proof, Toyal never appealed the Hearing Officer ruling, and even now does not offer any reason why the Hearing Officer's ruling should be overturned. Therefore, Mr. McClure's improper testimony regarding the vacuum chiller cannot be considered as evidence, and should be stricken from Toyal's Amended Response.

B. Toyal's Foregone Benefit Theory Must be Rejected

The State's economic benefit calculations were developed using a model created by Illinois EPA in accordance with accepted guidance regarding the economic benefit of noncompliance in litigated environmental enforcement cases. The basis for the State's opinion

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[19]Tr., 12/10/08, p. 205

[20]Tr., 12/10/08, p.21

has also been accepted by the Board in other air pollution cases[21]. The State's model gives due credit to a noncompliant entity such as Toyal, by accounting for possible tax benefits, increases in cost, and depreciation. Complainant's estimate also credits Toyal for 'partial' expenditures by 'stopping the interest clock' on expenditures once made, even though compliance had not been achieved. Thus, the mechanism used by the State in calculating the economic benefit of noncompliance is conservative, reasonable, and in accordance with environmental enforcement policy.

On the other hand, Toyal's foregone benefit estimate, which subtracts hypothetical savings from its unrelated solvent reclamation project, is an elaborate, self-serving, and "homemade" invention, without support of legal authority. Complainant is unaware of any litigated case where such subtractions from economic benefit have been accepted by a court or administrative panel. Certainly, Toyal's expert witness did not cite any decisions proving the validity of his theory at hearing. And Toyal has cited no cases in its Amended Response in support of its 'foregone benefit' theory. Moreover, as previously explained in Complainant's Post-Hearing Brief, the basis of Toyal's theory has already been rejected by the Board.[22]

Based on testimony provided at hearing, it is obvious that Toyal and its expert simply 'cherry picked' a few sections from USEPA's BEN User Manual, and created a novel and

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[21] *People v. Panhandle Eastern Pipeline Company*, PCB 99-191

[22]. In *Panhandle*, the Board rejected a similar claim, noting that "...any penalty that a company might face if its 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". PCB 99-191 (11/15/01, slip op. at 32).

unsupportable argument for the purpose of eliminating an expected and deserved civil penalty[23].

Toyal's 'theory' references two short passages out of USEPA's BEN User Manual. On Page 4-3 of the Manual, USEPA states that 'annual recurring costs may be negative'[24]. However, both parties have included positive avoided annual recurring costs (e.g. fuel and power) in their experts' opinions. Therefore this section is not relevant to this case.

Toyal also points to a passage in Chapter 4 of the Manual, page 4-6, to support its claim for a deduction from proven economic benefit. This section is contained in Chapter 4 of the Manual, in which USEPA directs the user to issues described as "Common Violator Arguments"[25]. In support of its 'theory', Toyal cites "Violator Argument Example 7", in which a violator claims that "compliance is 'cheaper' than non compliance". Conveniently, Toyal does not include the language contained in the very next paragraph of this Section, which provides: **"Be wary of such negative economic benefit results!"**[26]

USEPA clearly recognized the likelihood that a defendant would raise 'after the fact' arguments related to plant improvements, or other efficiencies, and then claim that it 'lost money' by not complying with the applicable regulation. Toyal's claim that this Section supports its argument is patently incorrect.

Even if Toyal had *correctly* interpreted the guidance in the BEN Users Manual, neither

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[23]The State did not use USEPA's BEN Model in calculating economic benefit. Tr., 12/10/08, p.96

[24]Respondent's Exhibit 22(a), p. 3-11

[25]Id., p. 4-1

[26]Id., p.4-6

the Manual nor the BEN Model are binding upon State Agencies, or upon adjudicative bodies such as the Board. Toyal's proposed 'foregone benefit' theory simply does not represent sound public policy for environmental enforcement cases. The recovery of economic benefit under the Act is a general mandate, and the Board should not allow violators to carve out exceptions based on novel theories. Moreover, as explained in Complainant's Post-Hearing brief, there is no nexus between the claimed 'foregone benefit' from failure to install solvent recovery equipment and the method used to finally comply with the regulation. Toyal had multiple opportunities to install a solvent recovery system connected to a flare, vent, or (beginning in 1998) to the existing RCO. As a business decision, Toyal decided to wait until 2003. Any claimed "foregone benefit" was therefore self-imposed.

In the *Panhandle Eastern* case, the Board considered similar claims, and summarily rejected these arguments. Because the issues raised in *Panhandle* are almost identical to Toyal's 'foregone benefit' claims, the Board must reject Toyal's desperate attempt to retain the economic benefits derived from *eight years* of noncompliance[27].

V. TOYAL'S REQUEST FOR SEP CREDIT MUST BE DENIED

A. Supplemental Environmental Projects are Considered only in Settlement

Toyal has asked the Board to consider its newly-installed control device as a Supplemental Environmental Project ("SEP"), and credit its expenditure of $674,000.00 against any civil penalty. This request is unprecedented and improper, and must be denied.

Section 42(h) of the Act, 415 ILCS 5/42(h) provides, in pertinent part:

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[27]As further example of Toyal's 'cherry picking' approach, Toyal's expert totally ignored USEPA's guidance and excluded avoided labor costs for RCO operation and maintenance from its estimate. See: Respondent's Exhibit 22(a), p.4-2.

> In determining the appropriate civil penalty...the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> * * *
>
> (7) Whether the respondent has agreed to undertake a "supplemental environmental project", which means an environmentally beneficial project that a respondent has agreed to undertake in settlement of an enforcement action under this Act....(emphasis supplied)

There has been no settlement of this matter, and no agreement between the parties as to an acceptable project. Toyal's request that the Board impose a SEP upon the State, after forcing a contested hearing on both liability and remedy, is contrary to the Act, improper, and therefore must be rejected.

B. Toyal's Purchase of the New Control Device was Made for Plant Efficiency Purposes

As identified in the State's Post-Hearing Brief, and as shown at hearing, despite continued operational problems with its RCO (the original VOM control device), Toyal was able to come into compliance using this equipment[28]. However, the RCO remained a 'headache', and was replaced with the new control device ("CRO") in 2005. As testified to by Toyal Vice President Barry Van Hoose, the new control device increases the efficiency of Toyal's operations[29].

Obviously, Toyal's new VOM control device was installed simply to improve its own operations, the overall goal of any plant capital expenditure. Requesting SEP credit for a capital expenditure made in the ordinary course of Toyal's business is improper, and Toyal's

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[28]Tr., 12/10/08, p. 113

[29]Tr., 12/10/08, p. 112

argument must be rejected by the Board.

VI. CURRENT ECONOMIC CONDITIONS SHOULD NOT DICTATE THE BOARD'S CALCULATION OF CIVIL PENALTY

Over Complainant's objection, Toyal presented evidence at hearing regarding the current business climate and losses incurred during 2008, well after the relevant period. As noted in its Response, Toyal expected to lose $3.0 MM in 2008. However, Toyal provided no information regarding its profits during the period of violations, i.e. 1995-2003. Moreover, it is important to recognize that Toyal has not claimed that it is unable to pay a civil penalty in the amount requested by the State. Nor has it presented any evidence that payment of a civil penalty would result in plant closure, delay of plant expansions, or that employees would be directly affected. Toyal simply relies on the fact that this case is coming to the Board for decision during a period of general economic difficulty.

According to the record, Toyal employs 89 people and has few competitors. In 2007, its parent company reported sales in excess of $5BB[30]. Also, Toyal clearly was able to make such capital expenditures as necessary to grow its business during the relevant period. For example, while it was completing installation of the controls necessary to come into compliance in 2002, it was also engaged in a $5-6 MM overhaul of its "B-Unit"[31]. Moreover, Toyal apparently was able to purchase a $1MM piece of equipment (the 'vacuum chiller") which was never used, and a $674,000.00 replacement control device used to improve plant efficiencies.

Obviously Toyal does not want to pay a penalty. But there is nothing in the record to

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[30]Toyal states that it operates as a 'stand alone company'. However, its is part of a much larger organization, which will presumably act to protect its investment in Toyal.

[31]Tr., 12/11/08, p. 54

indicate that Toyal cannot pay a civil penalty of $716,440.00 to resolve eight years of violations.

VII. CONCLUSION

The evidence proves that Toyal violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2006), and 35 Ill. Adm. Code 218.986(a). The violations continued from March 15, 1995 until April 30, 2003. An analysis of the Board's penalty factors suggests the need for a substantial penalty to accomplish the purposes of the Act and to aid in future enforcement. The civil penalty imposed must, at a minimum, recover all of the economic benefit accrued by Toyal through its violations. The evidence shows this benefit to be at least $316,440.00.

In addition, Complainant requests that an additional penalty of $400,000.00 be assessed. Every day that Toyal operated its facility from March 15, 1995 until April 30, 2003, it did so with the knowledge that it was operating in violation of the VOM control regulations. Therefore, a significant gravity component is necessary to deter future violations by Toyal and other similarly situated entity persons. Accordingly, Complainant believes that a penalty of $716,440.00 is necessary and appropriate to accomplish the purposes of the Act.

RESPECTFULLY SUBMITTED

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

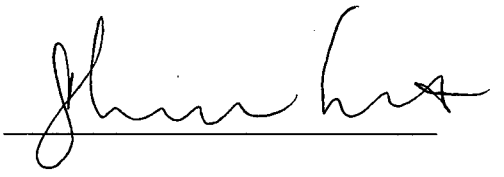
ROSEMARIE CAZEAU, Chief
Environmental Bureau North

BY: 

CHRISTOPHER GRANT
VANESSA VAIL
Environmental Bureau
Assistant Attorneys General
69 W. Washington Street, #1800
Chicago, IL 60602
(312)814-5388
(312)814-5361

CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 29th day of April, 2009, the foregoing Reply Brief and Notice of Electronic Filing upon the persons listed below, by hand delivery, and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.



CHRISTOPHER GRANT

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph
Chicago, Illinois 60601 (By Hand Delivery)

Mr. Roy M. Harsch
Drinker Biddle Gardner Carton LLP
191 N. Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698 (By First Class Mail)