ILLINOIS POLLUTION CONTROL BOARD
July 15, 2010

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 00-211
	)	(Enforcement - Air, Land)
TOYAL AMERICA, INC., formerly known as ALCAN-TOYO AMERICA, INC., a foreign corporation,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent from the majority opinion. I agree with the findings of violation and that a civil penalty should be imposed, but I believe the penalty ordered is excessive. As requested by the complainant, today's total civil penalty is $716,440, which includes $316,440 based on the purported economic benefit enjoyed by the respondent by not complying. It is my concern that the majority's penalty decision is inconsistent with Board precedent, fails to consider important aspects of the case, and improperly considers factors not contemplated by the General Assembly.

There are many mitigating facts here not present in People v. Panhandle Eastern Pipe Line Co., PCB 99-191 (Nov. 15, 2001), an air enforcement decision on which both parties rely. In Panhandle, the Board imposed an $850,000 civil penalty, $500,000 of which reflected the natural gas pipeline company's economic benefit from noncompliance. The majority acknowledges some of the distinguishing facts between the two cases favoring this respondent, but then does not meaningfully reconcile the $400,000 non-economic benefit portion of its penalty ($50,000 per year of violation) with the corresponding $350,000 penalty amount assessed in Panhandle ($35,000 per year of violation).

The Panhandle respondent did not self-disclose its noncompliance, did not attempt to comply, did not face complex technical or operational hurdles to compliance, and, after ten years of noncompliance, had not yet come into compliance. Here, in contrast, the respondent self-disclosed its noncompliance, repeatedly attempted to comply (including installing and operating an emission control device beginning in 1998, over a year before the complaint was filed), faced a very complex array of technical and operational issues, and, after eight years of noncompliance, ultimately did demonstrate compliance.[1] The complainant's portrayal of the respondent as a scofflaw, which the majority largely adopts, is contradicted by the record.

[1] An order to "cease and desist from violations" properly contemplates only *continuing* violations. 415 ILCS 5/33(b) (2008); *see also* BLACK'S LAW DICTIONARY 202 (5th ed. 1979)

In addition, the respondent in Panhandle emitted an unauthorized 3341.67 tons of a pollutant into the air. This record lacks any such data quantifying potential environmental harm. Further, while the respondent in this case is relatively small, the respondent in Panhandle was a large company, with operations in many states, including five facilities in Illinois.

Next, the majority does not consider as mitigating factors the respondent's implementation of the catalytic recuperative oxidizer or improved solvent recovery, each of which results in benefits to the environment and neither of which is required by law. These projects should also work in mitigation of the non-economic benefit portion of the civil penalty. That any of these measures may also have business purposes makes them no less environmentally beneficial. Helping the environment does not have to be bad for a business' bottom line to count as a mitigating factor. At the same time, the majority accepts the offer to take into account the complainant's waiver of an unspecified amount of attorney fees and costs that might be available under Section 42(f) of the Act (415 ILCS 5/42(f) (2008)). The complainant's litigation decision to forego attempting to meet the considerable burden of recovering attorney fees and costs is not an aggravating factor and is irrelevant to arriving at an appropriate civil penalty under Section 42(h) (415 ILCS 5/42(h) (2008)).

Additionally, the majority's penalty calculation of any economic benefit gained by the respondent from noncompliance is unduly inflated. Based on the recommendation of a reputable consultant, the respondent spent over one million dollars on the vacuum chiller unit in a good-faith attempt to comply (nearly as much money as the respondent eventually spent to comply). These facts are established in the evidence, regardless of the exclusion of the amended opinion of the respondent's economics expert. The majority should have, but did not, consider these "matters of record in mitigation . . . of penalty" (415 ILCS 5/42(h) (2008)). It is uncontested that the considerable sum spent on the unit was unavailable to the respondent for other purposes. Common sense dictates that any economic benefit from delayed compliance was diminished by this expenditure.

Even if not considered under Section 42(h)(3) of the Environmental Protection Act (Act) (415 ILCS 5/42(h)(3) (2008)) for purposes of economic benefit, the Board has the discretion to consider the vacuum chiller evidence in mitigation of the non-economic benefit portion of the penalty. *See*, *e.g.*, ILCS 5/42(h)(2) (2008) ("the presence or absence of due diligence on the part

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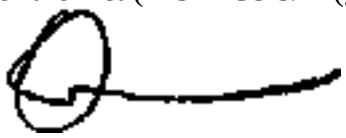
("cease and desist order" is one "prohibiting a person or business firm from continuing a particular course of conduct."). It is uncontested that the respondent here has come into compliance. An order to cease and desist is therefore unnecessary. Worse, even if one could cease and desist from "future" violations, I believe that this aspect of the majority's order inappropriately exposes the respondent to greater civil penalties. Presumably, any subsequent noncompliance with the statute or regulations at issue would further constitute a violation of this Board order. *See* 415 ILCS 5/42(a) (2008) (providing civil penalties of up to $50,000 per violation of the statute, regulations, permit, or Board order, and up to an additional $10,000 for each day any such violation continues). For these reasons, the majority's cease and desist order is not "appropriate under the circumstances." 415 ILCS 5/33(a) (2008).

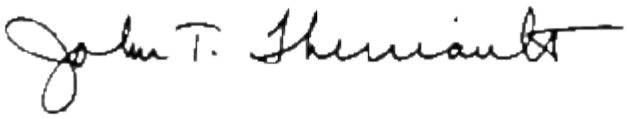
of the respondent *in attempting to comply*" (emphasis added)). Good-faith attempts at compliance based on the recommendations of reputable firms should be encouraged.

Finally, the majority accepts the complainant's argument that part of the respondent's economic benefit from noncompliance is $25,674 in interest from *delaying penalty payment, after* the respondent came into compliance. Section 42(h)(3) of the Act (415 ILCS 5/42(h)(3) (2008)) contemplates a penalty calculation based on economic benefits, if any, from delay in complying with the requirements violated, not delay in paying a civil penalty after the respondent is in compliance with those requirements. Penalty payments are not due until the time prescribed in final orders of the Board or the courts and any interest charged for late payment is addressed in Section 42(g) of the Act (415 ILCS 5/42(g) (2008)).



Thomas E. Johnson

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on July 15, 2010.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board