ILLINOIS POLLUTION CONTROL BOARD
September 16, 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):

On July 15, 2010, I dissented in this enforcement case because I found the $716,440 civil penalty imposed excessive. The issue today is whether to grant a motion to stay the obligation to pay the penalty, pending appeal by Toyal America, Inc. (Toyal) to the Third District Appellate Court. The People of the State of Illinois (People) oppose the motion. For the reasons below, I respectfully dissent from the majority's denial of Toyal's request for stay. In this opinion, I discuss applicable Board precedent, the People's position, and the majority's decision, after which I provide my conclusions.

APPLICABLE BOARD PRECEDENT

As cited by Toyal (Mot. at 2-3), the Board has a long line of decisions that supports granting a stay of an order to pay a civil penalty pending appeal, but denying such a stay of an order requiring one to cease and desist from harmful behavior or to perform some sort of remedial action. In a 2007 decision staying a civil penalty pending appeal, the Board explained its approach:

> The decision to grant or deny a motion for a stay is discretionary. "The Board has been reluctant to stay its orders when a stay may result in harm to the public or the environment." People v. Blue Ridge Construction, Corp., PCB 02-115 (Dec. 16, 2004); *see also* People v. Prior, *et al.*, PCB 02-177 (Sept. 16, 2004); citing Panhandle Eastern Pipeline Co. v IEPA, PCB 98-102 (July 8, 1999), *aff'd sub nom* Panhandle Eastern Pipeline Co. v. PCB and IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist., 2000). The Board, however, often grants stays of its orders with respect to payment of penalties. Blue Ridge Construction, PCB 02-115, slip op. at 2; citing IEPA v. Pielet Bros. Trading, Inc., PCB 80-185 (Dec. 17, 1981) (granting motion for stay of order's provision requiring penalty payment, but denying motion for stay of order's provision requiring respondent to cease and desist from violations), *aff'd sub nom* Pielet Bros. Trading Co. v. PCB, 110 Ill.

> App. 3d 752, 442 N.E.2d 1374 (5th Dist. 1982). When granting a stay with respect to the payment of penalties, the Board has reasoned that "[p]ayment of monetary penalty can be delayed without prejudice to the public and it has been our practice to allow such motions pending appeal." Citizens for a Better Environment v. Stepan Chemical Co., PCB 74-[201], 74-270, 74-317, slip op. at 1 (June [26], 1975). IEPA v. Northern Illinois Service Co., AC 05-40, slip op. at 2-3 (Apr. 19, 2007).

The issue in these cases therefore turned on whether detriment to the public or the environment may result from a stay, a matter with which this technical Board is especially well-qualified to address. For example, in 2004, the Board granted a stay pending appeal of an order imposing $300,000 in civil penalties and $6,600 in attorney fees, without requiring the posting of any appeal bond or other security. *See* People v. Prior, PCB 02-177, slip op. at 1-2 (Sept. 16, 2004). In Prior, the movant emphasized that the People and the environment would not be harmed if a stay is granted, and the People conceded that the motion for stay "'seeks merely to stay the payment of civil penalties and attorney's fees pending appeal.'" Prior, PCB 02-177, slip op. at 1.

THE PEOPLE'S POSITION

The People do not challenge the reasoning of this body of Board precedent. Instead, the People assert that to grant Toyal's requested stay of the civil penalty, an appeal bond or other security is *required* by the Supreme Court Rules. Resp. at 1. According to the People, the motion must be denied because Toyal has presented no such financial protection. *Id*. at 1-2.

By arguing that a bond or other security must be provided under Supreme Court Rule 305(a) (Resp. at 1), the People necessarily believe that the Board's civil penalty is a "money judgment." The People cite no authority to support this position, however, and there is case law indicating that an administrative fine, like the civil penalty here, is not a money judgment. *See* City of Chicago v. Thomas, 102 Ill. App. 2d 143, 149, 243 N.E.2d 572, 575 (1st Dist. 1968).

THE MAJORITY'S DECISION

I first address the special emphasis that the majority appears to place on whether a motion for stay has been opposed. *See*, *e.g.*, Maj. Op. at 4 ("where the stay was not contested by the complainant"). I submit that the only legal import of failing to oppose a motion for stay is that the non-movant waives any objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d). The corollary of this rule is that a timely response in opposition, as we have here, means only that the People are not subject to the waiver. Of course, mere opposition by the People does not bind the Board to deny the stay request, just as a failure to respond does not bind the Board to grant the motion. *Id*. Whether past motions for civil penalty stays granted by the Board were uncontested by the People is immaterial to the precedential value of those decisions. The Board's logic in so ruling remains sound.

The majority does not distinguish these earlier Board decisions. Nor does the majority rely upon the People's argument for denying Toyal's motion. Instead, the majority claims to

base its ruling upon two recent Board decisions, People v. Community Landfill Co. & City of Morris, PCB 03-191 (Nov. 5. 2009) (City of Morris), and People v. Community Landfill Co., Edward Pruim, & Robert Pruim, PCB 97-193, 04-207 (consol.) (Dec. 17, 2009) (Community Landfill), each of which relied upon the Illinois Supreme Court's decision in Stacke v. Bates,138 Ill. 2d 295, 562 N.E.2d 192 (1990). I do not believe, however, that these three decisions, individually or collectively, compel today's outcome.

In City of Morris and Community Landfill, each involving the same landfill, the Board denied motions for stay pending appeal, but both enforcement cases are readily distinguished from the instant proceeding. The movants in City of Morris and Community Landfill sought stays of *all* of their obligations under the respective orders. In City of Morris, the Board denied a stay of an order not only assessing a penalty, but also imposing obligations to provide significant financial assurance and to stop accepting waste. In Community Landfill, the Board denied a stay of an order that both assessed a penalty and imposed an obligation to cease and desist from substantial on-going violations. With a continuing risk of harm from the violations evident in both cases, the Board's denial of stays in City of Morris and Community Landfill was consistent with the Board precedent discussed above. Today, *only* a civil penalty is at issue. Moreover, City of Morris and Community Landfill posed concerns, not present here, over the dissipation or diversion of assets and the resulting risk of non-payment, militating against stays of the penalty portions of those orders.

The majority then cites Stacke to conclude, first, that Toyal does not have a "substantial case on the merits" for establishing Board error in imposing the civil penalty and, second, that Toyal has failed to show that "the balance of the [Stacke] equitable factors weighs in favor of granting the stay." Maj. Op. at 5, 6. I must disagree on both counts.

The Stacke court made clear that a "substantial case on the merits" does not mean a "probability of success on the merits." Stacke, 138 Ill. 2d at 309, 562 N.E.2d at 198. In Toyal, the issue of the appropriate civil penalty was the subject of a lengthy hearing, extensive briefing, and eventually a split Board vote. In the absence of explanation, it is unclear what, in the majority's estimation, would ever qualify as a "substantial case on the merits" for a losing party.

The majority then articulates only one "equitable factor," claiming that there would be a "hardship" on the People if payment of the penalty is stayed on appeal. Maj. Op. at 5. First, the majority surmises that the "companies who timely complied" would "continue to be placed at an economic disadvantage during the prevailing economic downturn." *Id*. at 6. This is because Toyal, while its appeal is pending, would be "allowed to keep or invest the economic benefit of its delay in compliance." *Id*. Next, according to the majority, maintaining the status quo through a stay would therefore "reward non-compliance," which, in turn, would provide a "disincentive to 'voluntary compliance'." *Id*. It is this disincentive, finally, which would be detrimental to "the interests of the People in prompt compliance and better air quality." *Id*.

The majority's multi-step rationale for finding that a "hardship" would befall the People seems tenuous. Initially, it must be observed that the People themselves do not claim any such hardship, nor was any such hardship found in City of Morris or Community Landfill. Generally, the Board's 1975 ruling that "[p]ayment of monetary penalty can be delayed without prejudice to

the public" is, I believe, as true today as it was when it was made. Citizens for a Better Environment v. Stepan Chemical Co., PCB 74-201, 74-270, 74-317, slip op. at 1 (June 26, 1975). It is dubious to suggest that a company will forego voluntary compliance with air pollution regulations, at the risk of hundreds of thousands of dollars in civil penalties, just because someday, if it is prosecuted and penalized, it might be able to invest the economic benefit portion of that penalty during its subsequent appeal, if any. There is simply no indication in this record that the People would suffer any hardship by mere delay in Toyal paying the civil penalty.

The Board has already calculated and imposed a civil penalty reflecting Toyal's alleged economic benefit from delay in compliance under Section 42(h)(3) of the Environmental Protection Act (Act) (415 ILCS 5/42(h)(3) (2008)). The State would recoup that economic benefit, to the dollar, if the penalty is affirmed by the appellate court. The record contains no evidence that Toyal lacks the wherewithal to pay the penalty.

Finally, what is made plain in the Board's enforcement case law is that, when imposing civil penalties, the Board, rightly, almost always finds that violators benefit economically from delayed compliance, even if the dollar amounts of those benefits are not specified. This begs the question, however, of when there will ever *not* be the hardship easily found by the majority. The General Assembly itself recognized that it may be appropriate for civil penalties to be stayed pending appeal: "if the time for payment is stayed during the pendency of an appeal, interest shall not accrue during such stay." 415 ILCS 5/42(g) (2008). The majority's novel test may, in effect, read this language out of the Act.

CONCLUSIONS

Toyal seeks a stay of only its obligation to pay a civil penalty. I would grant the stay, preserving the status quo, which the Board has often done in the past under like circumstances. This could have been done today in complete accord with Stacke, City of Morris, and Community Landfill.

I believe that Toyal has presented a substantial case on the merits. The People do not dispute Toyal's claim that it has "good cause on the merits to file an appeal before the Illinois Appellate Court including in part, the points made by the dissenting opinion." Mot. at 3. In addition, I believe that Toyal has shown that the balance of the equitable factors weighs in favor of granting the stay. As Toyal maintains, there is no issue here of harm to the public or the environment from on-going violations. *Id*. at 2-3. It is uncontested that Toyal came into compliance over seven years ago. *Id*. at 3. The majority should have, but did not, give any weight to this equitable factor, one which is particularly relevant in this case and in light of the Board precedent now apparently overturned.

Beyond the denial of Toyal's motion, I am troubled by two aspects of the majority's decision. First, I believe that a significant departure from applicable Board case law has been effectuated without justification. The majority refers to Stacke and its application in City of Morris and Community Landfill. The majority also mentions the earlier Board decisions granting penalty stays pending appeal. What the majority does not do, however, is explain why it abandons that prior precedent. *See* Chemetco, Inc. v. PCB, 140 Ill. App. 3d 283, 289, 488

N.E.2d 639, 643 (5th Dist. 1986) ("abrupt shifts" in agency practice "constitute 'danger signals'" and "in the very least, a reasoned analysis is required, indicating that prior policies and standards are being deliberately changed, not casually ignored").

Second, I believe that the majority has established essentially insurmountable hurdles to granting stays. The Board should not, in the face of any opposition from the People, routinely deny motions for stays by applying the type of "ritualistic formula" warned against by the Stacke court. Stacke, 138 Ill. 2d at 308, 562 N.E.2d at 198. There are doubtlessly good reasons for Supreme Court Rule 335(g) requiring that an appellant ordinarily seek a stay from the administrative agency in the first instance, including the agency's familiarity with the record. By denying a motion for stay so readily and suggesting that the respondent apply to the appellate court for a stay, we risk effectively abdicating our duty to meaningfully consider such motions.

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Thomas E. Johnson

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on September 16, 2010.

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John T. Therriault, Assistant Clerk
Illinois Pollution Control Board