

ILLINOIS POLLUTION CONTROL BOARD
September 7, 2023

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB 23-104 |
| |) | (Enforcement - Air) |
| 76 ENTERPRISES, INC., an Illinois |) | |
| Corporation, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by B.F. Currie):

On March 27, 2023, the Office of the Attorney General, on behalf of the People of the State of Illinois (People) filed a one-count complaint (Comp.) against 76 Enterprises, Inc. (76 Enterprises). The complaint alleges violations of the Environmental Protection Act (Act) and the Board’s air pollution regulations. The complaint concerns 76 Enterprises’ gasoline dispensing facility located at 7602 S. Vincennes Ave., Chicago, Cook County.

On August 9, 2023, the People filed a motion to deem facts admitted and for summary judgment (Mot.). 76 Enterprises has not responded to the motion. The People argue that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. For the reasons discussed below, the Board grants the People’s motion to deem facts admitted and for summary judgment, finding that 76 Enterprises violated Section 9(a) of the Act (415 ILCS 5/9(a) (2022)), and Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board Air Pollution Regulations (35 Ill. Adm. Code 218.586(i)(1)(B), 218.586(i)(2)(C)).

In this opinion and order, the Board first reviews the procedural history of the case and summarizes the People’s complaint. The Board then addresses the People’s motion to deem facts admitted and the uncontested facts. The Board next considers the People’s motion for summary judgment and discusses an appropriate remedy. The Board then reaches its conclusion and issues its order.

PROCEDURAL BACKGROUND

On April 6, 2023, the Board accepted the complaint for hearing. On August 9, 2023, the People filed a motion to deem facts admitted and for summary judgment. The People also filed a signed and dated certified mail return receipt showing service of the complaint on 76 Enterprises on March 29, 2023. See 35 Ill. Adm. Code 101.300(c)(2), 103.204(a). As of the date of this opinion and order, 76 Enterprises has not filed any answer or responsive pleadings to the complaint or responded to the motion to deem facts admitted and for summary judgement.

COMPLAINT

Count I of the complaint alleges that 76 Enterprises violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2022), and Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B), 218.586(i)(2)(C), by failing to decommission its vapor collection and control system, by failing submit decommissioning reports to the Illinois Environmental Protection Agency (Agency); failing to timely decommission its vapor collection and control system; and causing, threatening, or allowing emission of volatile organic compounds into the environment so as to violate Board regulations. Comp. at 4.

MOTION TO DEEM FACTS ADMITTED

The People's motion requests the Board deem the material allegations in their complaint to be admitted by 76 Enterprises. Mot. at 3. Under the Board's procedural rules, "the respondent must file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer." 35 Ill. Adm. Code 103.204(d).

76 Enterprises failed to answer the complaint within 60 days after service, *i.e.*, by May 29, 2023. Therefore, by rule, 76 Enterprises admits all material allegations of the complaint. *See* Ill. Adm. Code 103.204(d). Additionally, 76 Enterprises failed to respond to the People's motion and so waives objection to the Board granting it. *See* 35 Ill. Adm. Code 101.500(d). The Board grants the People's motion and deems admitted the material allegations in the People's complaint.

FACTS

76 Enterprises owns and operates a gasoline dispensing facility located at 7602 S. Vincennes Ave., Chicago, Cook County (facility). Comp. at 2. 76 Enterprises owns and operates gasoline pumps at the facility that emit volatile organic compounds (VOCs) into the environment. *Id.*

76 Enterprises has a vapor collection and control system. Comp. at 4. 76 Enterprises did not decommission its vapor collection and control system by December 31, 2016, and had not timely submitted a decommissioning checklist, certification, and test results to the Agency by the date of the People's complaint. *Id.*

MOTION FOR SUMMARY JUDGMENT

The People seek summary judgment against 76 Enterprises. A party has 14 days from receipt of the motion for summary judgment to respond. 35 Ill. Adm. Code 101.516(a). If no response is filed, "the party waives objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d); *see* People v. Env't'l Health and Safety Svcs., Inc., PCB 05-51, slip op. at 13 (July 23, 2009). 76 Enterprises did not respond to the People's motion or file a motion to

extend the time to respond. The Board finds that by failing to respond to the People's motion for summary judgment, 76 Enterprises waived any objection to the Board granting the motion for summary judgment.

The People argue that the facts deemed admitted contain all material facts necessary to establish that 76 Enterprises violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2022), and Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B), 218.586(i)(2)(C). Mot. at 3. The People assert there are no genuine issues of fact, and that the People are entitled to judgment as a matter of law. *Id.*

Next, the Board sets forth the relevant statutory and regulatory provisions and standards for considering motions for summary judgment, and then decides the motion.

Statutory and Regulatory Background

Section 9(a) of the Act states no person shall:

- (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act. 415 ILCS 5/9(a) (2022).

Section 3.315 of the Act defines "person" as "any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns." 415 ILCS 5/3.315 (2022).

Section 3.165 of the Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2022).

Section 218.586(c) of the Board Air Pollution Regulations states:

No owner or operator of a gasoline dispensing operation subject to the requirements of subsection (b) shall cause or allow the dispensing of motor vehicle fuel at any time from a motor fuel dispenser unless the dispenser is equipped with and utilizes a vapor collection and control system which is properly installed and operated as provided in this subsection. 35 Ill. Adm. Code 218.586(c).

Section 218.586(a)(7) of the Board Air Pollution Regulations defines "gasoline dispensing operation" as "any operation where motor vehicle fuel is dispensed into motor vehicle fuel tanks or portable containers from a storage tank with a capacity of 2176 liters (575 gallons) or more." 35 Ill. Adm. Code 218.586(a)(7).

Section 218.586(a)(11) of the Board Air Pollution Regulations defines “owner” or “operator” as “any person who owns, leases, operates, manages, supervises or controls (directly or indirectly) a gasoline dispensing operation.” 35 Ill. Adm. Code 218.586(a)(11).

Section 218.586(b) of the Board Air Pollution Regulations states:

The provisions of subsection (c) shall apply to any gasoline dispensing operation which dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month. Compliance shall be required and demonstrated in accordance with the schedule provided in subsection (d). 35 Ill. Adm. Code 218.586(b).

Section 218.586(d)(1) of the Board Air Pollution Regulations states:

Gasoline dispensing operations that operate at any time prior to January 1, 2014 shall comply with subsection (c) until decommissioning is allowed and commenced in accordance with subsections (i)(1) and (i)(2)(B). 35 Ill. Adm. Code 218.586(d)(1).

Section 218.586(i)(1)(B) of the Board Air Pollution Regulations states:

No later than December 31, 2016, an owner or operator of a gasoline dispensing operation shall complete the decommissioning of all vapor collection and control systems in accordance with all of the provisions specified in subsection (i)(2). 35 Ill. Adm. Code 218.586(i)(1)(B).

Section 218.586(i)(2)(C) of the Board Air Pollution Regulations states:

The owner or operator of a gasoline dispensing operation and the contractors that performed the decommissioning shall complete and sign a decommissioning checklist and certification, provided by the Agency, documenting the decommissioning procedures performed. Within 30 days after completion of the decommissioning procedures specified by subsection (i)(2)(B), the owner or operator shall provide the completed checklist and certification and the test results to the Agency. 35 Ill. Adm. Code 218.586(i)(2)(C).

Standards for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. V. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill.

2d 229, 240, 489 N.E.2d 867, 871 (1986). “It is well established that in deciding a motion for summary judgment the court may draw inferences from undisputed fact.” Makowski v. City of Naperville, 249 Ill. App. 3d 110, 119, 617 N.E. 2d 1251 (1993); Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 272, 586 N.E.2d 1211 (2d Dist. 1992). “However, where reasonable persons could draw divergent inferences from undisputed facts, the trier of fact should decide the issues and the summary judgment motion should be denied.” Makowski, 249 Ill. App. 3d at 119; Pyne v. Witmer, 129 Ill. 2d 351, 358, 543 N.E.2d 1304.

Ruling on Motion for Summary Judgment

76 Enterprises is the owner and operator of a gasoline dispensing facility that emits VOCs, which is a contaminant as defined in the Act. 415 ILCS 5/3.165 (2022). Board Air Pollution Regulations require a gasoline dispensing operation to have vapor collection and control systems if it dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month. 35 Ill. Adm Code 218.586(b), (c), (i). The People alleged that 76 Enterprises’ gasoline dispensing facility is a “gasoline dispensing operation” but did not allege that 76 Enterprises dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month. Comp. at 3; 35 Ill. Adm. Code 218.586(a)(7).

However, the facts deemed admitted include that 76 Enterprises has a vapor collection and control system. Comp. at 4. A reasonable person would infer from this undisputed fact that 76 Enterprises dispenses an average monthly volume of more than 10,000 gallons of motor vehicle fuel per month and therefore was required to install the vapor collection and control system. Makowski, 249 Ill. App 3d at 119. Accordingly, the facts deemed admitted establish that 76 Enterprises was required by Section 218.586(i)(1)(B) to decommission its vapor collection and control system by December 31, 2016, and required by Section 218.586(i)(2)(C) to submit a decommissioning checklist, a certification, and test results to the Agency within 30 days after completing decommissioning procedures.

On summary judgment, to determine whether a genuine issue of material fact exists, the Board must construe the record strictly against the People as movant and liberally in favor of 76 Enterprises as non-movant. *See supra* p. 4. Doing so, the Board finds no genuine issue of material fact. The facts deemed admitted establish that 76 Enterprises violated Section 218.586(i)(1)(B) by failing to timely decommission its vapor collection and control system and that 76 Enterprises violated Section 218.586(i)(2)(C) by failing to submit a decommissioning checklist, certification, and test results to the Agency. By violating these Board regulations, 76 Enterprises caused, threatened, or allowed the discharge or emission of VOCs into the environment so as to violate regulations adopted by the Board, and thereby violated Section 9(a) of the Act. Accordingly, the Board finds that the People are entitled to judgment as a matter of law.

Therefore, the Board grants the People’s motion for summary judgment, finding 76 Enterprises violated Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board Air Pollution Regulations, thereby violating Section 9(a) of the Act, 415 ILCS 5/9(a) (2022).

REMEDY

The People ask the Board to require 76 Enterprises to pay a civil penalty of at least \$10,000 for the violations. Mot. at 9.

Having found 76 Enterprises violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2022), and Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board's Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B), 218.586(i)(2)(C), the Board must now determine an appropriate remedy including any penalties. In evaluating the record to determine whether to impose a civil penalty on 76 Enterprises, the Board considers the factors of Section 33(c) of the Act, 415 ILCS 5/33(c) (2022). If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on 76 Enterprises, then the Board considers the factors of 42(h) of the Act, 415 ILCS 42(h) (2022), to determine the appropriate amount of civil penalty.

Section 33(c) of the Act states:

In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance. 415 ILCS 5/33(c) (2022).

The People provided brief statements regarding each of the above factors: 1) human health and the environment were threatened by emissions from the facility and 76 Enterprises' violations hindered the Agency's information gathering responsibilities; 2) there is social and economic benefit to the facility; 3) operation of the facility was and is suitable for the area in which it is located; 4) timely decommissioning of its vapor collection and control system, and timely submitting a decommissioning checklist, a certification, and test results to the Agency are both technically practicable and economically reasonable; and 5) 76 Enterprises has not subsequently complied with the Act or Board regulations. Mot. at 6.

The Board finds that 76 Enterprises' failure to timely decommission its vapor collection and control system and submit a decommissioning checklist, a certification, and test results

threatened human health and the environment and impaired the Agency's ability to gather information. This first Section 33(c) factor weighs against 76 Enterprises.

76 Enterprises' gasoline dispensing facility is suitable for the area in which it is located, and the facility has social and economic value. Factors (2) and (3) therefore weigh in favor of 76 Enterprises.

The Board finds that submitting a notice of intent to decommission, timely decommissioning of the vapor collection and control system and submittal of a decommissioning checklist, a certification, and test results are both technically practicable and economically reasonable. Factor (4) therefore weighs against 76 Enterprises.

76 Enterprises not has subsequently complied with the Act or Board regulations. Factor (5) therefore weighs against 76 Enterprises.

76 Enterprises threatened human health and the environment and hindered the Agency's ability to gather information by not filing a notice of intent to decommission, by not decommissioning the vapor collection and control system and submitting decommissioning reports in accordance with the Act and Board regulations, despite compliance being practicable and economically feasible. The Board finds that the Section 33(c) factors favor requiring 76 Enterprises to pay a civil penalty.

Having concluded that a penalty is appropriate under the Section 33(c) factors, the Board next applies the factors of Section 42(h) to consider the \$10,000 civil penalty requested by the People against 76 Enterprises. Section 42(h) of the Act states:

In determining the appropriate civil penalty to be imposed under subdivisions (a), (b) (1), (b) (2), (b) (3), (b) (5), (b) (6), or (b) (7) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including, but not limited to, the following factors:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
4. the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
6. whether the respondent voluntarily self-disclosed, in accordance with subsection i of this Section, the non-compliance to the Agency;
7. whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform; and
8. whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), (5), (6), or (7) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2022).

The People provided brief statements regarding each of the above factors: 1) 76 Enterprises’ violations have continued for over six years; 2) 76 Enterprises has failed to timely decommission its vapor collection and control system or submit decommissioning reports; 3) the \$10,000 requested penalty includes any economic benefit that 76 Enterprises may have accrued as a result of noncompliance; 4) the requested penalty will deter further violations and encourage future compliance by 76 Enterprises and others similarly situated; 5) 76 Enterprises has no previously adjudicated violations; 6) self-disclosure was not at issue in this matter; 7) 76 Enterprises did not offer to perform a supplemental environmental project; and 8) a Compliance Commitment Agreement was not at issue in this matter. Mot. at 8-9.

76 Enterprises’ violations of the Act and Board regulations continue for over six years. The duration of the violation is extensive. 76 Enterprises’ violations threatened human health and the environment and hindered the Agency’s ability to gather information. 76 Enterprises showed a lack of diligence in complying with the requirements of the Act and Board regulations. *Id.* The first two Section 42(h) factors weigh against 76 Enterprises.

The Board finds that the requested civil penalty of \$10,000 includes any economic benefit that 76 Enterprises may have accrued as a result of its noncompliance. The Board also finds that the suggested \$10,000 penalty will deter further violations by 76 Enterprises and

ensure voluntary compliance with the Act and Board Air Pollution Regulations. Factors (3) and (4) therefore weigh against 76 Enterprises and support the People's requested penalty.

76 Enterprises has no previously adjudicated violations. This factor weighs in favor of 76 Enterprises. Neither self-disclosure, nor a Compliance Commitment Agreement were at issue in this matter. 76 Enterprises did not propose, or perform, a supplemental environmental project. The Board does not weigh any of these last three factors as mitigating or aggravating of a penalty amount.

Based on this record and the statutory factors, the Board finds that the People's requested civil penalty is appropriate given the length of the violations and the resulting threat to human health and the environment. The requested penalty amount will serve to encourage future compliance by 76 Enterprises and others similarly situated and recoup any economic benefit 76 Enterprises may have accrued from its noncompliance. In its order below, the Board assesses a civil penalty of \$10,000.

CONCLUSION

The Board grants the People's unopposed motion to deem facts admitted. Given the facts admitted, the Board finds that there is no genuine issue of material fact and that the People are entitled to judgment as a matter of law. The Board accordingly grants the People's motion for summary judgment against 76 Enterprises. The Board finds that 76 Enterprises violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2022), and Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board's Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B), 218.586(i)(2)(C), as alleged in the People's complaint. Having considered the factors of Sections 33(c) and 42(h) of the Act, 415 ILCS 5/33(c) and 42(h) (2022), the Board enters an order requiring 76 Enterprises to decommission its vapor collection and control system and submit decommissioning reports to the Agency, and pay a \$10,000 civil penalty, as requested by the People.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants the unopposed motion to deem facts admitted and for summary judgment filed by the Office of the Attorney General, on behalf of the People, and finds that 76 Enterprises violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2022), and Sections 218.586(i)(1)(B), and 218.586(i)(2)(C) of Board's Air Pollution Regulations, 35 Ill. Adm. Code 218.586(i)(1)(B), 218.586(i)(2)(C).
2. 76 Enterprises must pay a civil penalty of \$10,000 no later than Tuesday, October 10, 2023, which is the first business day after 30 days from the date of this order. Payment must be made by certified check or money order payable to the Environmental Protection Trust Fund. The case number, case name, and 76 Enterprises' federal employer identification number must be included on the respective certified check or money order.

3. 76 Enterprises must send the certified check or money order to:

 Illinois Environmental Protection Agency
 Fiscal Services Division
 1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, Illinois 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2022)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2022)).

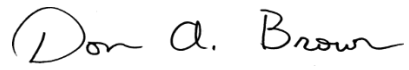
5. 76 Enterprises must decommission its vapor collection and control system and submit decommissioning reports to Illinois EPA.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2022); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

| Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court | |
|--|--|
| Parties | Board |
| Illinois Attorney General’s Office Attn: Jason Clark Assistant Attorney General Environmental Bureau 69 W. Washington St., Suite 1800 Chicago, Illinois 60602 Jason.clark@ilag.gov | Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601 don.brown@illinois.gov |
| 76 Enterprises Attn: Syed Ahmed 7602 S. Vincennes Avenue Chicago, Illinois 60602 | |

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 7, 2023, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above the printed name and title.

Don A. Brown, Clerk
Illinois Pollution Control Board