

ILLINOIS POLLUTION CONTROL BOARD
May 6, 2004

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 97-69
)	(Enforcement - Air)
ECONOMY PLATING, INC., an Illinois)	
corporation,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Today's order imposes a remedy in this air enforcement matter. On October 10, 1996, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against Economy Plating, Inc. (Economy Plating). The People amended the original complaint twice. The Board accepted the second amended complaint on November 21, 2002. The complaint contained a total of five counts, alleging that Economy Plating constructed a hard chrome electroplating tank with one fume scrubber without a permit, operated seven tanks without a permit, failed to file annual emission reports, violated special operating permit conditions, and failed to meet the initial certification requirements.

The Board's August 21, 2003 order granted the People's motion for summary judgment on all five counts of the complaint, finding Economy Plating in violation of the Illinois Environmental Protection Act (Act) as the People alleged. The order also directed the parties, either at hearing or in briefs, to address the Section 33(c) factors and propose a civil penalty, if any, supporting their position with facts and arguments that address any or all of the Section 42(h) factors. Economy Plating has not responded to the Board's order or the People's brief in support of a remedy. A party that fails to respond to a motion is deemed to have waived any objection to the granting of the motion. 35 Ill. Adm. Code 101.500(d). The Board finds Economy Plating has waived any objection to the People's arguments.

In the following paragraphs, the Board discusses the procedural background, applicable statutes, facts deemed admitted, and Economy Plating's arguments and the Board's analysis regarding an appropriate remedy. Finally, the Board orders Economy Plating to pay a civil penalty of \$5,000 and cease and desist from further violations of the Act and Board regulations.

PRELIMINARY MATTER

On December 5, 2003, the People filed a brief in support of a remedy. In the brief, the People analyzed the Section 33(c) and 42(h) factors and asked the Board to impose a \$5,000 civil penalty and order Economy Plating to cease and desist from plating operations and close the

facility by June 2004. In support of the argument that Economy Plating is undergoing financial difficulties and will close within a year, the People referred to Exhibits A and B.

The People did not attach the exhibits to the brief. At the request of Board Hearing Officer Brad Halloran, the People submitted the exhibits on April 1, 2004. Exhibit A is a letter, dated January 17, 2003, from Economy Plating to the People stating that Economy Plating does not have the ability to pay a significant fine and references three tax returns that were not included in the exhibit. Exhibit B is a letter, dated June 2, 2003, from Economy Plating to the People negotiating a settlement including how and when Economy Plating intends to close the facility.

The Board cannot consider either of the exhibits as proof of the facts they contain. The Exhibit A letter regarding Economy Plating's financial status is not supported by the tax returns to which it refers. The Exhibit B letter proposes a settlement. Matters relating to offers of settlement or compromise are generally inadmissible. Suriano v. Lafeber, 324 Ill. App. 3d 839, 850, 756 N.E.2d 382, 391 (1st Dist. 2001). Therefore, the Board cannot consider the facts contained in Exhibits A and B.

PROCEDURAL BACKGROUND

On May 22, 2003, the People moved to deem admitted facts alleged in the second amended complaint. On June 19, 2003, the Board granted the motion. On June 30, 2003, the People moved for summary judgment on all five counts. On August 21, 2003, the Board granted the People's motion for summary judgment, finding that Economy Plating violated Sections 9(a), (b), and 9.1(d)(1) of the Act and Sections 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402 of the Board's air pollution regulations as alleged in the People's five-count amended complaint, and directed the parties to hearing on the remedy. 415 ILCS 5/9(a), (b), and 9.1(d)(1) (2002); 35 Ill. Adm. Code 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402.

Board hearing officer Brad Halloran scheduled a hearing for December 23, 2003. Attorney for Economy Plating, withdrew his appearance on November 5, 2003. The hearing officer, together with the parties, cancelled the hearing. The hearing officer indicated in orders dated November 26 and December 31, 2003, that he had advised Mr. Koerner, the President of Economy Plating, that the corporation must be represented by an attorney.

The People filed a brief in support of a remedy on December 5, 2003. To date, no attorney has filed an appearance on behalf of Economy Plating. Economy Plating has not appeared through an attorney since November 5, 2003, or responded to the People's motion to deem facts admitted, the motion for summary judgment, or the brief in support of remedy.

APPLICABLE STATUTORY LANGUAGE

Section 33(c) of the Act provides that in making orders and determinations in enforcement actions, the Board must consider facts relating to the following five factors:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) 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;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2002).

Section 42 of the Act addresses civil penalties. The Act provides that after the Board finds a violation, the Board must consider five factors in determining whether or not to impose a civil penalty and the amount of the penalty, if any:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the violator 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 violator because of delay in compliance with requirements;
- (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2002).¹

FACTS DEEMED ADMITTED

Economy Plating owns and operates an electroplating facility located at 2350 N. Elston Avenue, Chicago, Cook County. At the facility, Economy Plating operates seven hard chrome electroplating tanks. Mr. Victor Koerner is the President of Economy Plating. Four of the tanks are controlled by centrifugal mist eliminators, and three are controlled by fume scrubbers with

¹ Section 42(h) of the Act (415 ILCS 5/42(h) (2002)) was amended by P.A. 93-575, effective January 1, 2004. The amendments establish that the economic benefit from delayed compliance is the minimum penalty to be imposed by the Board. Because the record in this proceeding was complete before January 1, 2004, the Board does not apply the amended Section 42(h) of the Act in determining the appropriate penalty in this matter.

composite mesh pads. One glass bead blasting operation at the facility is controlled by a baghouse. Economy Plating also operates one polishing lathe and one gas-fired boiler.

Economy Plating had a permit (no. 73031926) to operate six of the electroplating tanks, six scrubbers, one polishing lathe, and one gas-fired boiler, effective from May 22, 1973 until May 7, 1983. Economy Plating was reissued the operating permit (no. 73031926), valid from March 31, 1998 through March 31, 2003.

In the June 19, 2003 order, the Board determined that Economy Plating admitted the material allegations set forth in the following paragraphs.

Operating Without a Permit

The Board found that Economy Plating violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.144 of the Board rules (35 Ill. Adm. Code 201.144) by operating six hard chrome electroplating tanks, six polishing lathe and a gas-fired boiler without an operating permit between March 7, 1983 and November 30, 1995. Economy Plating violated these same provisions for operating a glass bead blasting operation with baghouse for the seventh scrubber between May or June of 1973 through November 30, 1995. Am. Pet. at 6. Economy Plating violated Section 9(b) of the Act and Section 201.143 of the Board rules (35 Ill. Adm. Code 201.143) by operating a seventh hard chrome electroplating tank with a seventh fume scrubber without the required new source operating permit from the Agency between May or June of 1973 through November 30, 1995. *Id.*

Construction Without a Permit

The Board also found that Economy Plating violated Section 9(b) of the Act (415 ILCS 5/9(b) (2002)) and Section 201.142 (35 Ill. Adm. Code 201.142) of the Board's rules by constructing a hard chrome electroplating tank with a fume scrubber without an Agency construction permit. Am. Pet. at 9.

Failure to File Annual Reports

The Board found that Economy Plating violated Section 9(a) of the Act (415 ILCS 5/9(a)) and Section 201.302 of the Board's regulations (35 Ill. Adm. Code 201.302) by failing to timely file annual emission reports in 1992 and 1994. Am. Pet. at 12. Economy Plating filed the 1992 annual emissions report to the Agency on October 4, 1993, and the 1994 annual emissions report on February 29, 1996. The respective deadlines were October 1, 1993, and May 1, 1995.

Violation of Special Operating Permit Conditions

The Board found that Economy Plating violated federal Clean Air Act regulation 40 C.F.R. 63.342 (c)(1)(ii) and conditions 1(b) and 1(c) of operating permit #73031926 by failing to maintain compliance with the chromium emission limit during a special permit compliance test on November 25, 1997. Economy Plating failed to establish required testing parameters in violation of federal Clean Air Act regulation 40 C.F.R. 63.343(c)(1)(ii) during a compliance test

performed on February 16, 2001. Finally, Economy Plating violated 40 C.F.R. 63.346(b)(1) and (8) and special operating permit condition 4(b) for failing to maintain complete records of inspection, maintenance and repairs for the add-on air pollution control equipment. Am. Pet. at 19. As a result, Economy Plating violated Section 9(b) of the Act, and by violating federal regulations, Economy Plating violated Section 9.1(d)(1) of the Act.

Certification Violation

Finally, the Board found that Economy Plating conducted an initial performance test on February 16, 2001. The test results demonstrated that Economy Plating failed to comply with the performance test requirements as set out the operating permit in violation of Section 9(b) of the Act and special operating permit condition 5 (a through i). Additionally, Economy Plating violated 40 C.F.R. 63.343(b)(1) by failing to comply with the parameters for the February 16, 2001 performance test, thereby violating Section 9.1(d)(1) of the Act. Am. Pet. at 23.

REMEDY DISCUSSION

Having previously found violations, the Board will now determine the appropriate remedy, including civil penalty, if any. In making a determination, the Board considers the factors set forth in Section 33(c) in determining the unreasonableness of the alleged pollution (Wells Manufacturing Company v. PCB, 73 Ill. 2d 226, 383 N.E.2d 148 (1978)), and the factors in Section 42(h) of the Act in determining the appropriate penalty (415 ILCS 5/42(h) (2002)).

The People move the Board to impose a \$5,000 civil penalty, and order Economy Plating to cease and desist from plating operations and close the facility within a year. Below the Board discusses the People's arguments under each of the Section 33(c) and 42(h) factors and presents the Board's findings and reasons for those findings.

Section 33(c) Factors

In determining what kind of remedy is appropriate, the Board considers all facts and circumstances of record relating to the reasonableness of the respondent's violations of the Act. 415 ILCS 5/33(c) (2002).

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People

The People argue that Cook County is a non-attainment area for ozone. The People also maintain that hexavalent chromium emissions are extremely toxic and carcinogenic, and therefore, endanger human health, general welfare, and the physical property of the people. As a result, the People maintain that Economy Plating interfered with the public welfare by not providing information necessary to monitor and control air pollution sources and their control equipment.

The Board finds that Economy Plating did not comply with several permit requirements for a period of more than 12 years, and in one instance more than 20 years. Further, the record shows that Economy Plating exceeded the federal limits for chromium emissions on two

occasions. The first occasion occurred on November 25, 1997, in conducting an initial performance test. The second instance took place on February 16, 2001, in conducting a compliance test. The Board weighs this factor against Economy Plating.

The Social and Economic Value of the Pollution Source

The People contend that because the facility employs fewer than five people, Economy Plating has limited social and economic value. The Board does not find any information in the admitted facts supporting this fact or in regard to the size of the facility or economic value of the pollution source. The Board finds that Economy Plating has social and economic value as an employer, but that its value is undercut by its history of non-compliance.

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

The People state that Economy Plating is suitable to its location because it is located in an industrial area. Again, the Board does not find this information in the record, but finds that Economy Plating is located in Cook County. The Board finds that if operated in compliance with the Act, Economy Plating is suitable to the area in which it is located. However, the People contend that because there exists a threat to human health, it is imperative that Economy Plating cease and desist operations until it can comply with 40 C.F.R. 63, Subpart N.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source

Next, the People argue it is technically practicable and economically reasonable for the source to reduce or eliminate emissions because other similarly situated sources have done the same. The People did not discuss the technical practicability or economic reasonableness of alternative means that Economy Plating may employ to avoid violating applicable chromium emissions standards in the future. Because Economy has made no argument to the contrary, the Board finds that compliance is technically practicable and economically reasonable.

Any Subsequent Compliance

As to subsequent compliance, the record indicates that Economy Plating was reissued an operating permit from March 31, 1998 through March 31, 2003. The record does not indicate whether Economy Plating has taken any further initiative to comply with the Act or Board regulations. The Board weighs this factor against Economy Plating.

Remedy Analysis

After considering the Section 33(c) factors, the Board finds a civil penalty is proper in this instance. To determine the proper penalty, the Board considers factors listed in Section 42(h) of the Act.

In addition to a civil penalty, the People request that the Board order Economy Plating to cease and desist plating operations and close the facility by June 2004. The record does not support an order requiring Economy Plating to close the facility by a date certain. However, the Board will require Economy Plating to cease and desist further violations of the Act and Board regulations. Incidental to the cease and desist order, Economy Plating may have to cease operations in order to come into compliance.

Section 42(h) Factors

The People's Arguments

In determining the appropriate amount of civil penalty to impose, the Board considers any matters of record that may mitigate or aggravate the penalty amount. 415 ILCS 5/42(h) (2002).

With regard to the Section 42(h) factors, the People argue that Economy Plating operated six hard chrome electroplating tanks, six fume scrubbers and/or centrifugal mist eliminators, and one polishing lathe and a gas-fired boiler from March 7, 1983 until November 30, 1995 without a permit from the Environmental Protection Agency (Agency). The People contend that from May 1973 until November 30, 1995, Economy Plating both constructed and operated a seventh hard chrome electroplating tank with a fume scrubber and class bead blasting operation with baghouse also without an Agency permit. The People maintain that Economy Plating has been out of compliance for more than 20 years and has not yet achieved compliance.

The People next argue that Economy Plating has not demonstrated due diligence in complying with the permitting requirements and remains out of compliance with the established procedures for stack testing. The People state that Economy Plating has economically benefited from its noncompliance by not paying the required permit fees for substantial periods of time.

The People contend a \$5,000 penalty will deter Economy Plating from further violating the Act and associated regulations and aid in future voluntary compliance. The People add that there is no evidence of previously adjudicated violations of the Act or Board regulations against Economy Plating.

The People move the Board to impose a \$5,000 penalty. The People state that Economy Plating claims that it has been losing more than \$26,000 per year of operation. The People further state that in a letter dated June 2, 2003, Economy Plating indicated it would close the plating operation in accordance with applicable regulations within one year. The People refer to exhibits A and B in support of this argument, but as discussed above, the Board cannot consider the facts contained in exhibits A and B. The People maintain that a nominal penalty of \$5,000 is adequate in light of the status of Economy Plating's business and inability to comply with Section 40 C.F.R. 63, Subpart N.²

² 40 C.F.R. 63 Subpart N, National Emission Standards for Chromium Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, includes Sections 63.341-347.

Penalty Analysis

The Board find that, considered in isolation, the duration and gravity of the violations, the lack of diligence on the part of Economy Plating, and the economic benefits that Economy Plating accrued through noncompliance would warrant a substantial civil penalty. The record clearly shows that Economy Plating operated six of the hard chrome electroplating tanks without a permit for twelve years. Economy Plating constructed and operated the seventh tank for more than 20 years. Further, Economy Plating failed to file annual reports on two occasions, and violated certain special operating permit conditions on two occasions. The special operating permit condition violations amounted to Economy Plating exceeding the chromium emission limit during compliance testing on November 25, 1997 and February 16, 2001, and failing to maintain complete records of inspection, maintenance, and monitoring data. Finally, Economy Plating failed to meet the initial certification of compliance requirement.

The Board finds the actual harm to the environment was relatively minimal since Economy Plating emitted contaminants into the environment above the allowable amounts on only two occasions. Nonetheless, the permit requirement is an essential part of the State's enforcement program to protect against damage to the environment and public welfare. Economy did not display due diligence in attempting to comply with the Act and Board regulations. The record does not indicate that Economy Plating has applied for the necessary permits. The record also shows that Economy Plating benefited from avoiding the cost of permitting. Economy Plating owned and operated six unpermitted chrome electroplating tanks for twelve years and a seventh unpermitted tank for more than 20 years. The Board weighs these three factors in aggravation of the civil penalty.

However, the Board also finds that the amount that will serve to actually deter further violations by Economy Plating and similarly situated entities merits a lesser penalty. Economy Plating is a small entity. Economy Plating's most recent operating permit incorporated federal regulations applicable to small electroplating facilities. *See* 40 C.F.R. 63.342(c)(1)(ii). Additionally, the record shows that Economy Plating has had no previously adjudicated violations of the Act. The Board finds these two factors serve to mitigate the civil penalty.

Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act or Board regulation and an additional civil penalty not to exceed \$10,000 for each day during which the violation continues. By multiplying \$50,000 times nine (the number of sections of the Act and Board regulations that respondents are alleged to have violated), a potential civil penalty of \$450,000 is reached.

Add to that sum, a civil penalty of \$10,000 a day for each day of noncompliance with those sections, and the total maximum penalty could amount to a multimillion dollar penalty. The complainant moves the Board to impose a civil penalty of \$5,000.

The Board finds that the People's requested civil penalty of \$5,000 is appropriate. The Act contemplates the Board assessing a penalty amount that will deter violations by the violator and similarly situated entities. 415 ILCS 5/42(h)(4) (2002). Accordingly, though the violations

have been ongoing for several years, a \$5,000 penalty will serve to deter a small facility undergoing financial difficulties like Economy Plating. Further, while the permit requirement is an essential part of the State's enforcement program to protect against environmental damage, the record establishes that Economy Plating emitted contaminants into the environment above the allowable amounts on only two occasions, amounting to minimal actual harm to the environment.

CONCLUSION

The Board finds a civil penalty is appropriate and imposes a penalty in the amount of \$5,000. In addition, the Board orders Economy Plating to cease and desist from further violating the Act and Board regulations.

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

ORDER

1. The Board incorporates by reference its August 21, 2003 order granting the Office of the Attorney General, on behalf of the People of the State of Illinois (People), summary judgment on all five counts of the second amended complaint. That order finds that Economy Plating, Inc. (Economy Plating) has violated Sections 9(a), (b), and 9.1(d)(1) of the Act and Sections 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402 of the Board's air pollution regulations. 415 ILCS 5/9(a), (b), and 9.1(d)(1) (2002); 35 Ill. Adm. Code 201.142, 201.143, 201.302, 201.144, 254.102(c), and 254.402.
2. Economy Plating must pay a civil penalty of \$5,000 no later than May 30, 2004, which is 45 days from the date of this order. Such payment must be made by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and Economy Plating's social security number or federal employer identification number must be included on the certified check or money order.
3. Economy Plating must send the certified check or money order by first class mail to:

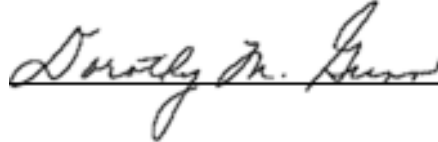
Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2002)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2000)).

5. Economy Plating must cease and desist from further violations of the Act and Board regulations.

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) (2002); *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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 15, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board