

ILLINOIS POLLUTION CONTROL BOARD
January 7, 1999

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 97-66
) (Enforcement - Land)
D'ANGELO ENTERPRISES, INC., an)
Illinois corporation,)
)
Respondent.)

ORDER OF THE BOARD (by K.M. Hennessey):

Respondent D'Angelo Enterprises, Inc. (D'Angelo) manufactures circuit boards and other electroplated products at a facility in Franklin Park, Illinois. In this case, the People of the State of Illinois (People) allege that D'Angelo violated provisions of the Illinois Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996), and Board regulations on solid and hazardous wastes.

On November 19, 1998, the Board granted in part and denied in part the People's motion for summary judgment on the complaint. People v. D'Angelo Enterprises, Inc. (November 19, 1998), PCB 97-66, slip op. at 18. The Board found that D'Angelo violated the Act when it stored hazardous wastes without a permit for over three years. The Board also found that D'Angelo violated various recordkeeping and filing requirements, including regulations that required D'Angelo to train personnel on hazardous waste management procedures. D'Angelo also violated regulations that required it to adopt a contingency plan to minimize hazards to human health and the environment in case of a fire, explosion, or release of hazardous materials.

In its order of November 19, 1998, the Board denied the People's motion to strike D'Angelo's cross motion for summary judgment on penalties and ordered the People to file a response to the cross motion with respect to the counts on which the Board granted the People summary judgment.¹ The People have done so, and the Board now addresses the cross motion. For the reasons explained below, the Board denies the cross motion.

In the cross motion, D'Angelo concedes that it violated certain provisions of 35 Ill. Adm. Code Parts 722, 728, and 809, although D'Angelo does not specify the provisions it violated. D'Angelo states that the Board must determine the appropriate penalty to be assessed on

¹ The Board stated that it would consider the cross motion only as it related to the claims on which the Board had granted the People summary judgment. D'Angelo, PCB 97-66, slip op. at 18.

D'Angelo under the factors set forth in 415 ILCS 5/33(c) and 42(h) (1996). D'Angelo argues that under those factors, no penalty is appropriate. Respondent's Response to Complainant's Motion for Summary Judgment and Respondent's Cross Motion for Summary Judgment (Cross Motion) at 9-16.

The factors that the Board must consider under Section 33(c) of the Act are as follows:

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) 1996.

D'Angelo argues that no penalty is appropriate under these factors. D'Angelo first notes that its violations did not involve any discharges, emissions, or releases to the environment, and therefore that the character and degree of injury that its violations caused were minor. Cross Motion at 10; Cross Motion Exh. J, Affidavit of James Post (Post Aff.) at 1. D'Angelo further argues that its business has social and economic value because it employs 45 people, has a payroll of \$1.9 million, and sales of \$2.8 million. Cross Motion at 11; Post Aff. at 1. D'Angelo argues that the facility is located in an industrialized area of Franklin Park and is therefore suitable to its location. Cross Motion at 11; Post Aff. at 1. D'Angelo also argues that it achieved compliance with the provisions it violated by June or July of 1994. Cross Motion at 11; Post Aff. at 1. D'Angelo argues that each of these factors therefore weigh against a penalty.

The only factor that D'Angelo concedes may favor a penalty is the technical practicability and economic reasonableness of corrective measures. D'Angelo states that its violations were "paper" violations that could be easily cured. Cross Motion at 11. However, D'Angelo argues that this factor alone does not justify a penalty. *Id.*

In response, the People argue that D'Angelo's violations were not merely "paper" violations; rather, the Board found, among other violations, that D'Angelo illegally stored over 3,000 gallons of hazardous waste for over three years, without taking measures to prevent or

address an emergency release. Resp. at 4. The People note that the Illinois General Assembly found that the improper and unsafe storage of hazardous waste is a significant threat and source of harm to the environment and the safety of the people of Illinois. See 415 ILCS 5/2(a) (1996). The People note that the seriousness of D'Angelo's violations is confirmed by the fact that the Act sets a maximum penalty of \$25,000 per day for hazardous waste violations, while a maximum of only \$10,000 per day for other violations of the Act. See 415 ILCS 5/42 (1996). The People further note that Section 42(b)(3) of the Act requires penalties for those who do not comply with filing requirements. See 415 ILCS 5/42(b)(3) (1996) ("Any person that violates . . . any filing requirement, regulation or order relating to the State RCRA program, shall be liable to a civil penalty . . . not to exceed \$25,000 per day of violation.").

The Board agrees with the People that a penalty is appropriate in this case. When D'Angelo illegally stored hazardous wastes for over three years, it created a risk that its hazardous wastes would escape to the environment or harm human health. D'Angelo's recordkeeping and filing violations created similar risks. As Section 2(a) of the Act confirms, these risks are serious. See also 415 ILCS 5/20(10) (1996) ("The General Assembly finds . . . that the handling, storage and disposal of hazardous substances and petroleum pose a danger of exposing citizens, property, natural resources and the environment to substantial risk of harm or degradation . . ."); see also ESG Watts, Inc. v. Pollution Control Board, 282 Ill. App. 3d 43, 51, 668 N.E.2d 1015, 1020 (4th Dist. 1996) ("[T]he Act clearly authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution."). The Board therefore finds a penalty warranted.

D'Angelo then argues that if the Board finds a penalty appropriate, the factors that Board may consider under Section 42(h) of the Act justify only a minor penalty. The Section 42(h) factors are:

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 the 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) (1996).

D'Angelo argues that its violations were not long or severe; that it showed diligence by

correcting the violations once the violations were brought to its attention; that the record does not show that it received any economic benefit from its noncompliance; that a penalty will not enhance voluntary compliance with the Act because D'Angelo came into compliance even before the People filed the complaint; and that D'Angelo has no prior violations. Cross Motion at 12-15. In support of its claim that a penalty will not enhance voluntary compliance, D'Angelo cites several cases holding that a penalty should be imposed only when it would aid enforcement of the Act. Cross Motion at 14-15, citing City of East Moline v. Pollution Control Board, 136 Ill. App. 3d 687, 483 N.E.2d 642 (3d Dist. 1985) and City of Moline v. Pollution Control Board, 133 Ill. App. 3d 431, 478 N.E.2d 906 (3d Dist. 1985). D'Angelo argues that these factors should mitigate any penalty that the Board imposes. Cross Motion at 14.

In its response, the People dispute D'Angelo's characterization of its violations, D'Angelo's claim that it acted diligently, and D'Angelo's claim that no penalty is necessary to enhance voluntary compliance with the Act. See Response to Section V of Respondent's Cross Motion for Summary Judgment (Resp.) at 4-8. In addition, the People request that the Board impose a penalty of at least \$70,000 on D'Angelo and award the People its costs and attorneys fees.

As discussed above, the Board finds that D'Angelo's violations were serious, and some of them lasted over three years. Under Section 42(h)(1), the duration and gravity of the violations would therefore tend to aggravate, rather than mitigate, D'Angelo's penalty.

The Board further agrees with the People that D'Angelo did not show due diligence. D'Angelo's violations continued for over three years. Although D'Angelo admits that it was "aware of its hazardous and special waste regulatory responsibilities," (Cross Motion at 13), D'Angelo did nothing to address these responsibilities until the Illinois Environmental Protection Agency (Agency) brought the violations to D'Angelo's attention. D'Angelo had a duty to comply with the Act and Board regulations when it began generating and storing hazardous wastes, over three years before the Agency inspected its facility. While D'Angelo's subsequent compliance may justify a lesser penalty, it does not equate to due diligence. See ESG Watts, 282 Ill. App. 3d at 53, 668 N.E.2d at 1022 (upholding imposition of a penalty even though no respondent came into compliance after Agency initiated enforcement proceedings).

The Board also agrees that a penalty will enhance voluntary compliance with the Act by encouraging D'Angelo and other hazardous waste generators to comply with the Act and Board regulations in the future. As the court held in ESG Watts:

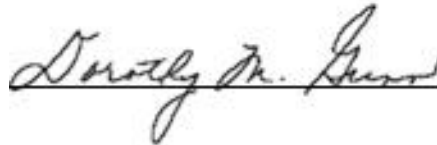
Some decisions which predate Section 42(h) seem to suggest that whenever compliance has been achieved, punishment is unnecessary. See, e.g., City of Moline, 133 Ill. App. 3d at 433, 88 Ill. Dec. at 417, 478 N.E.2d at 908. However, it is now clear from the 42(h) factors that the deterrent effect of penalties on the violator and potential violators is a legitimate goal for the Board to consider when imposing penalties. ESG Watts, 282 Ill. App. 3d at 52, 668 N.E.2d at 1021.

The record does not support D'Angelo's claim that as a matter of law, only a minor

penalty is warranted. Accordingly, the Board denies D'Angelo's cross motion. However, the Board cannot grant, at this time, the People's request for a penalty of at least \$70,000, plus attorneys fees and litigation costs. As the People pointed out in their motion to strike the cross motion, the People moved for summary judgment only on liability, not on penalties (or attorneys fees or costs). Therefore, the People's request for penalties, fees, and costs is not properly before the Board. The People may now file a motion for summary judgment on penalties, fees, and costs, or present its case for penalties, fees, and costs at the hearing on the counts of the complaint on which the Board denied both parties' motions for summary judgment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of January 1999 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