SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Exide Technologies, Inc. Plaintiff/Petitioner, v. Department of Toxic Substances Control, Defendant/Respondent.	))))))))	Case No. BS143369 **Order Granting Petitioner's Request for a Preliminary Injunction to Stay the April 24, 2013 Order for Temporary Suspension Pending Completion of the Administrative Proceeding Before Administrative Law Judge Julie Cabos-Owen**

On June 13, 2013, Exide Technologies, Inc. ("Exide" or "Petitioner"), a Delaware corporation, filed a verified petition for writ of mandate against the Department of Toxic Substances Control ("Department" or "Respondent"), a California public agency. Exide operates a lead battery recycling facility at 2700 South Indiana Street, Vernon, California. Before April 24, 2013, Exide recycled between 20,000 and 40,000 batteries per day at its Vernon facility. As part of the battery recycling process, Exide operated two smelting facilities to recover lead from the batteries. Lead produced in the smelting process was then refined into specific lead alloys. In essence, Exide's Vernon facility captures spent batteries that would otherwise be disposed of in landfills or illegally dumped and recycles them to create new batteries. This facility is one of two battery recycling facilities in the western United States. The Department regulates hazardous waste management activities at Exide's Vernon facility.

In its petition, Exide asserts claims for writ of mandamus, injunctive relief, and declaratory relief. Exide requests, among other things, a stay of the Department's April 24, 2013 Order for Temporary Suspension ("Order). The Order suspended Exide's interim status authorization which allowed it to receive, treat, or store hazardous waste. Although classified as "interim," the authorization had been in effect since 1981. In the Order, the Department's Deputy Director for the Hazardous Waste Management Program, Brian Johnson, concluded that it was necessary to issue the Order pending an administrative hearing to prevent or mitigate "an imminent and substantial danger to the public" pursuant to Health and Safety Code Section 25186.2" (Order, p. 2).

In essence, the Order required Exide to "cease operations effective April 24, 2013," the same date it was issued. (Order, p. 1). The Department based its Order on a "recent report submitted to [it] by Exide" and a "separate report submitted to the South Coast Air Quality Air Management District." (Id.). Specifically, the Department asserted the following: Exide is operating "its underground storm sewer pipelines in violation of hazardous waste requirements and are causing releases to the environment;" and Exide's "emissions from the facility operations pose a significant risk to the surrounding community." (Id.). Along with the Order, the Department served Exide with an Accusation for Suspension of Interim Status on April 24, 2013.

On June 17, 2013, the Court granted Exide's ex parte application and issued a temporary restraining order and order to show cause re preliminary injunction which stayed the Department's Order and prevented the Department from enforcing it until the conclusion of the pending administrative proceeding. The order to show cause hearing was scheduled for July 2, 2013. The Department submitted its opposition on June 25, 2013. On June 28, 2013, Petitioner filed its reply.

The matter was argued and submitted on July 2, 2013. After reading and considering the moving papers, the opposition, and the reply, the Court renders the following order:

Evidentiary Objections

If a party asserted a single objection to several sentences and one of the sentences is not objectionable, the Court overruled the objection. See People v. Porter, (1947) 82 Cal. App.2d 585, 588 ("An objection must usually be specific and point out the ground or grounds relied upon in a manner sufficient to advise the trial court and opposing counsel of the alleged defect so that the ruling may be made understandingly and the objection obviated if possible.").

Respondent's Objections
Objection Nos. 8, 9, and 12 , are sustained. The remaining objections are overruled.

Petitioner's Objections
Objection Nos. 2-4, and 22-24, are sustained. The remaining objections are overruled.

Summary of Applicable Law

The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. Major v. Miraverde Homeowners Ass'n., (1992) 7 Cal. App. 4th 618, 623. A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. Code Civ. Pro. §526(a)(4).

In determining whether to issue a preliminary injunction, the trial court is to consider the likelihood that the plaintiff will prevail on the merits at trial and to weigh the interim harm to the plaintiff if the injunction is denied against the harm to the defendant if the injunction is granted. King v. Meese, (1987) 43 Cal. 3d 1217, 1226. A party seeking an injunction must demonstrate a reasonable probability of success on the merits. IT Corp. v. County of Imperial, (1983) 35 Cal.3d 63, 73-74.

"In seeking a preliminary injunction, [the party seeking the injunction] bore the burden of demonstrating both likely success on the merits and the occurrence of irreparable harm." Savage v. Trammell Crow Co., (1990) 223 Cal.App.3d 1562, 1571; Citizens for Better Streets v. Board of Sup'rs of City and County, (2004) 117 Cal.App.4th 1, 6. Competent evidence is required to create a sufficient factual showing on the grounds for relief. Ancora-Citronelle Corp. v. Green, (1974), 41 Cal.App.3d 146, 150.

Where, as here, the Respondent is a public agency and Petitioner seeks to restrain it in the performance of its duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. Agricultural Labor Relations Bd. v. Superior Court, (1976) 16 Cal.3d 392, 401. This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief a plaintiff must make a significant showing of irreparable injury. Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd., (1994) 23 Cal. App. 4th 1459, 1471.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. See Code Civ. Pro. § 529(a); City of South San Francisco v. Cypress Lawn Cemetery Ass'n., (1992) 11 Cal. App. 4th 916, 920.

Analysis

The Department had two options if it wished to suspend or revoke Exide's interim status authorization allowing it to receive, treat, or store hazardous waste. It could have initiated an administrative proceeding and suspended or revoked the authorization after prevailing at the administrative hearing under Health & Safety Code § 25186.1, or it could have temporarily suspended or revoked the authorization before the hearing if it determined that the action was necessary to prevent or mitigate an imminent and substantial danger to the public health or safety or the environment under Health & Safety Code § 25186.2. Here, the Department chose the second option under section 25186.2.

California Health & Safety Code § 25186.2 provides as follows:

> The department may temporarily suspend any permit, registration or certificate issued pursuant to this chapter prior to any hearing if the department determines that the action is necessary to prevent or mitigate an imminent and substantial danger to the public health or safety or the environment. The department shall notify the holder of the permit, registration, or certificate of the temporary suspension and the effective date thereof and at the same time shall serve the person with an accusation. Upon receipt by the department of a notice of defense to the accusation from the holder of the permit, registration, or certificate, the department shall, within 15 days, set the matter for a hearing, which shall be held as soon as possible, but not later than 30 days after receipt of the notice. The temporary suspension shall remain in effect until the hearing is completed and the department has made a final determination on the merits, which shall be made within 60 days after the completion of the hearing. If the determination is not transmitted within this period, the temporary suspension shall be of no further effect.

For obvious reasons, the second option—immediate suspension subject to a subsequent hearing—severally affects a party's due process and property rights. Presumably, the Legislature sought to allay these significant concerns by allowing the Department to take this drastic action

only if it was necessary to prevent or mitigate an imminent and substantial danger to the public health or safety or the environment. In addition, the Legislature required that the subsequent administrative hearing "be held as soon as possible, but not later than 30 days after receipt" of a party's notice of defense. Health & Safety Code § 25186.2.

Since there is no case law interpreting the "imminent and substantial danger" language in section 25186.2, the Court looks to similar language in the federal Resource Conservation and Recovery Act ("RCRA"). An imminent and substantial endangerment exists if there is "reasonable cause for concern that someone or something may be exposed to a risk of harm . . . if remedial action is not taken." See United States v. Conservation Chem. Co., 619 F. Supp. 162, 194 (W.D. Mo. 1985). In order to establish "imminence," the agency must prove that the risk of threatened harm is currently present on the facility, and that the "potential for harm is great." United States v. Aceto Agricultural Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); see also Price v. United States Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) (imminence refers to the nature of the threat rather than identification of the time when the endangerment initially arose). Thus, any alleged endangerment "must be substantial or serious, and there must be some necessity for the action." Price, 39 F.3d at 1019. In Price, the district court heard testimony from expert witnesses who agreed that for an imminent and substantial endangerment to exist (1) there must be a population at risk, (2) the contaminants must be listed as hazardous under RCRA, (3) the level of contaminants must be above levels that are considered acceptable by the State, and (4) there must be a pathway of exposure. Price v. United States Navy, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992). In affirming, the Ninth Circuit agreed that there was no present imminent or substantial endangerment to health or the environment, despite the conclusion that contaminants (lead and asbestos) probably remained on the property at issue. Central to the court's conclusion was a concrete barrier that blocked the pathway to lead contamination. 39 F.3d at 1019-20.

On May 6, 2013 Exide filed a timely notice of defense in response to the Order and Accusation. In its notice of defense, Exide requested an emergency hearing for a temporary stay of the Order and a hearing on the merits within 30 days as required by section 25186.2. Although the administrative hearing began on June 3, 2013, or within 30 days after receiving Exide's notice of defense, the hearing has not been completed as of July 2, 2013. Indeed, after adjourning the hearing on June 5, 2013, ALJ Julie Cabos-Owen stated that she would need to schedule three more days of hearing. However, those dates would be scheduled at a later date and may not occur for months due to scheduling conflicts. Concerning Exide's request for a temporary stay, ALJ Cabos-Owen noted that since she does not have that authority under the Administrative Procedures Act, "that might be something that you take up with the Superior Court . . . this is not the place to request the stay, unfortunately." (Exhibit BB to Petitioner's moving papers, June 5, 2013 hearing, pp. 194-195).

1. Exide is likely to succeed on the merits

(a) Air Emissions

Exide's facility is located in an area dedicated to heavy industrial uses within the City of Vernon. All of the properties immediately adjacent to the facility are also involved in industrial uses. Exide is required to follow air emissions rules and regulations promulgated by a non-party, the

South Coast Air Quality Management District ("SCAQMD"). In determining whether air emissions from industrial facilities pose serious health risks, the SCAQMD requires industrial facilities to prepare human health risk assessments. ("HRA"). The HRA estimates the nature and probability of adverse health effects in humans who may be exposed to certain chemicals in their environment.

Exide's May 2012 emission tests showed that arsenic emission levels had been reduced by more than 70 percent when compared to the 2010 levels. However, in January 2013, Exide submitted a revised HRA to the SCAQMD and the Department which showed an HRA for Exide's off-site workers of 156 in a million. Because this HRA was unacceptably high, the SCAQMD demanded the implementation of risk reduction measures. Accordingly, Exide began to implement risk reduction measures. For example, by April 4, 2013, Exide, with the SCAQMD's approval, completed installation of an isolation door system to reduce emissions from its blast furnace.

Based on April 9 and April 10, 2013 emissions data, the calculated risks for cancer and non-cancer health concerns had been reduced substantially by Exide: less than five in a million for residential and sensitive receptors. In addition, the maximum increased worker cancer risk was only slightly above ten in a million. Thus, as of April 10, 2013, Exide's arsenic emissions levels were within acceptable risk levels for residents and workers as determined by the SCAQMD's rules and regulations, including Rule 1402. Additional testing conducted by Exide between April 10 and April 19, 2013 showed that arsenic emission rates continued to drop as a result of Exide's mitigation efforts. Although lower level Department employees knew that Exide had installed the isolation door system weeks before it issued its Order, that information was never conveyed to the Department's Branch Chief, Rizgar Ghazi, before the shut-down Order was issued. As acknowledged by Ghazi, the installation of this mitigation device should have been a critical part of evaluating whether to issue the Order in the first place. (Exhibit AA to Petitioner's moving papers, June 4, 2013 hearing, pp. 106-113).

Until the Department issued its Order, it never suggested that Exide's Vernon facility posed an imminent threat to human health or the environment. While the Department alleged in the Accusation that the Department only accepts a cancer risk that does not exceed one in one million, it has no such regulation and no such law exists in California. Indeed, the Department's Branch Chief, Rizgar Ghazi, testified as follows during the administrative hearing on June 4, 2013:

Question:	Do you know of any statute in the State of California that establishes the one in a million standard?
Answer:	No.
Question:	Do you know of any regulation in the State of California that establishes the one in a million standard?
Answer:	No.

(Exhibit AA to Petitioner's moving papers, June 4, 2013 hearing, p. 105). In fact, the Department approved a facility permit for Quemetco, Exide's direct competitor based in the City of Industry, after Quemetco submitted an HRA of more than 20 in a million.

In sum, as of April 19, 2013, or the week before the Department issued its Order, Exide had reduced its arsenic emission levels by at least 97% as a result of its environmental mitigation efforts. Because Exide's HRA was below the SCAQMD's Rule 1402 action risk levels, its air emissions did not pose an imminent and substantial threat to the public or the environment.

(b) The Storm Water Management System

The Department also based its Order on Exide's allegedly defective storm water management system. Specifically, the Accusation accompanying the Order alleged that "the degraded and compromised physical condition of the under ground pipelines are a source of continuous daily releases to the environment of hazardous waste-containing water." (Accusation, ¶ 17). This allegation is without merit.

The Department did not present any data to support its contention that any leakage from the storm water system is degrading the groundwater beneath the Vernon facility. In fact, the groundwater quality has been stable for a decade. As for the video of the storm water management system piping, the damage to the piping was limited to three areas at the top that could only result in a leak if the piping was full. The Court also notes that the water flowing through Exide's storm water management system carries storm water, not water processed from Exide's operations. Notably, the Department based its Order on sampling of the sediment, not the water flowing through the pipes.

At the administrative hearing, the Department's witness conceded that it had no soil sampling data to support the Accusation, and that the groundwater sampling data showed stable or decreasing concentrations of hazardous metals over the past decade. For example, the following colloquy between Exide's counsel and the Department's Branch Chief, Rizgar Ghazi, is instructive:

> Question: [The Department] never sampled the soil, along the underground storm water pipes before issuing the Order, correct?
>
> Answer: We did not.
>
> Question: And you never sampled the water in the pipes, right?
>
> . . .
>
> Answer: It's a no.

(Exhibit AA to Petitioner's moving papers, June 4, 2013 hearing, pp. 100-101).

While it is undisputed that Exide's underground storm water piping system is in need of repair, the Department did not show that breaches in the piping were causing hazardous waste leaks, let alone leaks that posed an imminent and substantial harm to the public and the environment. The Court does not accept Ghazi's conclusion in paragraph 16 of his June 25, 2013 declaration that the "degraded and compromised physical condition of the piping system presents a continuous threat of releases to the environment of hazardous waste-containing water, and actually causes such releases on a regular basis." There is no foundation for this statement. In any event, as discussed in John Hogarth's declaration, Exide completed installation of a temporary piping and sump system designed to by pass the existing storm water piping cited by the Department in its Order. (Hograth Declaration, ¶ 6).

In sum, Exide's storm water piping system did not pose an imminent and substantial threat to the public or the environment.

2. Exide will suffer irreparable harm unless the stay is issued

In its opposition, the Department argues that Exide will not suffer irreparable harm since it has invoked its statutory administrative remedy. Indeed, the Department contends that Exide failed to exhaust its administrative remedies because the administrative hearing has not been completed.

The requirement of exhaustion of administrative remedies does not apply if the remedy is inadequate (Glendale City Employees' Assn., Inc. v. City of Glendale, (1975) 15 Cal.3d 328, 342), or when irreparable harm would result by requiring exhaustion of administrative remedies before seeking judicial relief. Department of Personnel Administration v. Superior Court, (1992) 5 Cal.App.4th 155, 169. Both exceptions apply here. First, as discussed above, Exide's post-deprivation hearing will not be completed for months. The Department's contention that the hearing could have been completed but for Exide's request that the hearing be continued is without merit. The Department had two full days to put on its case. Exide should not be punished for seeking to present a defense that may last as long as, or slightly longer, than the Department's case. Second, Exide has shown that it will suffer significant irreparable harm by requiring it to exhaust its administrative remedies before seeking relief. As a result of the Order, Exide was forced to layoff 65 employees at its Vernon facility. In addition, the Order continues to significantly harm Exide's business and its relationship with its customers.

The Department also contends that the Court may not grant a preliminary injunction to stay the Order pending completion of the administrative proceeding under Code Civ. Proc. § 526(b) and Civil Code § 3423(d). While these laws preclude the issuance of an injunction preventing "the execution of a public statute by officers of the law for the public benefit," they do not apply when the activity sought to be enjoined is an attempt to apply a statute or ordinance to conduct not within its terms. See Novar Corp. v. Bureau of Collection & Investigative Servs., (1984) 160 Cal. App. 3d 1, 5-6; see also Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd., (1994) 23 Cal. App. 4th 1459, 1471; Startrack, Inc. v. County of Los Angeles, (1976) 65 Cal.App.3d 451, 457. Here, the Court finds that the Department's application of section 25186.2 as construed against Exide is unlawful. The Court also finds that Exide has made a significant showing of irreparable injury as a result of the Department's application of

this law.

3. The balance of harms weighs in Exide's favor

It is no secret that Exide has operated a hazardous waste facility in Vernon for years. In fact, Exide and its predecessors have done so for decades. It is also no secret that Exide's operations have resulted in hazardous waste that could cause illness or pose a threat to human health or the environment. The Department's interest in regulating and even eliminating the danger from Exide's operations at this facility are understandable. The Court is sympathetic to these legitimate concerns. Certainly, the people of this state, including residents in communities affected by pollution from the Vernon facility, are entitled to the maintenance of a quality environment. While everyone uses batteries, no one wants a lead battery recycling facility in their backyard polluting the air or contaminating the water--especially if the facility's operations could result in serious illness. However, the Department's concerns must be supported by law and evidence to justify closing a facility on a moment's notice.

While the Department's goal in reducing the HRA to one in one million is a laudable one, it is simply not the law. As for the evidence in support of the Order, the Department's avalanche of conclusions, speculation, and innuendo are not a substitute for evidence. Indeed, the Department's concessions at the administrative hearing are fatal to its claims. For example, Brian Johnson, the Department's Deputy Director for Hazardous Waste Management Program, signed the April 24, 2013 Order shutting down Exide's operations. However, he testified that when he issued the Order, he was not aware that Exide had installed mitigation systems such as the isolation door which cut arsenic emissions by 97 to 99 percent. (Exhibit Z to Petitioner's moving papers, June 3, 2013 hearing, pp. 92-94, 102-103). As for Exide's storm water system, the Court notes the following testimony by Johnson:

> Question: So at the time you signed this order or accusation . . . and made a statement that hazardous waste releases into the environment are increasing the concentration in both soil and ground water, you had no data on which to base that statement for either soil or ground water, isn't that right?
>
> Answer: Correct.

(Exhibit Z to Petitioner's moving papers, June 3, 2013 hearing, pp. 186-187).

Since the Department has not shown that its Order was necessary to prevent or mitigate an imminent and substantial danger to the public health or safety or the environment, the balance of harm weighs in Exide's favor in allowing it to continue operations subject to the following conditions:

1. Exide shall use the recently installed temporary piping and sump system to bypass the existing storm water piping system that was the subject of the Department's Order;

2. Exide shall, as soon as possible, with notice to the Department and the SCAQMD conduct source testing to confirm emissions reductions as a result of the installation of the isolation door on the blast furnace; and
3. After completing start-up testing, Exide's air emissions shall comply with SCAQMD's Rule 1402.

See Hummell v. Republic Fed. Savings & Loan Assn., (1982) 133 Cal. App. 3d 49, 51-52 ("a court may exercise injunctive power upon conditions protecting all interests affected by the injunction").

4. **Undertaking**

Code of Civil Procedure section 529(a) provides:

> On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. Within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved.

"Thus, the trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum." Abba Rubber Co. v. Seaquist, (1991) 235 Cal.App.3d 1, 14. It is well settled that reasonable counsel fees and expenses incurred in successfully procuring a final decision dissolving the injunction are recoverable as 'damages' within the meaning of the language of the undertaking, to the extent that those fees are for services that relate to such dissolution. ABBA Rubber Co. v. Seaquist, (1991) 235 Cal. App. 3d 1, 15-16.

Petitioner shall post an undertaking in the amount of $50,000 to cover Respondent's reasonable attorneys' fees and costs to dissolve the injunction.

Disposition

Based on the foregoing, the Court grants Petitioner's request for a preliminary injunction subject to the following conditions: (1) Exide shall use the recently installed temporary piping and sump system to bypass the existing storm water piping system that was the subject of the Department's Order; (2) Exide shall, as soon as possible, with notice to the Department and the SCAQMD conduct source testing to confirm emissions reductions as a result of the installation of the isolation door on the blast furnace; and (3) after completing start-up testing, Exide's air emissions shall comply with SCAQMD's Rule 1402.

Exide shall post an undertaking in the amount of $50,000 within five court days. This stay of the April 24, 2014 Order for Temporary Suspension shall continue until the administrative hearing is completed and the hearing officer has issued her final decision and order.

IT IS SO ORDERED.

July 2, 2013

Luis A. Lavin
Judge, Superior Court of California
County of Los Angeles