

The People served the request to admit facts and the genuineness of documents (request to admit) upon Decicco by first class mail on June 11, 2002. Decicco has not filed an answer to the complaint, the request to admit, or either of the two motions for summary judgment as of the date of this order. The People filed a request to admit on June 11, 2002. The People allege in their motion for summary judgment that Decicco admitted the material allegations asserted in the complaint because Decicco did not respond to the People's request to admit facts and the genuineness of documents. Mot. at 2. For filings made on or after January 1, 2001, facts are deemed admitted and documents deemed genuine where a party fails to respond. *See* 35 Ill. Adm. Code 101.618(f).

Because Decicco failed to respond to the People's request to admit, the Board therefore deems admitted the matters of fact and the genuineness of the documents set forth in the People's request to admit. Specifically, the Board finds the following facts admitted:

1. Decicco was the owner and operator of a demolition or renovation activity that began on or before March 1, 1997, at 4305 West 24th Place, Chicago (site 1). Mot. at 2-3, Exh. A.
2. Decicco notified the Agency of the demolition or renovation of site 1 in a notification of demolition and renovation form postmarked February 24, 1997. Mot. at 3, Exh. A.
3. Decicco was the owner and operator of a demolition or renovation activity that began on or before March 17, 1997, at 2908 West Madison Street, Chicago (site 2). Mot. at 3, Exh. E.
4. Decicco notified the Agency of the demolition or renovation of site 2 in a notification of demolition and renovation form postmarked March 17, 1997. Mot. at 3, Exh. E.
5. Decicco was the owner and operator of a demolition or renovation activity that began on or before March 17, 1997, at 2910 West Madison Street, Chicago (site 3). Mot. at 4, Exh. C.
6. Decicco notified the Agency of the demolition or renovation of site 3 in a notification of demolition and renovation form postmarked March 17, 1997. Mot. at 3, Exh. C.
7. Decicco was the owner and operator of a demolition or renovation activity that began on March 17, 1997, at a site located at 5650 South Ashland Avenue in Chicago (site 4). Mot. at 4, Exh. B.
8. Decicco notified the Agency of the demolition or renovation of site 4 in a notification of demolition and renovation form postmarked March 13, 1997. Mot. at 5, Exh. B.

9. Decicco was the owner and operator of a demolition or renovation activity at 3353-3355 West Chicago Avenue, Chicago (site 5). Exh. E.
10. Decicco was the owner and operator of a demolition or renovation activity at 911-919 West 69th Street, Chicago (site 6). Exh. D.

The Board also finds that the genuineness of the documents attached to the People's motion, Exhibits A-F, is admitted. Now the Board discusses whether the People are entitled judgment as a matter of law based on the admitted facts and genuineness of documents.

MOTION FOR SUMMARY JUDGMENT

Standard of Review

Summary judgment is appropriate when the pleadings and depositions, together with any 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. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should only be granted when the movant's right to the relief "is clear and free from doubt." *Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370, *citing Purtil v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis, which would arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Discussion

Relevant Statutes and Regulations

Section 9.1(d)(1) of the Act states, that "No person shall: Violate any provisions of Sections 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto." 415 ILCS 5/9(d)(1) (2000).

The United States Environmental Protection Agency (USEPA) has adopted the asbestos NESHAP regulations pursuant to Section 112 of the Clean Air Act (42 U.S.C. § 7412 (2001)). The relevant asbestos NESHAP regulations are at 40 C.F.R. § 61.141 and 40 C.F.R. § 61.145(a) and (b) (2000). Those regulations provide, in pertinent part:

40 C.F.R. § 61.141 Definitions

* * *

Category I nonfriable asbestos-containing material (ACM) means asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos as determined using the method

specified in appendix E, subpart E, 40 CFR. part 763, section 1, Polarized Light Microscopy.

Category II nonfriable ACM means any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

* * *

Demolition means the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or the intentional burning of any facility.

* * *

Facility means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.

* * *

Owner or operator of a demolition or renovation activity means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

* * *

Working day means Monday through Friday and includes holidays that fall on any of the days Monday through Friday.

* * *

40 C.F.R. § 61.145 Standard for demolition and renovation

- (a) Applicability. To determine which requirements of paragraphs (a), (b), and (c) of this section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence

of asbestos, including Category I and Category II nonfriable ACM. The requirements of paragraphs (b) and (c) of this section apply to each owner or operator of a demolition or renovation activity, including the removal of RACM as follows:

* * *

(2) In a facility being demolished, only the notification requirements of paragraphs (b)(1), (2), (3)(i) and (iv), and (4)(i) through (vii) and (4)(ix) and (xvi) of this section apply, if the combined amount of RACM is

- (i) Less than 80 linear meters (260 linear feet) on pipes less than 15 square meters (160 square feet) on other facility components, and
- (ii) Less than one cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously or there is no asbestos.

* * *

(b) Notification requirements. Each owner or operator of a demolition or renovation activity to which this section applies shall:

(1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

* * *

(3) Postmark or deliver the notice as follows:

- (i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section. If the operation is as described in paragraph (a)(2) of this section, notification is required 10 working days before demolition begins.

* * *

(4) Include the following in the notice:

- (i) An indication of whether the notice is the original or a revised notification.

* * *

- (iii) Type of operation: demolition or renovation.

* * *

- (v) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.
- (vi) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.
* * *
- (viii) Scheduled starting and completion dates of asbestos removal work (or any other activity, such as site preparation that would break up, dislodge, or similarly disturb asbestos material) in a demolition or renovation; planned renovation operations involving individual nonscheduled operations shall only include the beginning and ending dates of the report period as described in paragraph (a)(4)(iii) of this section.
* * *
- (ix) Scheduled starting and completion dates of demolition or renovation.
* * *

Count I: Untimely Notifications

The People allege that Decicco violated Section 61.145(b) of the asbestos NESHAP, and therefore violated Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1)(2000)) by failing to submit notifications to the Agency at least 10 days before demolition began. Mot. at 3.

The Board finds that Decicco is an owner or operator of a demolition or renovation activity as defined by the asbestos NESHAP. Furthermore, the structures at issue in count I, sites 1, 3, and 4, are facilities as defined by the asbestos NESHAP. *See* 40 C.F.R. § 61.141(2000). The notification requirements of Section 61.145(b) apply to facility demolitions even where there is no asbestos present. *See* 40 C.F.R. § 61.145(a)(2) (2000). Section 61.145(b)(3) requires notice “[a]t least 10 working days before demolition begins.” There is no issue of material fact that Decicco did not submit the notice to the Agency on time before starting the demolitions at the three sites in count I. *See* Ex. A at 9, 12, and 24.

The Board finds that Decicco violated Section 61.145(b) of the asbestos NESHAP. The USEPA adopted the asbestos NESHAP regulations pursuant to Section 112 of the Clean Air Act. The Board accordingly finds that Decicco violated Section 9.1(d)(1) of the Act and grants that part of the People’s motion for summary judgment.

Count II: Incomplete Notifications

The People allege that Decicco violated Section 61.145(b)(4) of the asbestos NESHAP, and therefore, violated Section 9.1(d)(1) of the Act by submitting incomplete notification of demolition forms to the Agency. Mot. at 8. The Board finds that the structures at issue in count II, sites 1, 2, 4, 5, and 6, are facilities as defined by the asbestos NESHAP. *See* 40 C.F.R. § 61.141(2000).

Section 61.145(b)(4)(i) of the asbestos NESHAP states that the notification must indicate if it is original or revised. There is no genuine issue of material fact that notifications for sites 5 and 6 did not provide this information. The Board finds that Decicco violated Section 61.145(b)(4)(i), and therefore, Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(iii) of the asbestos NESHAP states that the notification must indicate the type of operation – demolition or renovation. There is no genuine issue of material fact that notifications for sites 5 and 6 did not indicate this information. The Board finds that Decicco violated Section 61.145(b)(4)(iii), and therefore, Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(v) of the asbestos NESHAP states that the notification must indicate the procedure, including analytical methods, employed to detect the presence of RACM and Category I and II nonfriable ACM. There is no genuine issue of material fact that the notifications for sites 1, 2, 3, 4, 5, and 6 did not indicate these procedures. The Board finds that Decicco violated Section 61.145(b)(4)(v), and therefore, Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(ix) of the asbestos NESHAP states that the notification must indicate the starting and ending dates of demolition or renovation. There is no genuine issue of material fact that the notifications for sites 5 and 6 did not indicate the starting and ending dates for either demolition or renovation. The Board finds that Decicco has violated Section 61.145(b)(4)(ix), and therefore, Section 9.1(d)(1) of the Act.

Section 61.145(b)(4)(viii) of the asbestos NESHAP states that the notification must indicate the starting and ending dates of asbestos removal work “or any other activity, such as site preparation that would break up, dislodge or similarly disturb asbestos material.” 40 C.F.R. § 61.145(b)(4)(v)(2000). As alleged, the notifications for sites 5 and 6 did not indicate these dates. *See* Exh. D and E. However, these notifications indicated that there was no asbestos to be removed, making the starting and ending dates for asbestos removal inapplicable. Furthermore, where the amount of RACM is small to nonexistent in a facility being demolished, Section 61.145(b)(4)(viii) of the notification requirements does not apply. *See* 40 C.F.R. 61.145(a)(2)(ii)(2000). The Board finds that Decicco did not violate Section 61.145(b)(4)(viii).

The asbestos NESHAP notification requirements do not oblige the owner or operator to state that asbestos is present. Section 61.145(b)(4)(vi) mandates only that an owner or operator estimate the amount of RACM to be removed from the facility in addition to the Category I and II nonfriable ACM that will not be removed. Decicco answered this question on the Agency’s notification forms for sites 5 and 6. Since the Board finds no requirement in the asbestos NESHAP requiring an owner or operator to indicate if asbestos is present on the notification

form. The Board finds that Decicco did not violate Section 61.145(b)(4)(vi) of the asbestos NESHAP, and therefore, did not violate Section 9.1(d)(1) of the Act by failing to state if asbestos is present.

CONCLUSION

The Board deems admitted the facts and genuineness of documents set forth in the People's request to admit. The Board grants the People's motion for summary judgment on all alleged violations except those involving: (1) failure to indicate the starting and ending dates of asbestos removal work; and (2) failure to indicate whether asbestos was present. The Board denies the People's motion for summary judgment on the two latter alleged violations.

The Board therefore finds that Decicco violated Section 9.1(d)(1) of the Act and Sections 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) of the asbestos NESHAP regulations.

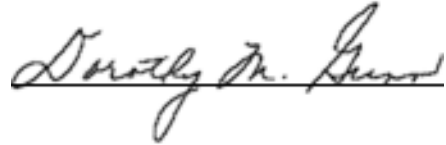
The Board directs the parties to hearing on the specific issue of remedy, including penalty. Decicco may also be liable for costs, pursuant to 42(f) of the Act, including attorney, expert witness, and consultant fees, incurred by the State in this action. The parties are only to present evidence relevant under Sections 33(c), 42(f), and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2000)).

ORDER

1. The Board grants the People's motion for summary judgment in part, finding that Decicco violated Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2000)), and Sections 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) of the asbestos NESHAP (40 C.F.R. §§ 61.145(b)(3), 61.145(b)(4)(i), 61.145(b)(4)(iii), 61.145(b)(4)(v), and 61.145(b)(4)(ix) (2000)).
2. The Board denies the People's motion for summary judgment in part, finding Decicco did not violate Sections 61.145(b)(4)(viii) and 61.145(b)(4)(vi) of the asbestos NESHAP. 40 C.F.R. §§ 61.145(b)(4)(viii) and (vi)(2000).
3. The Board directs the parties to hearing on the specific issue of the appropriate remedy, including penalty, and the People's costs, and attorney fees. The parties are only to present evidence that is relevant under Sections 33(c), 42(f) and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2000)). The Board directs the parties to provide specific figures and justifications for any proposed penalty.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim order on January 9, 2003, 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