

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
by LISA MADIGAN, Attorney)	
General of the State of Illinois,)	
)	
Complainant,)	
)	
v.)	PCB No. 06-27
)	
JOEL HILLMAN, individually,)	(Enforcement - Air)
)	
Respondent.)	

NOTICE OF FILING

TO: See Attached Service List
(VIA ELECTRONIC FILING)


PLEASE TAKE NOTICE that I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing Complainant's Motion to Deem Facts Admitted and for Summary Judgment, a copy of which is attached herewith and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

BY:


STEPHEN J. SYLVESTER
Assistant Attorney General
Environmental Bureau
188 W. Randolph St., 20th Floor
Chicago, Illinois 60601
312-814-2087

DATE: November 23, 2005

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

Mr. Joel Hillman
3000 Island Blvd Apt 2003
Aventura, Florida 33160

AND

15 Franklin Avenue
Quogue, NY 11978

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph, Room 11-500
Chicago, Illinois 60601

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MOTION TO DEEM FACTS ADMITTED AND FOR SUMMARY JUDGMENT

Now comes the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and pursuant to Sections 103.204 and 101.516 of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204 and 101.516, and the September 22, 2005 Hearing Office Order in this cause, hereby moves for the entry of an order deeming all material facts in Complainant's Complaint as admitted against Respondent, JOEL HILLMAN, as to Counts I, II, III, and IV of the Complaint. Further, Complainant moves this Illinois Pollution Control Board ("Board") for Summary Judgment as to Counts I, II, III, and IV of the Complaint against Respondent, JOEL HILLMAN. In support thereof, Complainant states as follows:

1. On August 24, 2005, the Complainant filed its Complaint against Respondent, JOEL HILLMAN ("Hillman"). Complainant alleged violations of Sections 9(a) and 9.1(d) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/9(a) and 9.1(d) (2004), Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141, and Sections 61.145(b), (c)(1), and (c)(6), and 61.150(b) of the U.S. EPA's NESHAPs, 40 C.F.R. 61.145(b), (c)(1), and (c)(6), and 61.150(b). Specifically, the Complaint alleges Air Pollution, Failure to

Follow Proper Notification Requirements, Failure to Follow Proper Emission Control Procedures, and Improper Disposal of Regulated Asbestos Containing Materials ("RACM").

2. On September 21, 2005, Complainant filed its Proof of Service of the August 24, 2005 Complaint with the Board.

3. The Hearing Officer's Order of September 22, 2005, required Respondent to answer the Complaint within 60 days from the date of the Hearing Officer's Order, that being on or before November 15, 2005.

4. As of the date of the filing of this Motion, Respondent has not filed an answer, nor otherwise pled, to the Complaint.

5. Section 103.204(d) and (e) of the Board's Procedural Rules, 35 Ill. Adm. Code 103. 204(d) and (e), provides as follows:

- d) Except as provided in subsection (e) of this Section, the respondent may 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, unless respondent asserts a lack of knowledge sufficient to form a belief. Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing.
- e) If the respondent timely files a motion under Section 103.212(b) or 35 Ill. Adm. Code 101.506, the 60-day period to file an answer described in subsection (d) of this Section will be stayed. The stay will begin when the motion is filed and end when the Board disposes of the motion.

6. By failing to answer the Complaint by November 15, 2005 and by failing to file a motion staying the 60-day period in which to file an answer as required by Section 103.204(d) and (e) of the Board's Procedural Rules, 35 Ill. Adm. Code 103. 204(d) and (e), Respondent has admitted the material allegations asserted in the Complaint.

7. Complainant therefore requests that the Board enter an order finding that pursuant to Section 103.204(d) and (e) of the Board's Procedural Rules, 35 Ill. Adm. Code 103. 204(d) and (e), Respondent has admitted all material allegations asserted in the Complaint.

8. Complainant's Complaint sufficiently states facts establishing the following violations of the Act, Board Air Pollution Regulations, and the U.S. EPA's NESHAPs Regulations against Respondent:

- Count I: Air Pollution: Violation of Section 9(a) of the Act, 415 ILCS 5/9(a) (2004), and Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141;
- Count II: Failure To Follow Proper Notification Requirements: Violation of Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2004), and Section 61.145(b) of the U.S. EPA's NESHAPs Regulations, 40 CFR 61.145(b);
- Count III: Failure to Follow Proper Emission Control Procedures: Violation of Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2004), and Section 61.145(c)(1), and (c)(6) of the U.S. EPA's NESHAPs Regulations, 40 CFR 61.145(c)(1), and (c)(6); and
- Count IV: Improper Disposal Of Regulated Asbestos Containing Materials: Violation of Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2004), and Section 61.150(b)(1) of the U.S. EPA's NESHAPs Regulations, 40 CFR 61.150(b).

9. Section 101.516(b) of the Board's Procedural Regulations, 35 Ill. Adm. Code 101.516(b), provides as follows:

- b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

10. If the Board finds that Respondent has admitted all material allegations in Complainant's Complaint, then the record shows that there is no issue of material fact remaining for review. Therefore, pursuant to Section 101.516(b) of the Board's Procedural Regulations, 35

Ill. Adm. Code 101.516(b), Complainant is entitled to summary judgment in its favor as a matter of law.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board issue an order in favor of Complainant and against Respondent, JOEL HILLMAN, individually, as follows:

1. Ordering all material allegations in the Complaint admitted against Respondent;
2. Finding that Respondent violated Sections 9(a) and 9.1(d) of the Act, 415 ILCS 5/9(a) and 9.1(d) (2004), Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141, and Sections 61.145(b), (c)(1), and (c)(6), and 61.150(b) of the U.S. EPA's NESHAPs, 40 C.F.R. 61.145(b), (c)(1), and (c)(6), and 61.150(b);
3. Granting summary judgment in favor of Complainant and against Respondent on Counts I through IV of the Complaint.

REMEDY

The September 1, 2005 Board Order in this cause provides, in pertinent part, as follows:

Accordingly, the Board further directs the hearing officer to advise the parties that in summary judgment motions and responses, at hearing, and in briefs, each party should consider: (1) proposing a remedy for a violation, if any (including whether to impose a civil penalty), and supporting its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) proposing a civil penalty, if any (including a specific total dollar amount and the portion of that amount attributable to the respondent's economic benefit, if any, from delayed compliance), and supporting its position with facts and arguments that address any or all of the Section 42(h) factors. . . .

Pursuant to the September 1, 2005 Board Order, Complainant is proposing a remedy for Respondent's violations of Sections 9(a) and 9.1(d) of the Act, 415 ILCS 5/9(a) and 9.1(d) (2004); Section 201.141 of the Board Air Pollution Regulations, 35 Ill. Adm. Code 201.141, and Sections 61.145(b), (c)(1), and (c)(6), and 61.150(b) of the U.S. EPA's NESHAPs, 40 C.F.R. 61.145(b), (c)(1), and (c)(6), and 61.150(b), and states as follows:

Impact on the Public Resulting from Respondent's Alleged Non-Compliance

Section 33(c) of the Act, 415 ILCS 5/33(c) (2004), provides 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.

In response to these factors, the Complainant states the following:

1. The impact to the public resulting from Respondent's failure to adhere to the work practice standards of the asbestos NESHAPs in connection with regulated building renovation activities resulted in the emission of asbestos fibers, a known carcinogen, which threatened human health and the environment, especially the workers on site and the nearby neighborhood. In addition, the Illinois Environmental Protection Agency ("Illinois EPA") and the public were not privy to information that is important to the control of air pollution in Illinois, because no notification of renovation activities was received by the Illinois EPA, prior to the commencement of renovation activities at 133-135 Park Avenue, Barrington, Lake County, Illinois ("Site").
2. The Buildings at the Site, which are the subject of the Complaint, have social and economic value.
3. The Buildings at the Site, which are the subject of the Complaint, are suitable to the area in which they are located.

4. Complying with the applicable provisions of the Act, the Board's Air Pollution Regulations and the U.S. EPA's NESHAPs Regulations is both technically practicable and economically reasonable.

5. Complainant states that Respondent has subsequently complied with the Act, the Board Regulations, and the U.S. EPA's NESHAPs Regulations.

A civil penalty should be assessed against Respondent because of the potentially severe impact the exposure to asbestos, a known carcinogen, had on human health and environment.

Explanation of Civil Penalties Requested

Section 2(b) of the Act, 415 ILCS 5/2(b) (2004), provides:

It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, *and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.* (emphasis added)

The principal reason for penalties for violations of the Act is to aid in enforcement. Punitive considerations are secondary. *Tri-County Landfill Company v. Illinois Pollution Control Board*, 41 Ill.App.3d 249, 353 N.E.2d 316, 325 (2nd Dist. 1976).

Section 42(a) of the Act, 415 ILCS 5/42(a) (2004), provides in pertinent part, as follows:

- a) Except as provided in this Section, any person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any order of the Board pursuant to this Act, shall be liable for a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues;

If the Board finds that Respondent violated the statutory and regulatory provisions alleged in Counts I through IV of the Complaint, using October 27, 2003, the date when Respondent directed the removal of asbestos containing floor tile and thermal insulation from the buildings at the Site, continuing to July 17, 2004, when the regulated asbestos containing

material ("RACM") in the parking lot at the Site was finally remediated, the maximum statutory penalty that Section 42 of the Act, 415 ILCS 5/42 (2004) authorizes for those violations is \$8,0280,000, including the penalty for continuing violations of \$10,000 per day.

Penalties for violations of the Act and regulations are calculated according to the formula contained in Section 42(a), 415 ILCS 5/42(a) (2004). The statutory maximum is calculated as follows:

Count I

1 violation of Section 9(a)	\$ 50,000
1 violation of Section 201.141	50,000
2 violations continuing 266 days	5,320,000

Count II

1 violation of Section 9.1(d)/40 C.F.R. 61.145(b)	50,000
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Count III

1 violation of Section 9.1(d)/40 C.F.R. 61.145(c)(1)	50,000
1 violation of Section 9.1(d)/40 C.F.R. 61.145(c)(6)	50,000

Count I

1 violation of Section 9.1(d)/40 C.F.R. 61.150(b)	50,000
1 violation continuing 266 days	2,660,000

Total	\$8,280,000
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Consideration of Section 42(H) Factors

Section 42(h) of the Act, 415 ILCS 5/42(h) (2004), provides:

In determining the appropriate civil penalty to be imposed under ..., 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 violator 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 violator.
6. whether the respondent voluntarily self-disclosed, in accordance with Subsection (i) of this Section, the non-compliance to the Agency; and
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.

In response to these factors, the Complainant states as follows:

1. The duration of the violations that are the subject of the Complaint are alleged by Complainant to have occurred from approximately October 27, 2003 to July 17, 2004. The gravity of the alleged violations is severe, as a significant amount of RACM was disturbed during the renovation of the buildings at the Site, exposing any and all workers to carcinogenic asbestos fibers. Furthermore, Respondent allowed RACM to remain in the parking lot at the Site until July 17, 2004, potentially exposing persons in the neighborhood to the potentially severe health effects of carcinogenic asbestos fibers.

2. Respondent did not act diligently in this matter, as evidenced by his failure to ensure that all RACM was abated from the buildings at the Site prior to the commencement of

renovation activities. Additionally, the RACM in the parking lot at the Site was not remediated until July 17, 2005, over 8 months after the Illinois EPA inspected the Site.¹

3. Respondent accrued a nominal economic benefit by delaying proper abatement of asbestos containing materials prior to commencing renovation activities at the Site.

4. Complainant states that a maximum civil penalty payment of \$8,280,000 will serve to deter further violations by Respondent and to otherwise aid in enhancing voluntary compliance with the Act, Board Regulations, and the U.S. EPA's NESHAPs Regulations by Respondent and other persons similarly subject to the Act, Board Regulations, and the U.S. EPA's NESHAPs Regulations.

5. To Complainant's knowledge, Respondent has had no previously adjudicated violations.

6. Self-disclosure is not at issue in this matter.

7. Respondent did not offer to perform a supplemental environmental program.

These aggravating and mitigating factors provide guidance to the Board in determining the appropriate amount of a civil penalty in an environmental enforcement case. Accordingly, the Complainant brings these factors to the Board's attention.

¹ Illinois EPA inspected the Site on November 5, 2003. See ¶ 10, Count I of Complaint.


WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board grant its Motion to Deem Facts Admitted and for Summary Judgment against Respondent, JOEL HILLMAN, individually, award the relief requested herein, and take such other action as the Board believes to be appropriate and just.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN
Attorney General of the State of Illinois

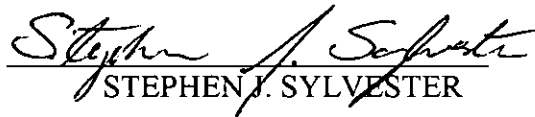
MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

BY: 
STEPHEN J. SYLVESTER
Assistant Attorney General
Environmental Bureau North
188 West Randolph St., 20th Floor
Chicago, Illinois 60601
312-814-2087

CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an Assistant Attorney General in this case, do certify that I caused to be served this 23rd day of November, 2005, the foregoing Motion to Deem Facts Admitted and for Summary Judgment and Notice of Filing upon the persons listed on said Notice by depositing same in an envelope, by first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.


STEPHEN J. SYLVESTER