

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 2006

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 04-7  
) (Enforcement - Air)  
4832 S. VINCENNES, L.P., an Illinois )  
limited partnership, and BATTEAST )  
CONSTRUCTION COMPANY, an Indiana )  
corporation, )  
)  
Respondents. )

INTERIM OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

On July 14, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a complaint against 4832 S. Vincennes, L.P. (Vincennes) and Batteast Construction Company of Illinois, Inc. The People alleged that respondents caused or allowed air pollution and violated various asbestos-related provisions in the renovation of a Chicago apartment building.

Today the Board decides a motion for summary judgment filed by the People against Vincennes on October 17, 2005. For the reasons discussed below, the Board denies the People’s motion for summary judgment and directs the parties to proceed to hearing.

In addition, the Board accepts a stipulation and proposed settlement between the People and Batteast Construction Company (Batteast) filed on December 30, 2005. Under the terms of that settlement, Batteast admits the alleged violations and agrees to pay a civil penalty of \$1,500.

This interim opinion and order first reviews the procedural history of this case and addresses a preliminary motion. Next, the opinion and order considers the People’s motion for summary judgment. Finally, the Board accepts the People’s settlement with Batteast before issuing its order.

**PROCEDURAL HISTORY**

On July 14, 2003, the People filed a complaint against Vincennes and Batteast Construction Company of Illinois, Inc. On July 24, 2003, the Board accepted the complaint for hearing. On September 8, 2003, Vincennes answered the complaint.

On November 6, 2003, the Board granted the motion of Batteast Construction Company of Illinois, Inc. to be dismissed. In the same order, the Board also granted the People’s motion for leave to file the first-amended complaint and accepted the first amended complaint for

hearing. The first-amended complaint substitutes Batteast for Batteast Construction Company of Illinois, Inc. but is otherwise materially the same as the original complaint accepted for hearing on July 24, 2003.

On October 17, 2005, the People filed a motion for summary judgment (Mot. SJ) against Vincennes. With leave of the hearing officer, Vincennes, on November 7, 2005, filed its memorandum in opposition to complainant's motion for summary judgment (Resp.). On November 21, 2005, the People filed a motion for leave to file a reply to respondent's memorandum in opposition to complainant's motion for summary judgment (Mot. Leave) accompanied by its reply (Reply). In the motion for leave to file, the People claim they would be materially prejudiced if not allowed to file a reply. Mot. Leave at 2. Vincennes has not objected to the motion for leave to file. The Board may allow a reply to prevent material prejudice. *See* 35 Ill. Adm. Code 101.500(e). The Board finds that material prejudice would result if the People's reply is not accepted. Accordingly, the Board grants the motion for leave to file, and accepts the reply.

On December 30, 2005, the People filed a stipulation and proposal for settlement as to Batteast, accompanied by a motion to request relief from hearing. The Board published notice of this proposed settlement in the January 5, 2006 *Chicago Sun-Times* and did not receive a request for a hearing.

## **THE AMENDED COMPLAINT'S ALLEGATIONS**

### **Count I**

The October 2003 amended complaint alleges in count I that Vincennes is and has been at all relevant times the owner of a four-story residential apartment building containing 67 units at 4832 South Vincennes Avenue, Chicago, Cook County (site). Am. Comp. at 2. The amended complaint names Batteast as the operator and manager of the site renovation. *Id.* The amended complaint further alleges that the respondents began renovation of the site on or about August of 2001. *Id.*

The People allege that Batteast, in the course of renovating the site on or about December 2001, discovered suspect asbestos-containing material (ACM) in the basement area while replacing first-floor floors. Am. Comp. at 2. The People claim that, after making this discovery, "Batteast contacted two asbestos contractors to bid on the removal of 3750 linear feet of ACM thermal system insulation, and 480 square feet of ACM surface materials in the boiler." *Id.* The People argue that "[a]fter the discovery of the suspect ACM, Respondents continued to employ workers to complete the renovation." Am. Comp. at 3.

The People further allege that, on January 31, 2002, the Illinois Environmental Protection Agency (Agency) inspected the building on the site. Am. Comp. at 3. The People state that, "on information and belief, no asbestos contractors had been hired by the Respondents as of January 31, 2002." *Id.*

The complaint states that an asbestos abatement and remediation plan took place between February 14, 2002 and February 19, 2002. Am. Comp. at 4. The People further allege that, under the plan, respondents removed 2400 linear feet of disturbed ACM and 6000 square feet of ACM tiles. *Id.*

The People allege in count I that, from December of 2001 to at least February 5, 2002, “respondents caused or allowed dry friable asbestos containing material to enter into the environment.” Am. Comp. at 5. The People further allege that Vincennes, as the owner of the site, “caused, threatened, or allowed the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution in that dry, friable asbestos fibers were released into the atmosphere during the renovation activities.” Am. Comp. at 5. The People further allege that Vincennes caused or allowed air pollution in Illinois “[b]y allowing dry friable asbestos containing materials to remain in a friable state, exposed to the environment.” Am. Comp. at 6, citing 415 ILCS 5/9(a) (2004); 35 Ill. Adm. Code 201.141.

### **Count II**

The amended complaint alleges that Vincennes, as owner of a “renovation,” violated the Act and federal regulations by failing to conduct a thorough inspection of the facility for the presence and location of asbestos before commencing renovation activities, by failing to remove all regulated asbestos-containing material (RACM) from a facility being renovated before an activity began that would break up, dislodge, or similarly disturb the material or preclude access for subsequent removal, and by failing to adequately wet all RACM and ensure that it remained wet until collected and contained or treated in preparation for disposal Am. Comp. at 12-13.

### **STATUTORY AND REGULATORY PROVISIONS**

Section 9.1(d)(1) of the Illinois Environmental Protection Act (Act) provides that “[n]o person shall violate any provisions of Section 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto . . . .” 415 ILCS 5/9.1(d)(1) (2004).

The Code of Federal Regulations provides definitions including the following at 40 C.F.R. 61.141:

Asbestos means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthrophyllite and actinolite-tremolite.

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 A, subpart F, 40 C.F.R. 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.

Friable asbestos material means any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 C.F.R. Part 763, Section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. If the asbestos content is less than 10 percent as determined by a method other than point counting by polarized light microscopy (PLM), verify the asbestos content by point counting using PLM.

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 1 nonfriable ACM that has become friable, (c) Category 1 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.

Remove means to take out RACM or facility components that contain or are covered with RACM from any facility.

Renovation means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions. 40 C.F.R. 61.141

The Code of Federal Regulations provides at 40 C.F.R. 61.145:

(a) **Applicability.** To determine which requirements of paragraph (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 paragraph (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:

- (1) In a Facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM is:
  - (i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other Facility components, or
  - (ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

\* \* \*

(c) **Procedures for asbestos emission control.** Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:

- (1) Remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

\* \* \*

- (6) For all RACM, including material that has been removed or stripped:
  - (i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150.

Section 101.516 of the Board's procedural rules provides that "if the record, including pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516.

## **PEOPLE'S MOTION FOR SUMMARY JUDGMENT**

### **Count I**

The People assert that the complaint, answer and discovery pleadings filed in this cause, together with the depositions, documents and affidavits supporting this motion, establish all material facts necessary to prove liability against Vincennes on the two counts of the first amended complaint. Mot. SJ at 2.

The People argue they have shown that, at all times relevant to this complaint, Vincennes has been and remains the owner of the site. Mot. SJ at 4, citing Ans. at 1, ¶ 3 (admitting allegation). The People further argue they have shown that, at all relevant times, Batteast was the operator and manager of the renovation of the site. Mot. SJ at 4, citing Ans. at 1, ¶ 4 (admitting allegation). The People claim Vincennes has admitted that the respondents began renovation of the site on or around August of 2001. Mot. SJ at 4, ¶ 5 (admitting allegation).

The People claim that after discovering ACM in the basement of the site, Batteast contacted two asbestos contractors to bid on the removal of 3750 linear feet of ACM thermal system insulation, and 480 square feet of ACM surface material on the boiler. Mot. SJ at 5, citing Ans. at 1, ¶ 7 (admitting allegation). The People further claim they have shown that, after discovery of the suspect ACM, respondents continued to employ workers on the site to complete the renovation. Mot. SJ at 5.

The People contend they have shown that, on January 31, 2002, Vincennes refused to stop work and that Batteast continued to work on the premises. Mot. SJ at 6, citing Mot. SJ, Exh. A (Zappa affidavit); Mot. SJ, Exh. C (Miller deposition); Resp. Req. Admit at 2, ¶ 4. The People further claim they have shown that, on January 31, 2002, there were several workers performing work in and around the first floor of the site. Mot. SJ at 6, citing Mot. SJ, Exh. A (Zappa affidavit); Resp. Req. Admit at 2 (¶ 8) (admitting allegation). The People argue they have demonstrated that those workers were neither wearing personal protective equipment nor using emission control procedures. Mot. SJ at 6, citing Mot. SJ, Exh. A (Zappa affidavit); Resp. Req. Admit at 2 (¶ 8) (admitting allegation). The People further argue that have demonstrated that most of the windows and doors at the site were open to the atmosphere. Mot. SJ at 6, citing Mot. SJ, Exh. A (Zappa affidavit).

The People argue they have shown that the City of Chicago, which was providing some of the funding for the renovation of the site, was contacted after the inspection of the site on January 31, 2002. Mot. SJ at 6, citing Mot. SJ, Exh. A. The People further argue they have shown that, on February 5, 2002, the city issued a stop work order and that renovation work at the site stopped. Mot. SJ at 6, citing Ans. at 2 (¶ 15) (admitting allegation).

The People contend that they have demonstrated that an approved asbestos abatement and remediation plan began at the site on February 14, 2002, and was completed on February 19, 2002. Mot. SJ at 6, citing Ans. at 2 (¶ 16) (admitting allegation). The People also claim they have demonstrated that execution of the plan resulted in the removal of 2400 linear feet of

disturbed ACM and 6000 square feet of ACM tiles. Mot. SJ at 6, citing Ans. at 2 (¶ 17) (admitting allegation).

The People argue they have shown that, from December 2001 until at least February 5, 2002, Vincennes caused or allowed dry friable ACM to enter into the environment. Mot. SJ at 8, citing Mot. SJ, Exh. A (Zappa affidavit); Mot. SJ, Exh. B (Guidarelli-Pelletier affidavit); Mot. SJ, Exh. C (Miller deposition at 63); Resp. Req. Admit. at 2 (¶ 8); Ans. at 2 (¶ 17). The People further argue they have shown that, as owner of the site, Vincennes “caused, threatened, or allowed the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution in that dry, friable asbestos fibers were released into the atmosphere during the renovation activities.” Mot. SJ at 8, citing Mot. SJ, Exh. A (Zappa affidavit), Mot. SJ, Exh. C (Miller deposition at 63), Resp. Req. Admit at 2 (¶ 8), Ans. at 2 (¶¶ 15, 17).

The People conclude that there exists no genuine issue as to any material fact, and the Complainant is entitled to judgment on Count I on the pleadings, admissions on file, depositions, and affidavits. Mot. SJ at 9. Specifically, the People argue that Vincennes allowed dry friable asbestos to remain in a friable state, thus causing or allowing air pollution in violation of Section 9(a) of the Act and Section 201.141 of the Board’s regulations. *Id.*, citing 415 ILCS 5/9(a) (2004), 35 Ill. Adm. Code 201.141.

## **Count II**

The People argue they have shown that Vincennes, as owner of the site, “was the ‘owner’ of the renovation activities, as that term is defined in 40 C.F.R. 61.141.” Mot. SJ at 13, citing Ans. at 3 (¶ 31) (admitting allegation). The People further argue they have shown that Vincennes, as owner of the renovation activity, “failed to conduct a thorough inspection of the facility for the presence and location of asbestos before commencing renovation activities” in violation of asbestos standards and the Section 9.1(d)(1) of the Act. Mot. SJ at 15, citing 415 ILCS 5/9.1(d)(1) (2004), 40 C.F.R. 61.145(a), Mot. SJ, Exh. A (Zappa affidavit), Mot. SJ, Exh. C (Miller deposition at 30, 63), Ans. at 1-2 (¶¶ 5, 17).

The People further argue they have demonstrated that Vincennes “failed to remove all RACM from a facility being renovated or demolished before an activity began that would break up, dislodge, or similarly disturb the material or preclude access for subsequent removal” in violation of asbestos standards and the Section 9.1(d)(1) of the Act. Mot. SJ at 15-16, citing 415 ILCS 5/9.1(d)(1) (2004), 40 C.F.R. 61.145(c)(1), Mot. SJ, Exh. A (Zappa affidavit), Mot. SJ, Exh. C (Miller deposition at 30, 63), Ans. at 1-2 (¶¶ 5, 17).

The People further argue they have shown that Vincennes “failed to adequately wet all RACM and ensure that it remained wet until collected and contained or treated in preparation for disposal” in violation of asbestos standards and Section 9.1(d)(1) of the Act. Mot. SJ at 16, citing 415 ILCS 5/9.1(d)(1) (2004), 40 C.F.R. 61.145(c)(6), Mot. SJ, Exh. A (Zappa affidavit), Resp. Req. Admit at 2 (¶ 8). The People thus conclude that “[t]here exists no genuine issue as to any material fact, and the Complainant is entitled to judgment on Count II on the pleadings, admissions on file, depositions, and affidavits.” Mot. SJ at 16.

**RESPONDENT VINCENNES' RESPONSE**

Vincennes states that the People are aware that a "Phase I environmental assessment" performed before the beginning of the renovation did not indicate that asbestos was present there. Resp. at 1 (citing to deposition not filed as exhibit to motion or response). Vincennes states that Batteast never told Gregory Miller, the owner's representative, that the environmental consultant Hygieneering had been hired regarding asbestos at the site. Resp. at 2, citing Resp. at 2, Exh. A (acceptance of Hygieneering proposal). Vincennes further states that Hygieneering's correspondence went to Batteast and shows no contact with Mr. Miller. Resp. at 2, citing Mot. SJ, Exh. B (Guidarelli-Pelletier affidavit and attachments). Vincennes further states that "[n]one of the correspondence, contracts, invoices, tests results, etc. between Hygieneering, Inc., and Batteast Construction Company were forwarded to, nor shared with Mr. Miller." Resp. at 2. Vincennes refers to the minutes from a series of meetings apparently concerning the site and argues that none of these minutes include Mr. Miller in attendance. *See* Resp., Exh. B. When Mr. Miller was notified of "a *suspicion* of the presence of asbestos," Vincennes states that it simply deferred to the contractor to do what was necessary. Resp. at 2 (citing to deposition not filed as exhibit to motion or response) (emphasis in original).

Vincennes refers to those minutes to claim that the basement area of the site had been tested for asbestos on December 18, 2001, and that test results were expected within three to five days. Resp. at 2, Exh. B. Vincennes further claims that the minutes of the January 2, 2002 meeting show that Batteast "will close down the job" as a result of positive tests for asbestos. Resp. at 2, Exh. B. Vincennes points to the minutes of a January 16, 2002 meeting to show that "[a]batement contractors have been requested to make proposals for asbestos abatement." *Id.* Vincennes also points to the minutes of a January 30, 2002 meeting to show that Batteast "will close down all interior work." *Id.* Vincennes further argues that none of the Construction Meeting Minutes make reference to any work in progress. Resp. at 2.

Vincennes argues that the reference in the January 30, 2002 minutes to closing down interior work came the day before Mr. Zappa's inspection on behalf of the Agency. Resp. at 3; *see* Mot. SJ, Exh. A. Vincennes contends that Mr. Zappa's inspection did not constitute notice that the site contained suspected ACM. Resp. at 3-4. Vincennes notes Mr. Zappa's affidavit states that Mr. Miller refused on January 31, 2002, to stop work on the site but does not affirmatively state that Mr. Zappa actually spoke with Mr. Miller on that date. Resp. at 3; *see* Mot. SJ, Exh. A. Vincennes claims that:

Mr. Zappa merely left his cell phone number with an employee of Batteast Construction with no indication of his official capacity. He did not display any credentials of his position as an Inspector for the Illinois Environmental Protection Agency; he was not driving a vehicle with the State of Illinois insignia; and left a mere verbal notice that the work site would have to be shut down. Resp. at 3-4 (citing to deposition not filed as exhibit to motion or response).

Vincennes asserts that it did not have notice of the presence of ACM until "[a] written Stop Work order was received by Mr. Miller on February 5, 2002." Resp. at 4, Exh. C.



Vincennes further suggests that the People are aware “that the premises were boarded up and secure.” Resp. at 2 (citing to deposition not filed as exhibit to motion or response). Vincennes notes that, on the February 5, 2002 date of the city’s Stop Work order, a city inspector received assurance that the security of the site would be maintained.” Resp. at 4, Exh. D.

In conclusion, Vincennes argues that the pleadings and exhibits “establish that genuine issues of fact remain as to whether the Respondent failed to inspect and to follow proper emission control procedures when asbestos was discovered.” Resp. at 4.

### **PEOPLE’S REPLY**

The People argue that Vincennes’ response is flawed by making allegations that are not supported by affidavits. Reply at 1. The People further argue that Vincennes has attached to its response several documents that are not authenticated as business records or on any similar basis. Reply at 1-2, *see* 35 Ill. Adm. Code 101.626(e). Accordingly, the People claim that the Board should disregard those assertions and documents in deciding their motion for summary judgment. Reply at 2.

The People claim that the assertions and documents attached by Vincennes actually support the motion for summary judgment. Reply at 2. The People note that Vincennes’ Exhibit A was also submitted with its motion. Reply at 2; Mot. SJ, Exh. B (Hygieneering proposal). The People argue that this document dated December 10, 2001 shows knowledge of the presence of asbestos at the site before any Agency inspection. Reply at 2.

The People further argue that the construction meeting minutes attached by Vincennes to its response as Exhibit B, had never been produced in the course of discovery, but nevertheless show knowledge of the presence of asbestos before any Agency inspection. Reply at 2.

The People further note that the four sets of minutes include initials or abbreviations showing that a number of persons or entities received copies of them, and that any of the several persons copied could have been Gregory Miller, the owner’s representative, or some other person representing Vincennes. Reply at 2.

The People stress that the construction meeting minutes actually show that the site would be closed during the performance of the asbestos abatement and that the admissions of fact and deposition statements show that workers were on the premises at least through January 31, 2002, and that the job was not shut down until the City of Chicago issued a stop work order on February 5, 2002. Reply at 3.

The People also rely on Vincennes’ Exhibit D to dispute the claim that the site had been secured, stressing that the writer states that the site was “unsecured” and that this lack of security allowed access to the site. Reply at 2; Resp., Exh. D.

Finally, the People note Vincennes had argued that the People’s affidavits had not been prepared by an expert or experts qualified regarding the presence of asbestos. Reply at 3; Resp.

at 2. The People respond that “[n]o experts are necessary as the Respondent has clearly admitted in its Answer that asbestos was on the premises.” Reply at 3.

### **DISCUSSION**

The Board’s procedural rules provide that, “if the record, including pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.” 35 Ill. Adm. Code 101.516. 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 & Dowd, Ltd. V. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 270 (1998). Summary judgment “‘is a drastic means of disposing of litigation,’ and therefore it should be granted only when the movant’s right to the relief ‘is clear and free from doubt.’” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

The Board first finds that Vincennes’ response to the motion for summary judgment lacks a supporting affidavit or affidavits and that it includes documents that have not been authenticated as business records or on any other grounds. The Board’s procedural rules provide that “[a] writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event.” 35 Ill. Adm. Code 101.626(e) (Admission of Business Records). However, “[to] be admissible, the writing or record will have been made in the regular course of business, provided it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter.” 35 Ill. Adm. Code 101.626(e). Vincennes did not adequately show that exhibits A-D meet Board’s articulated standard for admission of business records. Accordingly, the Board will not consider Vincennes’ exhibits A-D, in determining whether to grant the Peoples’ motion. However, the Board notes that Exhibit A submitted by Vincennes is identical to a document submitted as part of an exhibit to the People’s motion for summary judgment and authenticated by affidavit. Mot. SJ, Exh. B (affidavit and authenticated exhibits of Margaret Guidarelli-Pelletier). The Board thus has an independent basis on which it may consider that exhibit, and the information contained therein is part of the record.

As previously stated, summary judgment is a drastic means of disposing of litigation, and should only be granted if the movant’s right to the relief is free from doubt. The Board has extensively reviewed the record and arguments before it. When considering the available record strictly against the movant and in favor of the opposing party, the Board cannot conclude that this case presents no genuine issue of material fact, or that the People are entitled to judgment as a matter of law. The motion for summary judgment is therefore denied, and the Board directs the hearing officer to proceed expeditiously to hearing on the two counts of the amended complaint.

### **PROPOSED SETTLEMENT WITH BATTEAST**

On December 30, 2005, the People and Batteast filed a stipulation and proposed settlement, accompanied by a request for relief from the hearing requirement of Section 31(c)(1) of the Act (415 ILCS 5/31(c)(1) (2004)). This filing is authorized by Section 31(c)(2) of the Act (415 ILCS 5/31(c)(2) (2004)). See 35 Ill. Adm. Code 103.300(a). The Board provided notice of the stipulation, proposed settlement, and request for relief. The newspaper notice was published in the *Chicago Sun-Times* on January 5, 2006. The Board did not receive any request for hearing. The Board grants the parties' request for relief from the hearing requirement. See 415 ILCS 5/31(c)(2) (2004); 35 Ill. Adm. Code 103.300(b).

Section 103.302 of the Board's procedural rules sets forth the required contents of stipulations and proposed settlements. 35 Ill. Adm. Code 103.302. These requirements include stipulating to facts on the nature, extent, and causes of the alleged violations and the nature of Batteast's operations. Section 103.302 also requires that the parties stipulate to facts called for by Section 33(c) of the Act (415 ILCS 5/33(c) (2004)). The People and Batteast have satisfied Section 103.302. Batteast admits the alleged violations and agrees to pay a civil penalty of \$1,500. The Board accepts the stipulation and proposed settlement.

### **CONCLUSION**

The Board denies the People's motion for summary judgment against Vincennes in its entirety. The hearing officer is directed to proceed expeditiously to hearing. The Board accepts the stipulation and proposed settlement filed on December 30, 2005, by the People and Batteast.

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

### **ORDER**

1. The Board accepts and incorporates by reference the stipulation and proposed settlement entered into by the People and Batteast.
2. Batteast must pay a civil penalty of \$1,500 no later than Monday, April 17, 2006, which is the first business day after the 30th day after the date of this order. Batteast must pay the civil penalty by certified check or money order, payable to Environmental Protection Trust Fund. The case number, case name, and Batteast's social security number or federal employer identification number must be included on the certified check or money order.

3. Batteast must send the certified check or money order to:

Illinois Environmental Protection Agency  
Fiscal Services Division  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

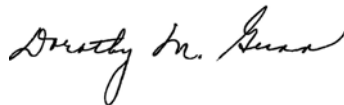
4. Penalties unpaid by Batteast within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2004)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2004)).
5. Batteast must cease and desist from the alleged violations.

IT IS SO ORDERED.

Board Member A.S. Moore dissented.

With regard to Batteast and the Board's acceptance of its settlement with the People, 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) (2004); 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 interim opinion and order on March 16, 2006, by a vote of 3-1.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board