

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

v.

GENERAL WASTE SERVICES, INC.,

Respondent.

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JUL 02 2008

PCB No. 07-45
(Enforcement)

STATE OF ILLINOIS
Pollution Control Board

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent, GENERAL WASTE SERVICES, INC. (hereinafter "GWS"), by its attorney, Thomas J. Immel, of Feldman, Wasser Draper and Benson, hereby moves for Summary Judgment in the above entitled cause, and, in support of said motion, states as follows:

1. This Motion for Summary Judgment is brought pursuant to this Board's Procedural Rule 101.516.
2. This case has not yet been set for hearing.
3. The Complaint in this cause alleges that Respondent failed to adequately wet RACM material while it was being removed on August 4, 2005.
4. The allegedly "too dry" ceiling material being removed by Respondent on August 4, 2005 did not contain asbestos, and was not RACM, as confirmed by two (2) samples of said ceiling material collected by the EPA Inspector on that date and tested

FELDMAN, WASSER
DRAPER & COX
1307 S. Seventh St.
Post Office Box 2148
Springfield, IL 62705
217/544-3403

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by EPA. EPA's lab reports that the test results were Negative for asbestos-containing material. During the course of discovery in this matter, Complainant has turned over to Respondent the Chain of Custody and laboratory results for the three (3) samples collected by its Inspector on August 4, 2005, a true copy of which is attached to this Motion as Exhibit A and incorporated by reference herein as though fully set forth.

5. The sole sample collected by the EPA Inspector that did test positive for ACM was collected from a stored drum of wetted material previously removed from another location in the building at a time and place remote from the area inspected on August 4, 2005, at which time and place the EPA Inspector was not even present. Nothing about the belated condition of the drummed material would or could speak to its degree of "wetness" at the time the material was gathered and placed in the drum. See Exhibit A attached hereto.

6. Because the material collected and sampled in the actual work area was not ACM, and because the ACM sample found in the disposal drum in the waste storage area on site was already properly containerized for disposal, there is no conceivable basis for the Complaint's assertion that Section 9(a) of the Act might be violated, particularly in light of the fact that the Agency Inspector's report states that **"the containment that General Waste had constructed was excellent"**. (Quotation from page 2 of Memorandum prepared by EAP Inspector on August 17, 2005 and turned over to Respondent during discovery.) Of course, it is the integrity of the containment that assures that any emissions of ACM are controlled/captured during the abatement process.

7. Per this Board's Procedural Rule 101.516(b), upon a demonstration that there is no genuine issue of material fact, the Board will grant summary judgment to a moving party; and it has often done so. See, for example, *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill.2d 90, 607 N.E.2d 1204 (1992); *McDonald's Corporation v. Illinois EPA*, PCB 04-14 (2004); *IEPA v. Ted Harrison & Gerald Gill*, PCG 05-08 (2006).

8. Of course, as the Board has noted in its opinions, summary judgment is indeed a drastic means of disposing of litigation, and only to be applied in a proper case. This is a proper case because it is axiomatic that the alleged failure to adequately wet down ACM prior to removal is an inapplicable regulatory requirement where the material in question is not ACM, the indisputable fact in this case as demonstrated by EPA's own laboratory report; and the accompanying alleged 9(a) violation is bottomed on the claim that it was indeed ACM that Respondent supposedly failed to adequately moisten prior to removal. Thus, all of the alleged violations evaporate in the face of the disclosure that there was no ACM in the first place. There is indeed no material issue of fact in dispute because this is not an "asbestos case" to begin with. Respondent is entitled to summary judgment as a matter of law.

WHEREFORE, Respondent prays that it be granted Summary Judgment, that the above entitled Complaint be dismissed with prejudice, and that Respondent be awarded its costs.

Respectfully submitted,

GENERAL WASTE SERVICES, INC., Respondent

By: 

Thomas J. Immel, Atty. Reg. #1301209

FELDMAN, WASSER
DRAPER & COX
1307 S. Seventh St.
Post Office Box 2148
Springfield, IL 62705
217/544-3403

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CERTIFICATE OF SERVICE

The undersigned, of FELDMAN, WASSER, DRAPER & COX, hereby certifies that a copy of the foregoing Motion for Summary Judgment was served upon each of the addressees hereinafter set forth by enclosing the same in an envelope plainly addressed to each of the said addresses, with postage fully prepaid, and depositing same in a U.S. Mail Box in Springfield, Illinois on this 30th day of June, 2008:

Michael D. Mankowski
Illinois Attorney General's Office
Environmental Bureau
500 South 2nd Street
Springfield, IL 62706

and that the original and ten (10) copies were mailed by First Class Mail, with postage fully prepaid, to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph
Chicago, IL 60601



Thomas J. Immel

Chain of Custody

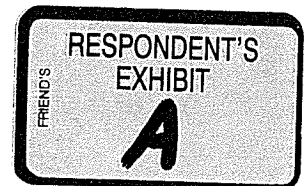
260568

Laboratory: STAT Analysis	Contact: Joe Zappa
Address: 3355 West Harrison, Suite B Chicago, IL 60612	Phone: 618.346.5153
Project Name: Memorial Hospital Apartment Complex 3701 Memorial Dr	Contractor/Owner: General Waste Service P.O. Box 1408 Alton IL 62002
Project Address: Belleville IL	Owner/Contractor Address:
Collector: Joe Zappa	ASHERA Inspector Number

Sample Identification	Date Collected	Location/Description
83 8/4/05/01	8/4/05	South West Room 1st floor
02	8/4/05	Hallway Second floor
03	8/4/05	Inside of Bag in Bag out Area

Released by (Signature)	Date/Time Released	Delivery Method	Received by (Signature)	Co/Agency Affiliation	Date/Time	Condition Noted
<i>Joe Zappa</i>	8/11/05	UPS	<i>D. Halford</i>	STATLAB	8/10/05	

Disposition of Samples: Return to Dale Halford, IEPA, P.O Box 19276, Springfield, IL 62794-9276
 Remarks, Special Instructions: Please fax results to Joe Zappa @ 618.346.5155



ASBESTOS ANALYSIS BY POLARIZED LIGHT MICROSCOPY

Method: EPA-600/M4-82-020

Illinois Environmental Protection Agency

P.O. Box 19276

Springfield, IL 627949276

Phone: (217)-557-2478

Fax: (217)-782-1875

Client Reference:

Date Received: 08/10/2005

Location: Memorial Hospital Apt Complex Belleville, IL

Date Analyzed: 08/10/2005

STAT Batch No.: 260568

Date Reported: 08/10/2005

STAT Client No.: 1977

Turn Around Time: 24 Hour

Laboratory Sample	Client Sample Number	Asbestos Components (%)	Non-Asbestos Components (%)
260568001	JZ 8/4/05 01	ND	Cellulose 10-15% Binder 85-90%
260568002	JZ 8/4/05 02	ND	Binder 99-100%
260568003	JZ 8/4/05 03	Chrysotile 1-5%	Binder 95-99%

ND = Asbestos Not Detected. NA = Not Analyzed NS = Not Submitted

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The information contained in this report and any attachments is confidential information intended only for the use of the individual or entities named above. The results of this report relate only to the samples tested. If you have received this report in error, please notify us immediately by phone. This report shall not be reproduced, except in its entirety, unless written approval has been obtained from the laboratory.

