



motion for summary judgment. Bagent v. Blessing Care Corp., 224 Ill. 2d 154, 162-63, 862 N.E.2d 985 (2007); Willett v. Cessna Aircraft Co., 366 Ill. App. 3d 360, 368, 851 N.E.2d 626 (1st Dist. 2006).

### **FACTS**

On December 8, 2006, the People filed a one-count complaint (Comp.) against General Waste. The complaint concerns General Waste's alleged asbestos abatement project at a two-story apartment building located at 3701 Memorial Drive in Belleville, St. Clair County. Comp. at 2. The complaint alleges that General Waste violated the Environmental Protection Act (Act) (415 ILCS 5/9.1(d) (2006)) and the United States Environmental Protection Agency's National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos (40 C.F.R. 61.145(c)(3), (6))<sup>1</sup>. Comp. at 2-6. According to the complaint, General Waste violated these provisions by failing to adequately wet regulated asbestos-containing material (RACM) during its removal at the apartment building and by failing to adequately wet and keep wet all RACM removed during renovation until such asbestos-containing waste materials were collected and contained in leak-tight wrapping in preparation for disposal. Comp. at 6.

### **GENERAL WASTE'S MOTION FOR SUMMARY JUDGMENT**

General Waste argues that summary judgment is appropriate as the facts demonstrate that the alleged violations did not occur. Mot. at 3. General Waste maintains that the complaint alleges that General Waste failed to adequately wet the RACM material while the material was being removed on August 4, 2005. Mot. at 1. General Waste asserts that the material being removed on August 4, 2005 did not contain asbestos and was not RACM. *Id.* General Waste bases this assertion on two samples of material collected by the Illinois Environmental Protection Agency (IEPA) inspector. Mot. at 1, Exh. A. Those two samples tested negative for asbestos-containing material. *Id.* According to General Waste, a third sample, which did test positive, was removed from a stored drum of wetted material previously removed from another location in the building remote from the area inspected on August 4, 2005. Mot. at 2.

General Waste argues because the material collected and sampled from the actual work area was not ACM, there is no basis for an allegation that Section 9(a) of the Act (415 ILCS 5/9(a) (2006))<sup>2</sup> was violated. Mot. at 2. General Waste asserts that the IEPA inspector noted that "the containment that General Waste had constructed was excellent" and the integrity of containment assures that any emissions of ACM are controlled during the abatement process. Mot. at 2, Exh. A.

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<sup>1</sup> The NESHAP for asbestos (40 C.F.R. 61.145(c)(3), (6)) was promulgated by the United States Environmental Protection Agency under Section 112 of the federal Clean Air Act (CAA) (42 U.S.C. § 7412). Section 9.1(d)(1) of the Act prohibits anyone from violating any federal regulation adopted under Section 112 of the CAA. Consequently, any violation of the asbestos NESHAP is also a violation of Section 9.1(d)(1) of the Act. *See* 415 ILCS 5/9.1(d) (2006).

<sup>2</sup> The Board notes that the complaint does not allege a violation of Section 9(a) of the Act (415 ILCS 5/9(a) (2006)) but only of Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2006)).

General Waste maintains that this is a proper case for summary judgment because the alleged failure to adequately wet ACM prior to removal is inapplicable, as the material being removed did not contain ACM. Mot. at 3. General Waste asserts this is an indisputable fact as the IEPA's own laboratory reports demonstrate that the material was not ACM. *Id.* General Waste argues that the alleged violations cannot stand given that the material was not ACM. *Id.*

### **PEOPLE'S RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT**

The People argue that genuine issues of material fact exist in this proceeding based on the pleadings and the exhibits; thus, the People ask that the Board deny the motion for summary judgment. Resp. at 2. The People assert that Farmer Environmental Services (Farmer Environmental) performed a building survey on May 11, 2005. Resp. at 3 and Exh. 1. The People claim that Farmer Environmental identified and sampled 28 suspect building materials. *Id.* According to the People, all apartments in the building contained drywall ceilings covered with textured spray material that Farmer Environmental classified and sampled. Resp. at 3-4, Exh. 1 and 2. The seven samples were tested for asbestos and five of the samples tested positive for 25% total asbestos and two tested positive for 20% total asbestos. Resp. at 4, Exh. 1.

The People assert that on August 3, 2005, General Waste began removing the drywall ceiling material and placed the material in lined fiber drums. Resp. at 4, Exh. 2. The drums were moved to a room located on the first floor at the end of the day on August 3, 2005. *Id.* The People claim that on August 4, 2005, the removal of drywall ceiling material continued and the material was placed in lined fiber drums. Resp. at 4, Exh. 3.

The People further assert that the IEPA inspector inspected the property on August 4, 2005, and took three samples of material being removed, two in the room where the material was being removed and a third from the lined fiber drums. Resp. at 4-5, Exh. 3 and 4. The People concede that the test results for the two samples from the room at which General Waste was removing the material were a non-detect for asbestos. Resp. at 5. However, the People argue that the third sample tested positive for one to five percent chrysotile asbestos and the material was not adequately wet. *Id.*

The People argue that a genuine issue of material fact exists as to whether the material removed by General Waste was ACM. Resp. at 5. The People assert that General Waste's argument that the material was not ACM is flawed because the argument is not based on the evidence available. *Id.* The People maintain that General Waste relies on one set of samples taken by the IEPA inspector to support the position that the material was not ACM, but earlier testing classified the ceiling material as a homogenous area of ACM containing 20% to 25% asbestos. Resp. at 5-6. The People opine that the existence of that second report contradicts General Waste's argument. Resp. at 6.

The People claim that ten samples of ceiling material were taken at the site and eight of the ten tested positive for a regulated amount of asbestos. Resp. at 6. The People assert that General Waste's assertion that the material was not ACM can be rebutted and the pleadings on file along with exhibits to the response establish that there exists a genuine issue of material fact. *Id.* Therefore, the People maintain summary judgment should be denied. *Id.*

### **DISCUSSION**

The exhibits attached to both the motion and the response indicate that there is a genuine issue of material fact concerning the material being removed on August 4, 2005. Although two samples tested non-detect for asbestos, other evidence indicates that asbestos was present throughout the building. In fact, eight samples, according to the People, tested positive for asbestos. Further, according to the facts as presented by the People, one sample taken on August 4, 2005, tested positive for asbestos. Thus, General Waste has presented facts that if proven would appear to refute the allegations of the complaint; however, facts do exist that if proven could lead to a finding of violation. Examining all materials submitted in the light most favorable to the People (Bagent, 224 Ill. 2d at 162-63; Willett, 366 Ill. App. 3d at 368), the Board cannot find that General Waste is entitled to judgment as a matter of law. The Board therefore finds that genuine issues of material fact exist and summary judgment is not appropriate. The Board denies the motion for summary judgment and directs the parties to proceed to hearing.

### **CONCLUSION**

The motion for summary judgment is denied as the Board finds that genuine issues of material fact exist and summary judgment is not appropriate. The Board directs the parties to proceed to hearing on the matter.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 30, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board