BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**PCB No. 07-45**
	)	**(Enforcement)**
GENERAL WASTE SERVICES, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

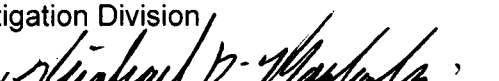
PLEASE TAKE NOTICE that on August 2, 2010, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S CLOSING ARGUMENT AND POST-HEARING BRIEF, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

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

BY: 

Michael D. Mankowski
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: August 2, 2010

CERTIFICATE OF SERVICE

I hereby certify that I did on August 2, 2010, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and COMPLAINANT'S CLOSING ARGUMENT AND POST-HEARING BRIEF upon the persons listed on the Service List.

Michael D. Mankowski
Assistant Attorney General

SERVICE LIST

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Illinois Pollution Control Board
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PEOPLE OF THE STATE OF ILLINOIS,	)	
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GENERAL WASTE SERVICES, INC., an Illinois corporation,	)	
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COMPLAINANT'S CLOSING ARGUMENT AND POST-HEARING BRIEF

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby presents its Closing Argument and Post-Hearing Brief.

I. INTRODUCTION

On October 28, 2009, and May 11, 2010, an evidentiary hearing was held to determine liability for the violations alleged by the State in its Complaint, filed in this matter on December 8, 2006. During the hearing, testimony was given by Joseph Zappa ("Zappa") of the Illinois Environmental Protection Agency ("Illinois EPA"), Calvin Johnson ("Johnson") of General Waste Services, Inc. ("General Waste"), and Kenneth Stevens ("Stevens"), also employed by General Waste. The People entered six Exhibits, all of which were admitted with no objection from the Respondent.[1]

The People's one-count Complaint against General Waste alleges violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1-58 (2008), and National Emission Standards for Hazardous Air Pollutants ("NESHAP") for asbestos, 40 C.F.R. Part 61, Subpart

[1] 10/28/09 Hearing Transcript p. 6

M, due to the improper removal of asbestos containing material ("ACM") at a two-story apartment building located at 3701 Memorial Drive, Belleville, St. Clair County, Illinois ("Memorial Drive facility" or "site"). In particular, Count I alleges that General Waste violated Section 9.1(d) of the Act, 415 ILCS 9.1(d)(2008) and 40 C.F.R. 61.145(c)(3) and (6) by failure to adequately wet asbestos containing waste material at the site and keep the asbestos material wet until it was collected and contained in leak-tight wrapping in preparation for disposal.

People's Exhibit 1 consists of the resume of Joseph Zappa. People's Exhibit 2 consists of the notification form submitted by General Waste to the Illinois EPA for an asbestos renovation project to be conducted from August 1 through August 12, 2005, at the Memorial Drive facility. Exhibit 3 consists of an inspection report created by Mr. Zappa after his August 4, 2005 inspection of the Memorial Drive facility. Exhibit 4 is a group exhibit consisting of all of the photographs taken by Mr. Zappa during his August 4, 2005 site inspection. The photographs fairly and accurately depict the Memorial Drive facility as it existed at the time of Zappa's inspection. Exhibit 5, consists of an asbestos inspection report created after an asbestos survey was conducted at the Memorial Drive facility on May 11, 2005, by Farmers Environmental Services, LLC ("Farmers"). Exhibit 6 consists of the project completion report created by General Waste after completing the renovation at the Memorial Drive facility.

The violations alleged by the People turn on two factors 1) whether the ceiling material removed by General Waste at the Memorial Drive facility was Regulated Asbestos Containing Material ("RACM") and 2) whether the material, if found to be RACM, was adequately wetted during removal and kept adequately wet until collected for disposal. The totality of the evidence present in the record shows that the ceiling material removed by General Waste was in fact RACM. The evidence shows that General Waste failed to adequately wet all RACM as it was removed, and failed to keep the material adequately wet until it was containerized for disposal

II. BURDEN OF PROOF

In an enforcement action such as this, the People bear the burden of proving, by a preponderance of the evidence, that the alleged violation occurred. *People v. Blue Ridge Construction Corp.*, PCB 02-115, slip opinion at 12; *see also Processing and Books, Inc. v. PCB*, 64 Ill. 2d 68, 75-76, 351 N.E.2d 865 (1976). Under the circumstances of this case, the People must therefore establish that it is more likely than not that 1) the regulatory threshold quantity of RACM existed at the facility, 2) Respondent disturbed, stripped or removed RACM at the facility without adequately wetting it, and 3) Respondent failed to keep the RACM wet until it was collected or contained for disposal. *Blue Ridge*, PCB 02-115 at 12; *See also Village of South Elgin v. Waste Management of Illinois, Inc.*, PCB 03-106, slip op. at 3 (Feb. 20, 2003).

III. SUMMARY OF THE RELIEF SOUGHT BY COMPLAINANT

Complainant seeks a finding of liability on Count I of the Complaint, and assessment of a civil penalty in the amount of $30,000. Complainant also requests that the Board order Respondent to cease and desist from future violations of the Act and Illinois Pollution Control Board regulations.

IV. FACTUAL BACKGROUND

On July 13, 2005, General Waste submitted an asbestos abatement notification form ("notification form" or "form") to Illinois EPA.[2] The notification form described an asbestos removal project to be conducted at the Memorial Drive facility from August 1, 2005 through August 12, 2005. General Waste was listed as the asbestos removal contractor. The notification form also specified that an estimated 6,714 square feet of RACM was to be

[2]People's Exhibit 2

removed from the site. Tim Wieneke of General Waste signed the notification form and certified that the information in the notification was correct.

Prior to submittal of the July 13th asbestos abatement notification, on May 11, 2005, the Memorial Drive facility was inspected by Farmers.[3] During the inspection, Farmers observed textured, spray on ceiling plaster present on the ceilings at the site. Farmers classified all ceiling material covered in the textured coating as a homogeneous area. Farmers took seven (7) samples of the off-white/tan textured coating which was found throughout the site. The seven (7) samples were numbered SPA-1 through SPA-7. All seven samples were tested using point counting by polarized light microscopy ("PLM") and found to contain greater than 1% asbestos.

On August 1, 2005, General Waste began the asbestos removal project at the Memorial Drive facility.[4] On August 3, 2005, General Waste began removing the asbestos containing textured ceiling material located within the building. On August 4, 2005, General Waste continued to remove the ceiling material. At approximately 9:30 a.m. on August 4, 2005, Illinois EPA inspector Joseph Zappa arrived at the Memorial Drive facility to conduct a compliance inspection.[5] Zappa inspected the first and second floors of the building.[6] During his inspection, Zappa observed debris that he suspected was asbestos containing material. Prior to leaving the site, Zappa collected samples of debris he found at the site, and took photographs of the conditions that he observed.[7] The violations alleged by the People stem from Mr. Zappa's

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[3]People's Exhibit 5

[4]People's Exhibit 6

[5]*Id. See also* People's Exhibit 3

[6]People's Exhibit 3

[7]*Id*, People's Exhibit 4.

inspection.

V. APPLICABLE STATUES AND REGULATIONS

A. Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2004)

(d) No person shall:

(1) 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;

B. 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:

* * *

(4) In a facility being renovated . . . all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed 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:

* * *

(3) When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation.

(I) In renovation operations, wetting is not required if:

(A) The owner or operator has obtained prior written approval from the Administrator based on a written application that wetting to comply with this paragraph would unavoidably damage equipment or present a safety hazard; and

(B) The owner or operator uses of the following emission control methods:

(1) A local exhaust ventilation and collection system designed and operated to capture the particulate asbestos material produced by the stripping and removal of the asbestos materials. The system must exhibit no visible emissions to the outside air or be designed and operated in accordance with the requirements in § 61.152.

* * *

(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; and

(ii) Carefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material.

VI. ZAPPA INSPECTION

On August 4, 2005, the Memorial Drive facility was inspected by Illinois EPA inspector Joseph Zappa. During the first day of the hearing, October 28, 2009, Zappa, testified about what he observed during his inspection.

Zappa has worked for the Illinois EPA for eleven years.[8] From June of 1999 through May of 2006, Zappa was employed as an Environmental Specialist III and served as an asbestos inspector under the Illinois EPA Bureau of Air.[9] As an asbestos inspector, Zappa conducted approximately 120 asbestos compliance inspections a year.[10] The purpose of these inspections was to determine if individuals were complying with state and federal laws including, but not limited to the Act and the asbestos NESHAP. Prior to becoming an asbestos inspector for the Illinois EPA, Zappa was employed as a licensed asbestos worker from November of 1995 through June of 1999.[11] While employed as an asbestos inspector, Zappa acquired his supervisor license as well as his asbestos building inspector license.[12]

On August 4, 2005, Zappa arrived at the Memorial Drive Facility at approximately 9:30 a.m.[13] After exiting his vehicle, Zappa had a discussion with Johnson, the project supervisor, who had just exited the building to reset an electrical breaker which had been tripped.[14] After speaking with Johnson, Zappa donned his protective gear and entered the building. While inside the building, Zappa examined both the first and second floors. General Waste had set up a containment system within the building by lining the walls and floors with six mil poly sheeting and setting up negative air machines to help keep asbestos fibers from exiting the

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[8]People's Exhibit 1, 10/28/09 Hearing Transcript p. 9

[9]People's Exhibit 1, 10/28/09 Hearing Transcript p. 9

[10]10/28/09 Hearing Transcript p. 16

[11]People's Exhibit 1, 10/28/09 Hearing Transcript pp. 10-12

[12]People's Exhibit 1, 10/28/09 Hearing Transcript p. 12-15

[13]People's Exhibit 6

[14]10/28/09 Hearing Transcript p. 26, 5/11/10 Hearing Transcript pp. 46-47

containment.[15]

On the first floor, Zappa observed a large amount of dry, friable ceiling material located in piles on the floor in a room located on the southwest side of the building.[16] The material had been "torn down and it was on the floor in various sizes. This material was completely dry."[17] Zappa believed the material to be part of the estimated 6,714 square feet of RACM listed on the General Waste notification form.[18] Zappa photographed the material and took a bulk sample of some of the material, labeling it as "JZ 8/4/05 01."[19] Zappa did not come into contact with any General Waste employees while on the first floor. During the May 11, 2010 hearing, Johnson testified that at the time of Zappa's inspection, General Waste employees were working exclusively on the second floor.[20] No General Waste employees worked on the first floor on the morning of August 4, 2005.[21]

In order to inspect the second floor, Zappa ascended a flight of stairs.[22] At the top of the stairs, Zappa observed Stevens, a General Waste employee, using a hose to add water to a row of fiber drums located in the second floor hallway. The drums were lined with a poly bag.[23]

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[15]People's Exhibit 3, People's Exhibit 6 (August 1 through August 5, 2005 Project Logs), 10/28/09 Hearing Transcript p. 26

[16]10/28/09 Hearing Transcript pp. 30-31

[17]10/28/09 Hearing Transcript p. 30, Zappa's description of debris found at Memorial Drive facility

[18]10/28/09 Hearing Transcript pp. 34-35, People's Exhibit 2

[19]People's Exhibit 3, 10/28/09 Hearing Transcript pp. 37 & 46, Peoples Exhibits 4a-4o

[20]5/11/10 Hearing Transcript pp. 33 & 61

[21]5/11/10 Hearing Transcript pp. 61-62

[22]10/28/10 Hearing Transcript p. 32

[23]People's Exhibit 4dd

General Waste was using the lined drums to store the ceiling material prior to disposing of it as asbestos containing waste.[24] The drum contained ceiling material which had been removed on the second floor. Zappa walked past Stevens, exclaiming "It's a little late for that, isn't it?"[25] While on the second floor, Zappa witnessed General Waste employees removing ceiling material without any water. They were letting the material drop to the floor, collecting it, then putting into the lined fiber drums. Prior to being placed in the drums, the material was lying in large piles on the floor. Although an airless sprayer was present on the second floor, Zappa observed that the material was dry and friable. Zappa photographed the material and took a bulk sample in the second floor hallway which he labeled as "JZ 8/4/05 02."[26]

After observing the second floor, Zappa inspected the first floor load out room, where General Waste stored the drums of removed ceiling material.[27] While in the loadout room, Zappa opened one of the barrels.[28] The barrel contained ceiling material that was dry and friable.[29] There was no evidence of water in the leak tight drum. Zappa photographed the material and took a bulk sample from the drum, labeling it "JZ 8/4/05 03."[30]

After his inspection, Zappa sent the three samples to a lab for testing. Samples JZ 8/4/05 01, JZ 8/4/05 02, and JZ 8/4/05 03 were all sampled using the PLM method.[31] The PLM

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[24]5/11/10 Hearing Transcript p. 28

[25]5/11/10 Hearing Transcript p. 106

[26]People's Exhibit 3, People's Exhibits 4cc-4gg

[27]5/11/10 Hearing Transcript p. 25

[28]10/28/09 Hearing Transcript pp. 37, 43

[29]10/28/09 Hearing Transcript p. 43, People's Exhibits 4z and 4aa

[30]People's Exhibit 3

[31]People's Exhibit 3

testing did not detect asbestos in samples JZ 8/4/05 01 and JZ 8/4/05 02. Sample JZ 8/4/05 03 tested positive for 5% chrysotile asbestos.[32]

VII. STATUTORY AND REGULATORY BACKGROUND

Section 112(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(b), lists air pollutants that Congress has determined present, or may present, a threat of adverse human health or environmental effects. Asbestos was one of the first pollutants listed under section 112(b). Section 112(d) of the CAA, 42 U.S.C. § 7412(d), directs the Administrator of the EPA to promulgate national emission standards (National Emission Standards for Hazardous Air Pollutants, or "NESHAPs") for point sources of pollutants listed under section 112(b). However, in order to control emissions of certain pollutants, including asbestos, for which point source controls alone would not be sufficient, Congress authorized EPA to promulgate work practice standards to achieve the statute's objectives.[33] The work practice standards of the asbestos NESHAP are codified at 40 C.F.R. §§ 61.140-157.

The original asbestos NESHAP was published in 1973, and included standards governing removal of asbestos prior to building demolition.[34] In 1975, the asbestos NESHAP was expanded to address the handling of asbestos during building renovations.[35] The current asbestos NESHAP, which was published in 1990, is found at 40 C.F.R. § 61.140 *et seq.*

Asbestos-containing material ("ACM") is material containing more than one percent asbestos as determined using the methods specified in appendix E, subpart E, 40 CFR part

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[32] 10/28/09 Hearing Transcript p. 38

[33] 42 U.S.C. § 7412(h)

[34] 38 Fed.Reg. 8,820 (1973)

[35] 40 Fed.Reg. 48,293 (1975); *United States v. American National Can Co.*, 126 F.Supp.2d 521, 523 (N.D.Ill.2000)

763, section 1, Polarized Light Microscopy.[36] The PLM method permits analysts to assess the asbestos content of a material by examining only a sample of the material.[37] The NESHAP classifies ACM as either "friable" or "nonfriable". Friable ACM is ACM that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure. Nonfriable ACM is ACM that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure.

Asbestos-containing material regulated under the NESHAP is referred to as "regulated asbestos-containing material" ("RACM"). RACM is defined in § 61.141 of the asbestos NESHAP and includes: (1) friable asbestos-containing material; (2) Category I nonfriable ACM that has become friable; (3) Category I nonfriable ACM that has been or will be sanded, ground, cut, or abraded; or (4) Category II nonfriable ACM that has already been or is likely to become crumbled, pulverized, or reduced to powder.[38] If the coverage threshold for RACM is met or exceeded in a renovation or demolition operation, then all friable ACM in the operation, and in certain situations, nonfriable ACM in the operation, are subject to the NESHAP.

Section 61.145 establishes the standard for demolition and renovation activities where the amount of RACM involved is 260 linear feet or more on pipes , 160 square feet or more on other components, or at least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

In the instant case Respondent is charged with violating two provisions of the asbestos NESHAP, 40 C.F.R. § 61.145(c)(3) and (6). Subsection 61.145(c)(3) directs that "When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation." Subsection 61.145(c)(6)(i) directs that "[f]or all RACM,

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[36]40 C.F.R. § 61.141

[37]*See* 40 C.F.R. § 763 Subpt. E, App'x E

[38]*Id.*

including material that has been removed or stripped" the owner or operator of a demolition or renovation activity must "[a]dequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150." The term "adequately wet" as defined at 40 C.F.R. § 61.141 means:

> sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

The waste disposal standard for demolition, renovation and certain other activities is set forth at 40 C.F.R. § 61.150. Owners and operators of any source covered under § 61.145 must either discharge no visible emissions to the outside air in the collection, processing, packaging or transporting of asbestos-containing waste material, or use one of the emission control and waste treatment methods detailed in paragraphs (a)(1) through (4). Paragraph 61.150(a)(1)(iii) directs in pertinent part that owners and operators must "[a]fter wetting, seal all asbestos-containing waste material in leaktight containers while wet."

VIII. NESHAP VIOLATIONS

Failure to comply with the requirements set out in the asbestos NESHAP constitutes a violation of Section 112 of the CAA.[39] Section 9.1(d) of the Act, prohibits the violation of any provisions of Sections 111, 112, 165 or 173 of the CAA, or federal regulations adopted pursuant thereto.[40] Therefore, violations of the asbestos NESHAP are also violations of Section 9.1(d) of the Act.

Asbestos is regulated as a hazardous air pollutant because it is a carcinogen. The CAA imposes strict liability on all owners and operators of properties in violation of the CAA. *United*

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[39]42 U.S.C. § 7412(i)(3)(A)

[40]415 ILCS 5/9.1(d) (2008)

States v. B & W Inv. Properties, 38 F.3d 362, 367 (7th Cir.1994). *See also*, e.g., *United States v. Hugo Key and Son*, 731 F.Supp. 1135, 1137 (D.R.I.1989); *United States v. Ben's Truck and Equipment, Inc.*, 17 Env'tl L.Rep. 20,777, 1986 WL 15402 (E.D.Cal.1986) ("the Act and the asbestos NESHAP provide strict liability for civil violations of their provisions.... Strict liability is essential to meet the purpose of the Act to protect and improve the quality of the nation's air."). The asbestos NESHAP extends liability beyond nominal owners of a property to all those who lease, operate, control, or supervise it. 40 C.F.R. § 61.02, *see also B & W Inv. Properties*, 38 F.3d at 367.

IX. ESTABLISHING A NESHAP VIOLATION

According to *United States v. American National Can Co.,* in order to establish liability under the asbestos NESHAP, the People must prove that General Waste 1) was an owner or operator of a facility, 2) a renovation occurred, 3) a jurisdictional amount of asbestos was disturbed, and 4) asbestos was removed or stripped without complying with the requirements and practices delineated in the asbestos NESHAP. *National Can Co.*, 126 F.Supp.2d at 525, *see also* 40 C.F.R. § 61.140 *et seq.* If all four elements are met, General Waste must be found strictly liable for all violations of the CAA and the Act. In this matter, the first two elements are not in contention. The parties are in dispute as to whether asbestos was removed or stripped without complying with the requirements of the asbestos NESHAP.

X. UNDISPUTED ELEMENTS

In its Answer, filed on February 14, 2007, Respondent admitted that it was the operator of a renovation at the Memorial Drive facility.[41] Respondent also admits that General Waste

[41]Respondent Answer ¶ 12

employees were removing some of the 6,714 square feet of ceiling material included in the asbestos notification.[42] However, Respondent contends that the material was not RACM. Therefore, the first two elements of the *National Can* test have been met.

Since the first two elements of the *National Can* test have been met, the remaining issues before the Board are 1) whether a jusridictional amount of asbestos was disturbed, 2) whether the material disturbed and removed by General Waste was RACM and 3) if it was RACM, whether the material was adequately wetted while being removed and 4) kept wet until collected and contained for disposal.

A. General Waste disturbed more than the jurisdictional amount of RACM at the Memorial Drive site

40 C.F.R. § 61.145 establishes the standard for demolition and renovation activities where the amount of RACM involved is 260 linear feet or more on pipes or 160 square feet or more on other components. The notification form submitted by General Waste, states that 6,714 square feet of RACM was to be removed from the site. 6,714 square feet is well beyond the 160 square foot threshold established by the asbestos NESHAP. The notification is a report which is required to be kept by law. 40 C.F.R. § 61.145(b); *see also Blue Ridge*, PCB 02-115 at 13. On its face, the notice states that the requested information is required by law to be disclosed. It is certified as correct by the signature of Tim Wieneke, an employee of General Waste. The volume of RACM indicated on that notice is presumably based on the inspection and measurement of an experienced asbestos contractor. The notification states that the material at the Memorial Drive facility was inspected by an asbestos inspector with the license number 100-8353 and that samples were tested by an analytical testing laboratory known as "EMC." Although the notification statement certifies that this testing occurred, Respondent never provided the results of such testing through discovery prior to hearing. Furthermore, the

[42]Respondent Answer ¶ 5

notice refers by name, address, size, and description to the Memorial Drive facility. By submitting the notification form, General Waste admitted that it was removing 6,714 square feet of RACM from the Memorial Drive facility.

If the notification form alone is not persuasive, other facts in the record support that the jurisdictional amount was exceeded by the Respondent. In its Answer, Respondent admitted that the building consisted of two stories which equaled approximately 5,000 square feet each.[43] Zappa's testimony supports the assertion that the building was approximately 10,000 square feet.[44] When the building was inspected by Zappa, approximately half of the total ceiling material in the building had been removed by General Waste employees.[45] Half of the ceiling material in a 10,000 square foot building, even when discounting the ceilings in the bathrooms and closets located in the building[46], is much larger than the 160 square feet required under the asbestos NESHAP.

Furthermore, Johnson signed a waste shipment form stating that 35 cubic yards of asbestos containing waste was shipped to the Roxana Landfill Authority on August 5, 2005,[47] the day after Zappa inspected the site. On the form Johnson certified that the information on the form was correct. From August 1 through August 5, 2005, the only material removed from the General Waste facility was the textured ceiling material and associated drywall.[48] Therefore, the only material that should have been shipped from the site as asbestos

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[43]Respondent's Answer ¶ 4

[44]10/28/09 Hearing Transcript p. 27

[45]5/11/10 Hearing Transcript p.60-61

[46]People's Exhibit 6 (August 3, 2005 Project Log, p. 1)

[47]People's Exhibit 6 (Waste shipment form for August 5, 2005)

[48]People's Exhibit 6 (Project logs for August 1 through August 5, 2005)

containing waste was the textured ceiling material. The asbestos NESHAP includes a jurisdictional amount requirement of at least 1 cubic meter (35 cubic feet) of facility components where the length or area could not be measured previously.[49] The reported amount of 35 cubic yards is well above the 1 cubic meter required by the asbestos NESHAP.

The amount of RACM listed on the notification form when combined with the other evidence in the record shows that more than the jurisdictional amount of asbestos containing material was disturbed or removed by Respondent's renovation project at the General Waste facility.

XI. MATERIAL REMOVED BY GENERAL WASTE WAS RACM

In its Answer to the People's Complaint, and at multiple times during the hearing, Respondent has argued that the material it removed at the Memorial Drive facility was not RACM.[50] Respondent's argument while forceful, is without merit and wholly unsupported by the record.

On its notification form, Respondent stated that it was to remove 6,714 square feet of RACM. The only material present at the Memorial Drive facility that can rightfully be described as RACM is the textured ceiling material found throughout the building. Ten samples of ceiling material were taken from the Memorial Drive Facility. Eight of those ten samples tested positive for containing greater than 1 percent asbestos. The results of that sampling show that the textured ceiling material was more likely than not RACM.

A. PLM testing conducted on eight of the ten samples of textured ceiling material by General Waste tested positive for greater than 1percent asbestos

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[49]40 C.F.R. § 61.145(a)(4)(ii)

[50]Respondent's Answer ¶ 6; 5/11/10 Hearing Transcript pp. 7 & 133

RACM is defined in 40 C.F.R. § 61.141 as friable asbestos material. Friable asbestos material is defined in Section 40 C.F.R. § 61.141 as any material containing more than 1percent 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. The PLM method permits analysts to assess the asbestos content of a material by examining only a sample of the material.[51]

Ten samples of ceiling material were taken at the Memorial Drive facility. Of the ten samples, eight tested positive for containing greater than 1 percent asbestos. Respondent provided no evidence to refute the eight positive samples.

1. Farmer Environmental Services, LLC Report

Prior to the beginning of the renovation project at the Memorial Drive facility, the facility was inspected by Farmers.[52] People's Exhibit 5 is an asbestos inspection report created by Farmers after they inspected the Memorial Drive facility on May 11, 2005. The report categorizes the materials present in the building; lists the materials for which samples were taken and provides the results of PLM tests conducted on the samples. People's Exhibit 5 was admitted during hearing with no objections from Respondent.[53]

During the Farmers asbestos inspection one of the materials present at the facility was off-white/tan textured ceiling plaster which was found throughout the building.[54] Farmers reasonably determined that this material may contain asbestos and classified the entirety of the ceiling material as a homogeneous area. Farmers collected seven samples of the ceiling

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[51] See 40 C.F.R. § 763 Subpt. E, App'x E

[52]People's Exhibit 5

[53]10/28/09 Hearing Transcript p. 6

People's Exhibit 5

material and labeled them SPA-1 through SPA-7. After taking the samples, Farmers had them tested using the PLM method. The PLM results for samples SPA-1, SPA-2, SPA-4, SPA-5, and SPA-7 all showed that the samples tested positive for 25 percent chyrsotile asbestos. The test results for samples SPA-3 and SPA-6 showed that the samples tested positive for 20percent chrysotile asbestos. All seven samples taken by Farmers contained greater than 1 percent asbestos. Because all seven samples tested positive for greater than 1 percent asbestos, the material sampled by Farmers, if found to be dry and friable, must be considered RACM which is regulated by the asbestos NESHAP.

2. Joseph Zappa Samples

As discussed in Section VI. of this brief, on August 4, 2005, Zappa collected three bulk samples of textured ceiling material from the Memorial Drive facility, the same material sampled by Farmers on May 11, 2005. Samples JZ 8/4/05 01, JZ 8/4/05 02, and JZ 8/4/05 03 were all sampled using the PLM method.[55] The PLM testing did not detect asbestos in samples JZ 8/4/05 01 and JZ 8/4/05 02.[56] Sample JZ 8/4/05 03 tested positive for 5% chrysotile asbestos.

Zappa testified that it is not uncommon for one or more bulk samples to come up as a non-detect for asbestos.[57] This was not the first time that Zappa had seen samples material of the same texture and color produce differing results. It was his opinion that over the life of the building, some of the surfacing material may have been damaged and replaced or that he may have simply collected a section of debris that did not include a layer of material that actually contained asbestos. The material at issue is a spray on material applied over drywall. In some

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[55]People's Exhibit 3

[56]People's Exhibit 3, 10/28/09 Hearing Transcript p. 38

[57]10/28/09 Hearing Transcript p. 39-40

places it had been painted over.[58] It is not unreasonable that one sample taken from the ceiling at the General Waste facility may come up as non-detect for asbestos, when others samples taken from the building come up positive. If the thin layer of asbestos containing material sprayed on the drywall was not included in the small piece of material collected by Zapp, than PLM testing would not find asbestos in the sample. Such a result is highly likely during the types of sampling conducted by compliance inspectors where inspections take place during ongoing renovation projects. Asbestos sampling procedures are designed to take into account that not every sample of material will come up positive.[59] That is why the concept of a homogeneous area has been adopted to determine whether a large area of material should be classified as ACM or be treated as RACM.

3. Ceiling was a homogeneous area

The asbestos NESHAP does not specify how to sample facility components during a renovation to determine if they contain asbestos. It merely states that samples be tested using the PLM method found in appendix E, subpart E, 40 C.F.R. part 763 section 1. 40 C.F.R. § 763 *et seq.* is known as the Asbestos Hazard Emergency Response Act ("AHERA") which governs ACM in schools.[60] AHERA regulations implement a strict sampling and testing protocol used to determine if material inside school buildings is ACM.

"Homogeneous area" is a term that is not defined in the asbestos NESHAP, however it is defined under the closely related AHERA regulations as an area of surfacing material, thermal system insulation material, or miscellaneous material that is uniform in color and

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[58] 5/11/10 Hearing Transcript p. 34

[59] *See* 40 C.F.R. § 763.83, 763.86 and 763.87

[60] *See* 40 C.F.R. § 763 *et seq.*

texture.[61] AHERA sampling protocol requires that for a homogeneous area of surfacing material greater than 5,000 square feet, an accredited inspector should collect at least seven bulk samples in a statistically random manner that is representative of the homogeneous area.[62] After the samples are collected, the material is tested using the PLM method.[63] If any of the samples from the homogeneous area test positive for containing greater than 1 percent asbestos, than the entire homogeneous area is determined to be ACM.

While the AHERA form of testing is not controlling in this matter, the framework it creates is a perfect example of how asbestos sampling should be conducted. Since it is impractical and cost prohibitive to take a sample of every square inch of a building. The AHERA methods create a process by which an owner or operator can conduct a good faith survey. Defining homogeneous areas, and sampling those areas accordingly is a reasonable means by which to conduct a thorough survey of a building.

For large facilities that may contain large amounts of material that are uniform in color and texture, owners require a method to determine if that material is ACM. If material found in a facility is of uniform color and texture it would be nearly impossible to visually distinguish one section of material from another. Because one section of material is indistinguishable from another, if one sample of the material contains asbestos, it is reasonable to consider that the entire area is compromised of ACM, even if isolated samples of indistinguishable material test negative for asbestos. If one or more samples of material, all of which have the same texture and color, test positive for containing greater than one percent asbestos, it is reasonable to treat all of the material as RACM. This is the only practical and reasonable way to regulate

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[61] 40 C.F.R. § 763.83

[62] 40 C.F.R. § 763.86(a)(3)

[63] 40 C.F.R. § 763.87

asbestos containing material. Without such a method, it would be impossible to determine which sections of material should or should not be considered asbestos because there is no way to distinguish between the materials within the homogeneous area. From a health and safety standpoint, it makes more sense to treat all of the material as asbestos, than to allow asbestos containing material to be handled improperly due to a small subset of negative samples.

This is exactly the situation that is before the Board. Both Farmers and Zappa determined that the ceiling located at the Memorial Drive facility was a homogeneous area.[64] The entire ceiling in the building, except the bathrooms and closets[65] was all the same color and texture. The material from one room could not be distinguished from the material in another room. This is evidenced in the many photographs taken by Zappa. People's Exhibits 4a through 4o accurately depict ceiling material observed on the first floor.[66] People's Exhibits 4s through 4u, and 4dd through 4ff accurately depict ceiling material observed on the second floor.[67] People's Exhibits 4z and 4aa accurately depict ceiling material found in a drum in the loadout room.[68] The material in all of the photographs is the same texture and same color. A good example of this is to look at People's Exhibits 4z, 4ff, and 4a. People's Exhibit 4z depicts the material that Zappa sampled as JZ 8/4/05 03. People's Exhibit 4ff depicts material found on the 2nd floor. People's Exhibit 4a depicts material found on the first floor. One group of ceiling material cannot be distinguished from the other. It is all the same color and the texture. If all of

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[64]People's Exhibit 5, 10/28/09 Hearing Transcript p. 65

[65]People's Exhibit 6 (August 3, 2005 Project Log p. 1)

[66]People's Exhibits 4a-4o

[67]People's Exhibits 4s-4u and 4dd-4ff

[68]People's Exhibits 4z and 4aa

the material was mixed together in the same drum, you could not determine what room it came from. In fact, no one is sure which room sample JZ 8/4/05 03 came from. It could have come from the first floor or the second floor. It could have come from one of the same rooms where Zappa took samples JZ 8/4/05 01 and JZ 8/4/05 02. Respondent did not provide any evidence showing where the material in the barrel came from. The drum did not contain, nor was required to contain, any labels stating which room the material had originated in. All that we know for certain is that the material in the drum with sample JZ 8/4/05 03 was disturbed at the Memorial Drive facility on either August 3, 2005 or the morning of August 4, 2005; that it was the same texture and color as the textured ceiling material found throughout the facility; and that PLM testing found that it contained greater than 1 percent asbestos. Therefore, it is not accurate for Respondent to argue that the material in that drum was not part of the same homogeneous area as the rest of the ceiling material found in the facility.

Respondent offered no evidence to refute that the ceiling found throughout the Memorial Drive facility was a homogeneous area.

Although the AHERA regulations do not apply in this matter, the concept of homogeneous area is instructive in determining that all of the textured ceiling material at the Memorial Drive facility was RACM. Given the lack of a rebuttal by the Respondent and the totality of the facts in evidence, the only reasonable inference that can be made is that all of the textured ceiling material located at the Memorial Drive facility compromised a homogeneous area.

4. The Board must find that the textured ceiling material was RACM

Ten (10) samples of textured ceiling material were taken at the Memorial Drive facility. Those ten (10) samples are enough to form a representative sample of the textured ceiling material. Eight (8) of those samples tested positive for containing greater than one percent

asbestos. Respondent's attorney rested its case on the fact that PLM testing conducted on two samples of material did not detect asbestos. Respondent argument fails to acknowledge that one of the samples taken by Zappa tested positive for greater than one percent asbestos. That sample was indistinguishable from the rest of the ceiling material found throughout the facility. Snce that sample came from an unlabeled drum and the respondent did not provide any evidence as to which room the material came from, the only inference that can be made is that the material in the barrel was removed on either August 3rd or 4th, 2005. Therefore it is impossible for the Respondent to argue that the material did not come from either of the rooms where Zappa collected the other two samples. Furthermore, the fact that two samples out of ten came up as non-detect for asbestos does not render the other eight samples as inconsequential or insufficient to support a finding that the textured ceiling material was subject to the asbestos NESHAP.

The simple truth is that a thorough inspection was done previous to the renovation. All of the samples taken during that inspection tested positive for containing greater than one percent asbestos. Respondent certified in its asbestos notification that it was removing 6,714 square feet of RACM. The record shows that the ceiling material was the only material in the building that could be classified as RACM. Respondent provided no evidence rebutting the fact that the ceiling material removed on August 3 and 4, 2005, was anything other than the 6,714 square feet of RACM listed on the notification form. Compounding this, is the fact that Respondent provided no evidence that the ceiling material was not RACM. Respondent provided no samples showing that material from one room was any different than the material found in another room. If Respondent wanted to argue that the material was not RACM, than it should have tested the ceiling material itself to prove that the material was not RACM.

The eight positive samples, when combined with the totality of the facts in evidence, establish that it is more likely than not that the ceiling material was RACM. Since it is

impossible to distinguish any one section of ceiling from the other, the only reasonable assertion that can be made is that if eight out of ten samples tested positive for containing greater than one percent asbestos, than the entirety of textured ceiling material must be considered RACM.

The People have met their burden of showing that the textured ceiling material present at the Memorial Drive facility was RACM. The Board must find that all of textured ceiling material present at the Memorial Drive facility was RACM and is thus regulated under the asbestos NESHAP.

XII. GENERAL WASTE FAILED TO ADEQUATELY WET REGULATED ASBESTOS MATERIAL DURING REMOVAL AND FAILED TO KEEP THE MATERIAL WET UNTIL IT WAS PROPERLY CONTAINERIZED FOR DISPOSAL

The last factor that the Board must decide on is whether Respondent actually violated the asbestos NESHAP. Liability in this matter turns on whether the Respondent properly executed two work practices required by the asbestos NESHAP, 40 C.F.R. § 61.145(c)(3) and (6). The record shows that disturbed textured ceiling material was found at the Memorial Drive facility in a dry friable state. It also shows that even though the Respondent had the required equipment onsite to properly wet the material, it failed to keep the material wet during and after removal. The facts present in the record show that Respondent failed to adequately wet RACM while it was being removed, and failed to assure that the RACM remained wet until it was collected or contained in preparation for disposal.

A. Adequately wet

Subsection 61.145(c)(3) directs that "When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation." The term "adequately wet" as defined at 40 C.F.R. § 61.141 means:

> sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

The NESHAP definition of adequately wet is clear. When wetting the material, the liquid used must sufficiently mix or penetrate the material to prevent the release of particulates. If the liquid has not sufficiently mixed or penetrated the ACM, then the material is not adequately wet. The release of visible emissions is a definite sign that the material has not bee adequately wetted. However, since asbestos fibers cannot be seen with the naked eye, the lack of visible emissions does not absolve a party of liability.

During the hearing, much testimony was given on the proper way to adequately wet the textured ceiling material present at the Memorial Drive facility. During the first day of hearings, Zappa gave testimony about the proper way to adequately wet asbestos containing material. Zappa testified that the asbestos NESHAP requires that material be kept wet so that it does not release fibers into the atmosphere.[69] He also testified that a material is adequately wet if the wetting agent penetrates the material in such a way as keep it from releasing fibers. Zappa's understanding of the regulations is consistent with the wording of 40 C.F.R. § 61.141.

Along with discussing the definition of adequately wet, Zappa also addressed the proper procedure for wetting the material. He stated that the material must be wetted prior to removal, kept wet during removal, and remain wet while being collected and containerized for disposal[70]. It is not enough to just wet the material once it is in a disposal container. Zappa also stated that if one method is not adequately wetting the material, than it is the responsibility of the party removing or disturbing asbestos containing material to find a method that does adequately wet

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[69] 10/28/09 Hearing Transcript p. 22

[70] 10/28/09 Hearing Transcript pp. 47, 61

it.[71]

Zappa also discussed the proper way to tell if the textured ceiling material was adequately wet.[72] He stated that if the material was adequately wet, the textured material as well as the drywall behind the textured spray would appear darker and there would be water present on any plastic located under or around the material. He added that the material should not be dry, friable, or able to crumble under hand pressure.[73] If the material could be crumbled under hand pressure, it was not adequately wet. If you were to hold the material in your hand, Zappa agreed that you should be able to feel moisture in the material.[74] Zappa's method for determining adequate wetness is reasonable. The textured ceiling material was sprayed onto drywall. Drywall is a hydroscopic material that readily accepts water. Both Johnson and Stevens testified that the textured ceiling material had been painted and would not accept water. Zappa did not believe that all of the textured ceiling was unable to accept water. He pointed to the fact that there were some sections of ceiling material that had absorbed water.[75] This was illustrated by Exhibit 4dd. Exhibit 4dd is a photograph of fiber drums filled with ceiling material. Material in the first drum, located in the foreground of the picture, is a darker color than the rest of the material, showing that it had in fact absorbed water. This was one of the few examples of wet material that Zappa observed at the site.

Even if the coating was not accepting water, if the material was being wetted during removal, water would have gotten onto the drywall and its backing, discoloring it. In the

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[71] 10/28/09 Hearing Transcript pp. 130-131

[72] 10/28/09 Hearing Transcript p. 33

[73] 10/28/09 Hearing Transcript pp. 33, 50, 56 & 63

[74] 10/28/09 Hearing Transcript p. 62

[75] 10/28/09 Hearing Transcript p. 129

majority of the photographs taken by Zappa, there is no evidence of moisture on the drywall backing. It is unreasonable to believe that Respondent was able to adequately wet the textured coating without also wetting the backing material. If the textured material got wet, than the drywall had to have gotten wet as well. You cannot have one without the other.

During cross examination, Zappa testified that the term adequately wet was not subjective.[76] Mr. Immel brought Zappa's attention to p. 67, line 19, of a deposition which Zappa participated in on March 24, 2009. During that depostion, Mr. Immel asked Zappa, "Is there any specific standard you can point me to that would define what is meant by the term "adequately wet"? I hear that used a lot, but I -- it sounds like a pretty -- a pretty fairly subjective." To this Zappa replied "Yes, it is subjective."[77] During the hearing, Zappa was unable to recall his deposition answer. The fact that Zappa's two answers appear inconsistent, does not affect the testimony that Zappa provided in regards to whether the textured ceiling removed by respondent was adequately wet. The definition of "adequately wet" is regulatory, meaning that any interpretation of the definition is a legal matter. Only the trier of fact is qualified to decide on legal issues. Whether Zappa believed that the term "adequately wet" was subjective is immaterial to the case at hand. What is material, is the fact that Zappa's understanding of the meaning of adequately wet is consistent with the regulatory definition.

Respondent's witnesses also testified about the adequately wet standard. Johnson testified that "everybody's got their own version of adequately wet."[78] His version of "adequately wet" was "being wet, not swimming...You just wet down and then put in containers."[79] With all

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[76]10/28/09 Hearing Transcript pp. 122-123

[77]March 24, 2009 Zappa Deposition, p. 67, line 23

[78]5/11/10 Hearing Transcript p. 66

[79]*Id.*

of his years of experience as an asbestos worker and supervisor, Johnson, the project supervisor, could not come up with a description of how to determine if the material was adequately wet. Johnson did understand that the material needed to be kept wet until it was disposed of, and that if the material was left out to dry, than it was not adequately wet.[80]

Kenneth Stevens did not directly testify as to an understanding of "adequately wet," he merely stated that he understood the regulations related to the term.[81] Stevens did state that if the material was wet enough before it was disturbed, than there would be no need to wet it after it was disturbed, explaining, "if the material was soaked the first time, we wouldn't have to keep adding water to it..."[82] Although Stevens states that he understands the "adequately wet" standard, he felt the needed to add water to the ceiling material after it was already in the lined fiber drums. By his own standard, if the material was wet enough while being removed, then it would not need to be wetted once inside the drums. If the material needed to be wetted by Stevens, than it was not adequately wet while being removed. Therefore, Stevens was adding water "too late" in the process.

B. General Waste failed to adequately wet textured ceiling material as it was being removed

When Zappa was on the second floor of the Memorial Drive facility, he observed drums of dry, friable textured ceiling material.[83] When Zappa reached the top of the stairs, Stevens had a hose in his hand and used it to add water to the drums.[84] Stevens testified that he had

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[80]5/11/10 Hearing Transcript pp. 71 & 80

[81]5/11/10 Hearing Transcript p. 111

[82]5/11/10 Hearing Transcript pp. 119-120

[83]10/28/09 Hearing Transcript p. 60

[84]5/11/10 Hearing Transcript p. 106

been watering the drums all morning.[85] However, at the time Zappa arrived on the second floor the barrels contained dry, friable material. The drums are depicted in People's Exhibit 4dd. The photograph clearly shows that there is water present on the plastic inside of the drum. However, even though water is present, Zappa testified that the material was still not adequately wet.[86] Some of the material had absorbed water and had darkened in color, however, most of the material inside of the drum was still dry and brightly colored.[87] It had not absorbed enough water to darken, a sure sign that it had not absorbed water. If the material was still dry and brightly colored, it had not absorbed enough water to assure that it would not release particulates. Seeing Stevens adding water to the barrels, Zappa uttered, "It's a little late for that."[88] Zappa was correct, the material was supposed to be adequately wetted prior to its placement in the drums. Adding water to the drums after the material was removed from the ceiling in a dry condition does not fulfill the requirements of 40 C.F.R. § 61.145. Under §61.145, the material should have been adequately wetted when it was on the ceiling, prior to being disturbed. The material than should have been kept wet while it was being removed, and after removal.

After walking past Stevens, Zappa observed other General Waste employees removing ceiling material without using water.[89] The employees were letting the material drop to the floor and were then picking it up and placing it in the lined fiber drums. He was able to observe this dry removal because the employees did not notice that he was there. When the employees

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[85]5/11/10 Hearing Transcript p. 113

[86]10/28/09 Hearing Transcript p. 60

[87]10/28/09 Hearing Transcript p. 61

[88]5/11/10 Hearing Transcript p. 105

[89]10/28/09 Hearing Transcript p. 32

noticed Zappa, they used an airless sprayer in an attempt to wet the material. The material Zappa observed on the second floor is depicted in People's Exhibits 4ee and 4ff. 4ee clearly depicts a large amount of ceiling material piled on the floor. The backing of the material is a light tan and the facing of it, which contained the textured ceiling material, is bright white. There are only a few spots that appear to be darkened by moisture. This is consistent with Zappa's testimony that the employees attempted to wet the material after he arrived. It is not consistent with Johnson's and Stevens' testimony that General Waste employees were adequately wetting the material during removal. 4ff is a photograph taken at a shorter distance from the material. Once again, there is no evidence of wetting on this material. It does not appear to have absorbed any water.

With the large amount of material present on the floor, it is unreasonable to believe that General Waste employees could have kept that large of an amount of material wet with just one airless sprayer. Johnson testified that the airless sprayer was set to spray out a fog, or light mist of water.[90] A light spray of water might be useful to keep the air within containment moist, to help control fibers released during removal, but it is not enough to adequately wet a large amount of material. Even if General Waste employees were using the airless sprayer, it was obviously not sufficient to adequately wet the ceiling material.

Johnson testified that they were instructed to use the airless sprayer in order to use as little water as possible so as not to damage the floors of the building.[91] He stated that if the floors were damaged, General Waste would be responsible for the damages. Johnson also testified that the ceiling material was not absorbing water.[92] Under the asbestos NESHAP,

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[90]5/11/10 Hearing Testimony p. 20,

[91]5/11/10 Hearing Testimony pp. 18-19,

[92]5/11/10 Hearing Testimony p. 19

General Waste should have been concerned with finding a way to adequately wet the ceiling material, not protect the floors. The asbestos NESHAP is concerned with the release of asbestos fibers, not saving asbestos abatement firms money. It does not allow parties to circumvent established work practices in order save money during a cleanup. If the airless sprayer was not adequately wetting the material, General Waste was not allowed to tear down the ceiling and wet it down once it was placed in the fiber drums. General Waste had a responsibility to find a more effective method to adequately wet the ceiling materia. If they could not find one, they should have stopped disturbing the material.

If General Waste was concerned with water damaging parts of the facility, 40 C.F.R. 61.145(c)(3)(i)(A) allows an owner or operator to apply for a waiver of the wetting requirement if water would unavoidably damage equipment or present a safety hazard. General Waste did not apply for such a waiver.

Zappa was the only witness who testified about being in the room where dry removal was observed. Johnson was outside of the building when Zappa was on the second floor.[93] Stevens testified that he was not in the same room as the employees removing ceiling material when Zappa observed the dry removal.[94] Therefore, Johnson and Stevens cannot attempt to rebut what Zappa observed during his inspection of the second floor. Furthermore, Zappa's testimony is supported by photographs that clearly and accurately depict what he observed on August 4, 2005.

The record clearly shows that Zappa observed General Employees removing dry, friable asbestos material on the second floor without adequately wetting it. The Respondent provided no evidence that rebuts this assumption. At best, Respondent provided evidence of what the

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[93]5/11/10 Hearing Testimony p. 46

[94]5/11/10 Hearing Transcript p. 122

General Waste employees were supposed to be doing, not what they were actually doing when Zappa arrived on the second floor. Even if General Waste employees were using an airless sprayer inside the containment, that method was obviously not adequate to wet the ceiling material because Zappa observed dry friable ceiling material as depicted in his photos.

C. General Waste failed to keep RACM adequately wet until it was collected or containerized for disposal.

40 C.F.R. § 61.145(c)(6)(i) directs that "[f]or all RACM, including material that has been removed or stripped" the owner or operator of a demolition or renovation activity must "[a]dequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150."

Along with the second floor ceiling material discussed above, Zappa observed a large amount of dry, friable ceiling material on the first floor of the Memorial Drive facility.[95] This material is depicted in People's Exhibits 4a through 4o. There is no evidence of water in any of the pictures. There are no water droplets on any of the plastic sheeting found around the ceiling material. Neither the backing nor the surfacing of any of the material depicted in People's Exhibits 4a-4o has been darkened by moisture. People's Exhibit 4d is a close up of a piece of ceiling material. The paper backing of the material shows no evidence of wetting. People's Exhibits 4j and 4k show dry, dusty, pulverized ceiling material. None of this material is adequately wet. No liquid has penetrated this material in sufficient amount to keep it from releasing particulates. People's Exhibits 4f, 4j and 4k all show dust, therefore the material was able to release dry, visible emissions. Johnson testified that on August 4, 2005, no General Waste employees were working on the first floor.[96] General Waste only had one airless sprayer

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[95] 10/28/09 Hearing Transcript pp. 30-31

[96] 5/11/10 Hearing Testimony p. 38

onsite and it was located on the second floor.[97] With only one airless sprayer and all of the employees working on the second floor, there was neither a water source nor any employees available to wet the material lying in piles on the first floor. That material was left out to dry. Both Johnson and Stevens admitted that if the ceiling material was left on the first floor, it would dry out and if it dried out, it would no longer be considered adequately wet.[98]

In the first floor loadout room, Zappa observed fiber drums.[99] Some of the drums were filled with ceiling material which had been removed on August 3rd and 4th, prior to Zappa's inspection.[100] Johnson and Stevens both testified that on August 3rd, General Waste employees removed ceiling material on both the first and second floors.[101] General Waste's normal removal procedure was to begin on the highest floor and than work their way down, but they had to remove some of the ceiling from the rooms on the first floor where they would store their drums and other materials. General Waste's Dumpster arrived on site at the same time Zappa was performing his inspection,[102] so all of the material that had been removed on August 3rd and 4th was either in drums in the loadout room, drums on the second floor, or lying on the floor withing the building.

While in the loadout room, Zappa opened one of the drums, which had not yet been sealed with duct tape, and photographed the material he found inside.[103] Since no duct tape

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[97]5/11/10 Hearing Testimony pp. 62 & 123

[98]5/11/10 Hearing Testimony pp. 70, 89-90, & 121

[99]10/28/09 Hearing Transcript pp. 37 & 56, People's Exhibits 4x & 4y

[100]5/11/10 Hearing Transcript pp. 28, 30, & 85

[101]5/11/10 Hearing Transcript p. 26

[102]5/11/10 Hearing Transcript p. 86

[103]10/28/09 Testimony p. 43, People's Exhibits 4z and 4aa

had been applied to the barrel, the containerizing process had yet to be completed. The material was dry and friable. There was no moisture within the bag. The material had not been sufficiently wetted to prevent the release of particulates. The material could not have been in the drum for longer than a day. Had Respondent properly wetted the material when it was removed, and kept it adequately wet, water droplets or other evidence of moisture would have been present within the bag. Zappa collected a bulk sample from the drum and labeled it JZ 8/4/05 03.[104] As discussed earlier PLM testing later found that sample JZ 8/4/05 03 contained greater than 1 percent asbestos material. There is no way to determine which room the material had come from. All that we do know is that the material was RACM, that it had been removed from the Memorial drive facility, and that it was not kept adequately wet until it was containerized as required by 40 C.F.R. § 61.145(c)(6).

On August 4, 2005, Zappa observed large amounts of dry, friable ceiling material. The material had not been kept wet enough to ensure that it was not releasing particulates as required by 40 C.F.R. § 61.145(c). Neither Johnson nor Stevens were with Zappa when he observed the dry material on the first floor and the second floor. Therefore they could not speak as to what Zappa observed. The photographs that Zappa took of the dry material accurately depict what he observed. Given the totality of the evidence present in the record, the only reasonable assertion that can be made is that Respondent failed to keep disturbed RACM adequately wet until it was properly containerized for disposal.

XIII. GENERAL WASTE VIOLATED THE ASBESTOS NESHAP AND SECTION 9.1(d) OF THE ACT

The record clearly shows that Respondent violated the asbestos NESHAP and Section

[104]People's Exhibit 3

9.1(d) of the Act. Respondent was the operator of a renovation at the Memorial Drive facility. During the renovation, Respondent removed 6,714 square feet of drywall ceiling covered in a textured spray on acoustic coating; 6,714 square feet is above and beyond the 160 square foot requirement found in the asbestos NESHAP. The ceiling throughout the facility was all the same texture and color. The ceiling in one room was indistinguishable from the ceiling in another. Eight of ten samples collected of the spray on textured coating tested positive for containing greater than one percent asbestos. It is more likely than not that all of the textured coating in the Memorial Drive facility contained greater than one percent asbestos. Because the textured ceiling coating contained greater than one percent asbestos, it is considered RACM under the asbestos NESHAP.

Since Respondent's asbestos abatement activites disturbed ceiling material RACM, the work practice regulations found in 40 C.F.R. § 61.145 applied to Respondent's renovation project. Subsection 61.145(c)(3) directs that "When RACM is stripped from a facility component while it remains in place in the facility, adequately wet the RACM during the stripping operation." 40 C.F.R. § 61.145(c)(6)(i) directs that "[f]or all RACM, including material that has been removed or stripped" the owner or operator of a demolition or renovation activity must "[a]dequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150." The term "adequately wet" as defined at 40 C.F.R. § 61.141 means:

> sufficiently mix or penetrate with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

While removing RACM at the Memorial Drive facility, Respondent failed to adequately wet the material and assure that the material remained wet until it was collected and containerized for disposal.

Because Respondent failed to adequately wet the material, the Board must find that Respondent violated 40 C.F.R. § 61.145(c)(3). Because Respondent failed to assure that the material remained wet until collected and containerized for disposal, the Board must find that Respondent violated 40 C.F.R. § 61.145(c)(6)(i).

Violations the asbestos NESHAP are considered violations of the section 112 of the CAA. Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2008), makes it illegal to violate any provisions of Section 112 of the CAA or associated regulations. Therefore violations of Section 112 of the CAA are also violations of Section 9.1(d) of the Act. Because Respondent violated the asbestos NESHAP, the Board must hold that they also violated Section 9.1(d) of the Act.

XIV. ANALYSIS OF THE 33(c) FACTORS DEMONSTRATES THAT THE BOARD SHOULD ASSESS A CIVIL PENALTY

In making its orders, the Board is directed to consider matters of record concerning the reasonableness of the alleged pollution, including those factors identified in Section 33(c) of the Act, 415 ILCS 5/33(c) (2006). The Board is also authorized by the Act to consider any matters of record concerning the mitigation or aggravation of penalty, including those matters specified in Section 42(h).

A. Section 33(c) Factors

Section 33(c) of the Act, 415 ILCS 5/33(c) (2008), 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:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (iii) 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;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

(v) any subsequent compliance.

1. Section 33(c)(i): Character and Degree of Injury or Interference

During the asbestos renovation activities at the Memorial Drive facility, a significant amount of dry, friable RACM was disturbed and improperly handled. Dry, friable RACM has the ability to release dangerous asbestos fibers into the air. These fibers have the potential to interfere with the protection of the health and general welfare of the people. Fortunately, General Waste installed a functioning containment system at the Memorial Drive facility. Air monitoring reports for August 4, 2005, were not made available, so it is impossible to tell whether the containment was functioning properly on the day of Zappa's inspection. Given the fact that the building was under negative air containment, the actual injury to the health and general welfare of the people was minimal.

However, as a properly licensed asbestos contractor utilizing licensed workers, Respondent is aware of proper asbestos removal methods and the risks associated with the failure to adequately wet asbestos containing material. Although the proper equipment was available, Respondent chose to improperly wet RACM at the facility in order to avoid costly damages to the building. This lack of regard for the asbestos NESHAP and associated regulations by a licensed asbestos abatement contractor has the potential to cause significant damage to the general welfare of the people, through increased regulatory costs.

The Board should weigh this factor in favor of assessing a civil penalty.

2. Section 33(c)(ii): Social and Economic Value of the Pollution Source

Renovating 3701 Memorial Drive so that it could be used as doctors offices was a

definite benefit to the surrounding community. However, a facility that operates in violation of regulations is a social and economic detriment.

The Board has previously found that a pollution source typically possesses a "social and economic value" that is to be weighed against its actual or potential environmental impact. *People v. Waste Hauling Landfill, Inc., and Waste Hauling, Inc.*, PCB No. 95-91 (May 21,1998). Respondent's failure to reduce adequately wet RACM being removed at the Memorial Drive facility was a detriment to the site and surrounding area, which therefore, would diminish the social and economic value of the source.

The Board should weigh this factor in favor of assessing a civil penalty.

3. Section 33(c)(iii): Suitability or Unsuitability of the Pollution Source

Asbestos is a federally listed hazardous air pollutant. Improperly handling RACM is not suitable to any location.

The Board should weigh this factor in favor of assessing a civil penalty.

4. Section 33(c)(iv): Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions

The record shows that Respondent faced no significant technical or economic obstacles to compliance. Respondent had all of the equipment on site to adequately wet the RACM it removed from the Memorial Drive facility. All it had to do was use them. The only obstacle Respondent cited was that it did not want to damage the hardwood floors present in the building or it would have to pay for the damages. After Zappa's inspection, Respondent was able to adequately wet the material using the equipment on site and assure that the material remained wet until disposal.

The Board should find that compliance would have substantially reduced if not eliminated the risk of releasing contaminants into the air and weigh this factor heavily in favor of assessing a civil penalty.

5. Section 33(c)(v): Subsequent Compliance

Respondent was able to come into compliance on August 5, 2005. One day after Zappa's compliance inspection.

6. Conclusion

A review of the evidence shows that a moderated civil penalty is both appropriate and necessary to aid in enforcement of the Act.

XV. AFTER CONSIDERATION OF THE 42(h) FACTORS, THE BOARD SHOULD ASSESS A CIVIL PENALTY OF $30,000

A. Statutory Maximum Civil Penalties

The evidence at hearing demonstrates that the Respondent has violated the asbestos NESHAP and the Act. Air Pollution Regulations. Section 42(a) of the Act permits the Board to impose penalties against those who violate any provision of the Act or regulation adopted by the Board, 415 ILCS 5/42(a) (2008). The Board may impose a maximum penalty of$50,000.00 for each violation of the Act, and an additional $10,000.00 penalty for each day the violation continues, 415 ILCS 5/42(a) (2008). In our case, the State has proved at least two violations of the asbestos NESHAP and therefore the Act, i.e. 40 C.F.R. § 61.145(c)(3) and 40 C.F.R. § 61.145(c)(6) both of which are violations of Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2008).

Respondent first disturbed RACM at the Memorial drive facility on August 3, 2005. Respondent had returned to compliance on August 5, 2005. This represents a period of 2 days. Therefore, statutory daily penalties for Count I amount to $40,000 with an additional $50,000.00 per violation or a total maximum penalty of $140,000. Complainant requests at a minimum that the Board impose a total civil penalty of $30,000 on Respondent for the violations.

B. Section 42(b) Factors

Section 42(h) of the Act, 415 ILCS 5/42(h) (2008), authorizes the Board to consider the impact of any matter of record in determining an appropriate civil penalty.

Section 42(h) provides:

> (h) In determining the appropriate civil penalty to be imposed under subdivision[] (a)... of this Section, 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, ... ;
>
> (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 respondent 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 respondent;
>
> (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," ...

1. Duration and Gravity

A civil penalty imposed under the Act must "bear some relationship to the seriousness of the infraction or conduct" of the polluter. *Southern Illinois Asphalt Company v. Pollution Control Board*, 60 Ill. 2d 104,326 N.E. 2d 406, 412 (1975); *Trilla Steel Drum Corp. v. Pollution Control Board*, 180 Ill. App. 3d 1010, 1013 (1989) (penalty should be "commensurate with the seriousness of the infraction"). The Act "authorizes the Board to assess civil penalties for violations regardless of whether these violations resulted in actual pollution." *ESG Watts. Inc. v.*

IPCB, 282 Ill. App. 3d 43, 51 (4th Dist. 1996). Accordingly, the Board should consider both the seriousness and duration of the asbestos NESHAP work practice violations committed by Respondent.

During their asbestos renovation activities, Respondent disturbed and improperly handled a significant amount of dry, friable RACM. As a properly licensed asbestos contractor employing licensed asbestos workers, Respondent was aware of proper asbestos removal methods and the risks associated with the failure to adequately wet RACM. The duration of the violations may be limited to only two days as General Waste remedied the violations by adequately wetting RACM at the facility and properly disposing of the material in leak tight containers at the Roxana Landfill.

The limited duration of the violations, as well as the fact that the asbestos renovation work occurred within negative air equipped containment should mitigate the gravity component of the Board's penalty calculation.

2. Due Diligence

Respondent did not act diligently to ensure that RACM was adequately wetted while removing it on August 3rd and 4th, 2005 or to assure that the RACM remained wet after removal. However, Respondent did act diligently to come into compliance and adequately respond to Zappa's concerns on the day of his inspection.

3. Economic Benefit of Noncompliance

The evidence at hearing demonstrates that Respondent's violations were of limited duration and were remedied by General Waste employees, therefore Respondent does not appear to have gained any economic benefit from its two days of noncompliance.

4. Deterrence

Deterrence is an important objective for the Board in establishing an appropriate civil

penalty, even where a violator has already achieved compliance. *See ESG Watts, Inc. v. Pollution Control Board*, 283 Ill. App. 3d 43,51 (4th Dist. 1996) (Respondent's compliance came only after initiation of enforcement, and associated hardships imposed on Illinois EPA warranted a "stiff' penalty to assure deterrence). Although Respondent did come into compliance with the Act after Zappa made them aware of their violations, General Waste is a licensed asbestos abatement firm which employed licensed asbestos abatement workers during the Memorial Drive renovation. Therefore, Respondent should have been aware of the proper procedures required under the asbestos NESHAP and the dangers of removing RACM without properly wetting it. Respondent's knowledge of asbestos NESHAP work practices should have been enough to ensure that compliance.

Courts have found that the Act's provisions for civil penalties is to "provide a method to aid enforcement of the Act". *Southern Asphalt Co. v. PCB,* 60 Ill. 2d 204, 207, 326 N.E.2d 406, 408 (1975). In *People of the State of Illinois v. State Oil Company*, PCB 97-103, 2003 WL 1785038 (March 20, 2003), the Board found that imposing a civil penalty on State Oil, which continued to operate for another eight months after receipt of a violation notice, served the purpose of having a "prospective deterrent effect on current and future Act violators." *State Oil Company*, 2003 WL 1785038, * 13 ("Levying a civil penalty against State Oil and the Anests in this case aids in the enforcement of the Act because it informs violators that they may not delay efforts to comply with the Act while pursuing sale of the offending property.").

Here, where Respondent chose to violate the Act in order to avoid potential clean up costs, even though it knew the proper methods to wet RACM and dangers of dry asbestos removal, the Board should place a high priority on assessing a penalty that is substantial enough to encourage future compliance by Respondent and the entire regulated community. *See, ESG Watts Inc. v. PCB*, 282 Ill. App. 3d 43, 52, 668 N.E.2d 1015, 1021 (4th Dist. 1996) ("the deterrent effect of penalties on the violator and potential violators is a legitimate goal for

the Board to consider when imposing penalties."). Training and licensing was not enough to ensure that General Waste and its employees complied with the asbestos NESHAP, therefore a small penalty will not dissuade future noncompliance. Therefore the Board should be a factor considered a penalty that truly serves the goals of deterrence.

Complainant believes that a total civil penalty of $30,000 will serve to deter future violations by the Respondent and to otherwise aid in enhancing voluntary compliance with the Act by the Respondent and other persons similarly situated.

5. Compliance History

The People are unaware of any previously adjudicated violations by Respondent.

6. Voluntarily Self-Disclose

Respondent did not voluntarily self-disclose its noncompliance. The noncompliance was discovered during an Illinois EPA compliance inspection.

7. Supplemental Environmental Project

This factor is not applicable to the present case as no supplemental environmental project has been accepted by the Illinois EPA.

8. Requested Penalty

The People believe that a total civil penalty of $30,000 will best serve the purposes of the Act.

XVI. CONCLUSION

"A little late for that," this seemingly sarcastic comment fairly sums up the violations ins this matter. The owners of 3701 Memorial Drive wanted to turn the building into office space. Prior to this renovation they had the entire building inspected for the presence of asbestos. Among other things, the inspection confirmed that the ceilings in the building were covered in a spray on, textured, acoustic, coating which contained greater than one percent asbestos

material. The textured coating was found throughout the building and was a uniform texture and color. There was no way to differentiate one rooms ceiling from another.

Respondent, a licensed asbestos abatement contractor was hired to remove the asbestos found in the building. After Respondent was hired, they notified the Illinois EPA of their intentions to renovate the building, removing 6,714 square feet of RACM. When August 1, 2005 arrived, Respondent built a containment inside the building. They brought in their equipment and on August 3rd, began to remove RACM. All of the employees were wearing protective equipment. Negative air machines were used in an attempt to keep asbestos fibers from exiting the containment. All of these precautions made sense because the Respondent was there to remove RACM, a heavily regulated hazardous air pollutant and a known carcinogen. They were not there to remove non asbestos containing drywall ceilings.

Because they were there to remove RACM, they were required to follow the asbestos NESHAP. Unfortunately, after taking many precautions, Respondent's employees, through either disregard or misunderstanding of the NESHAP requirements, failed to adequately wet RACM as they removed it. They tore out the ceilings throughout the building without using water. They left the material piled on the floor without placing it in leak tight containers.

How do we know these violations occurred? We know because they were witnessed by Zappa, a trained Illinois EPA inspector. On August 4, 2005, Zappa observed General Waste employees removing RACM without water. He observed piles of dry, friable RACM lying on the floor instead of being properly wetted and containerized for disposal. Zappa documented all of this in a series of photpgraphs. On August 4, 2005, Zappa even witnessed General Waste employees attempting to wet material after the realized they were being watched. At that point it truly was "A little late." The material should have been wetted while it was being removed, and kept wet until it was properly containerized for disposal.

The evidence proves that Respondent is liable for the violations alleged in Count I of the

Complaint. Respondent failed to adequately wet RACM as it was being disturbed and removed at the Memorial Drive facility. Respondent thereby violated 40 C.F.R. § 61.145(c)(3). Respondent also failed to assure that the RACM it disturbed remained wet until it was properly containerized for disposal. Respondent thereby violated 40 C.F.R. § 61.145(c)(6)(i). By violating 40 C.F.R. § 61.145(c)(3) and (6)(i), Respondent also violated Section 112 of the CAA. 42 U.S.C. § 7412. Violations of the Section 112 of the CAA are also violations of Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (2008). Therefore, by violating Section 112 of the CAA, Respondent also violated Section 9.1(d) of the Act.

An analysis of the Board's penalty factors suggests the need for a moderate penalty to accomplish the purposes of the Act, and aid in enforcement. Respondent followed many of the requirements during the first 3 days of its renovation project. However, it failed to wet RACM found at the site in order to avoid potential costs associated with water damage within the building. Although the Board has the authority to award a maximum penalty $140,000, the People believe that a total civil penalty of $30,000 will best serve the purposes of the Act.

Respectfully submitted,

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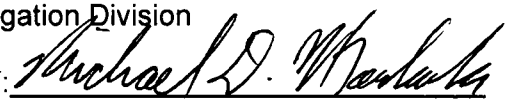
BY: 

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