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

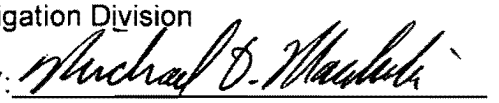
PLEASE TAKE NOTICE that on January 5, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S REPLY BRIEF, a copy of which is attached hereto and herewith served upon you.

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
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Dated: January 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on January 5, 2011, 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 REPLY BRIEF upon the persons listed on the Service List.

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COMPLAINANT'S REPLY BRIEF

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

I. INTRODUCTION

Complainant submitted its Closing Argument and Post-Hearing Brief ("Post Hearing Brief") on August 2, 2010. Respondent General Waste Services, Inc. ("General Waste") filed its Closing Argument and Post-Hearing Brief ("Response") on December 3, 2010.

The matter before the Board is quite simple. In its one-count Complaint, the State alleged two violations committed by the Respondent, a licensed asbestos removal contractor, during an asbestos removal project conducted at 3701 Memorial Drive, Belleville, Illinois ("the site"). The violations are limited to Section 9.1(d) of the Illinois Environmental Protection Act ("The Act"), 415 ILCS 5/9.1(d) (2008), and 40 CFR 61.145(c)(3) and (6). These are very specific work practice violations. Section 9.1(d) makes it illegal to violate certain sections of the Clean Air Act. 40 CFR 61.145(c)(3) and (6) are regulations created with authority granted under the Clean Air Act, which require that all regulated asbestos containing material ("RACM") must be adequately wetted while it is being removed and containerized for storage during a

renovation or demolition. As such, both of the alleged violations are related to the improper wetting of RACM during Respondent's removal project. One violation was for failing to adequately wet RACM while it was being removed at the site. The second was for failing to adequately wet and keep wet all RACM until such asbestos-containing waste materials were collected and contained in leak-tight wrapping in preparation for disposal.

All the Board is deciding in this matter is whether the acoustic spray on ceiling coating removed by Respondent was RACM; whether Respondent failed to adequately wet RACM while it was being removed; and whether Respondent adequately wetted that material until it was collected and contained in leak-tight wrapping in preparation for disposal. Although Respondent's florid Response would have the Board think otherwise, in the present case, the Board is not required to decide whether Respondent caused or allowed air pollution; had adequate containment at the site; had an adequate number of negative air machines; or how a person should treat a rental car.

Respondent's use of obfuscation, red herrings, misstatements of facts, use of facts not present in the Record, and improper attacks on the State's witness, do not change the fact that the State has clearly proven that it is more likely than not that Respondent violated Section 9.1(d) of the Act by violating Sections 40 CFR 61.145(c)(3) and (6).

II. IMPROPER IMPEACHMENT OF JOSEPH ZAPPA

Before discussing the merits of Respondent's argument, the State feels that it must address the improper, and shameless attempt at impeaching the State's witness, Joseph Zappa, made by Respondent's counsel. At the October 28, 2009 Hearing, over strenuous objections by the State, Respondent's counsel attempted to question Zappa about his possible

prior criminal history. Counsel, opined that it would be malpractice not to do so[1], when in fact, his questioning was barred by decades of Illinois case law regarding this very personal and highly prejudicial subject. After some discussion, and over the State's objections, the Hearing Officer allowed counsel to make an offer of proof related to Zappa. This was also done in error. Respondent continued to discuss this offer of proof within its Response. For the reasons outlined below, it is clear that this impeachment attempt should be disregarded by the Board when determining Zappa's credibility and all mention of it should be stricken from the Record. The offer of proof must be denied..

A. Absolute Bar Against Use of Convictions More than 10 Years Old at the Time of Testimony.

Counsel makes a false show of sympathy, stating, "This is an unfortunately messy business, which is precisely why persons burdened with Mr. Zappa's history stay away from witness stands, but the State was willing to throw him into the mosh pit."[2] This should never have been a "messy business." The Supreme Court of Illinois has held that all witnesses are protected from the type of attack perpetrated by counsel. Zappa should not have had to be subjected to the indignity of having his name dragged through the mud in a public hearing. It was not the State that made things difficult for Zappa, it was Respondent's counsel. Had he done a simple search he would have realized that Zappa was protected from counsel's "mosh pit" of improper and inadmissible statements, by a long string of Illinois decisions.

In *People v. Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695 (1971), the Illinois Supreme Court adopted proposed Rule 609 of the Federal Rules of Evidence concerning admissibility of a witness' prior convictions for impeachment purposes. This rule, as set forth in *Montgomery*, provides:

[1] 10/28/09 Hearing Transcript p. 119
[2] Response p. 9

> "(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of *nolo contendere*, is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3) in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.
>
> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date."[3]

The ten-year period commences with the date of the conviction itself.[4] Like the rule generally, subdivision (b) applies to witnesses other than to the accused who elects to testify.[5] The *Montgomery* rule is also applicable to civil actions and prosecution witnesses.[6] Evidence of the prior conviction is inadmissible if the conviction or release of such witness, whichever occurred later, was more than 10 years before the giving of his testimony.[7]

Furthermore, the party seeking to impeach testimony has the responsibility of presenting proper evidence of an impeaching conviction.[8] Proof of prior convictions for impeachment purposes is provable **only by the introduction into evidence of the record of conviction or an authenticated copy**.[9]

If counsel felt that Zappa had an admissible conviction in his past, he had a duty to do his due diligence and obtain proper evidence of that conviction. At the October 28, 2009 Hearing, counsel did not offer any proof of an impeaching conviction. He did not attempt to introduce a record of conviction into evidence. He went from the questioning Zappa about his August 4, 2005 inspection right into questioning about Zappa's possible criminal history.

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[3] *Montgomery*, 47 Ill.2d at 516
[4] *See People v. Hawkins*, 243 Ill. App. 3d 210, 183 Ill. Dec. 421 (1993)
[5] *People v. Stewart*, 54 Ill. App. 3d 76, 81, 11 Ill. Dec. 677 (1977)
[6] *Knowles v. Panopoulos*, 66 Ill.2d 585, 589, 6 Ill.Dec. 858 (1977); *Stewart*, 54 Ill. App. 3d at 81
[7] *People v. Thibudeaux*, 98 Ill.App.3d 1105, 1113, 54 Ill.Dec. 275 (1981)
[8] *People v. Yost*, 78 Ill. 2d 292, 297, 35 Ill. Dec. 755 (1980)
[9] *People v. Nelson*, 275 Ill.App.3d 877, 212 Ill.Dec. 276 (1995) (*citing People v. Kosearas*, 408 Ill. 179, 96 N.E.2d 539 (1951); *People v. McCrimmon*, 37 Ill.2d 40, 224 N.E.2d 822 (1967); *People v. Depper*, 256 Ill.App.3d 179, 196 Ill.Dec. 154, 629 N.E.2d 699(1994))

Counsel had not met his burden of proof, yet he felt that he was somehow entitled to blindly probe into Zappa's past, although he had provided no proof of any felony conviction.[10] The *Montgomery* court realized that prior convictions can be extremely prejudicial and ruled that after 10 years, the probative value of the conviction with respect to a person's credibility diminished to a point where it should no longer be admissible. Therefore, unless counsel provided proof that Zappa had been convicted of a felony less than ten years before he testified, counsel was not allowed to "probe further" into Zappa's past in hopes of scoring points against him. As far as the law is concerned, there are no felony convictions that affect Zappa's credibility.

As well as failing to meet his burden of proof, counsel's attacks on Zappa are false. Zappa was an asbestos laborer prior to working for the IEPA. He was never "in prison after being convicted of a felony." That is a fabrication on counsel's part. Zappa's past includes no felony convictions that can be used to impeach his credibility and it definitely does not include serving time in **prison**.

B. Zappa is a Credible Witness

Zappa has a long history with the Illinois EPA and the asbestos removal industry. Zappa worked as an asbestos laborer for four years prior to being hired by the Illinois EPA where he has worked since 1999.[11] Once employed by the agency, Zappa became a licensed asbestos inspector and conducted hundreds of site inspections prior to his visit to the site on August 4, 2005.[12] Also, Zappa is an impartial witness. Although he is employed by the Illinois EPA, he has no incentive to make false allegations against anyone or lie about what he observed during a site inspection. One of the main goals of the Illinois EPA is assuring compliance with the

[10] Response p. 10, "Hearing Officer would not permit any questions..."
[11] People's Exhibit 1, 10/28/2009 Hearing Transcript pp. 8-16
[12] *Id.*

state's environmental laws and regulations. The Illinois EPA would be perfectly content if its Bureau of Air inspectors never observed any violations because this would mean that every asbestos removal company in working in the state was in compliance. Zappa did not arrive at 3701 Memorial Drive hoping to harass Respondent. He was there to check for compliance and accurately recorded the conditions he observed.

It may be true that Zappa was nervous while he testified, but considering the conduct of Respondent's counsel, he had a right to be. Being nervous does not affect his credibility and also does not change the fact that Zappa witnessed violations on August 4, 2005, which he documented in pictures[13] and in his inspection report.[14] During the October 28, 2009 Hearing, he truthfully testified as to what he observed.

When counsel states that he "hopes that hereafter there might be further clarity as to how this sort of issue will be handled at hearings, because what occurred was downright cumbersome,"[15] he has only himself to blame for the situation being cumbersome. The law is very clear regarding this situation and no further clarity is needed.

III. ARGUMENT

Respondent agrees that the Burden of Proof in this matter is preponderance of the evidence.[16] For reasons already stated in its Post Hearing Brief and further elaborated on in this Reply Brief, the State has clearly and sufficiently met its burden by showing that it is more likely than not that the ceiling material removed by the Respondent was RACM and that Respondent failed to properly implement the wetting procedures required under the NESHAP when it removed RACM at the site. More specifically, the State has shown that it is more likely

[13] People's Exhibits 4a-4gg
[14] People's Exhibit 2
[15] Response p. 10
[16] Response p. 2

than not that Respondent failed to adequately wet the RACM while removing it and keep the RACM wet until it was contained in leak-tight wrapping in preparation for disposal.

Respondent's claims that it has successfully refuted the State's allegations are simply without merit. Respondent would like the Board to believe that the State has created its allegations out of thin air. It props up this claim by continuing the incredible argument that **although it was an asbestos removal contractor**, paid to conduct an asbestos removal project at 3701 Memorial Drive, **it removed no RACM**! It makes this argument with a straight face, even though three weeks prior to the project **it certified to the State**, in an asbestos notification, entered as People's Exhibit 2, **that it was to remove 6714 sq/ft of regulated asbestos containing material** ("RACM"). It certified this notification after asbestos was detected at the site using Polarized Light Microscopy. It continues to make this argument even though 80% of the samples of ceiling material found in the Record show that the ceiling material contained greater than 1% asbestos containing material. No "3-D solar powered prosthetic nose[17]" is required to tell that Respondent's RACM argument does not pass the smell test.

Respondent goes on to argue that even if the material was asbestos, it was adequately wetted. Zappa testified that on August 4, 2005, he observed workers removing ceiling material without the use of water. At the time of his inspection Calvin Johnson was outside the building and Kenny Stevens was in the hallway, unable to see what was going on in the area where Zappa observed dry removal. Therefore neither of Respondent's witnesses have any firsthand knowledge of what Zappa observed. All Mr. Stevens could add to the discussion was that he had to occasionally refill the bucket which fed the airless sprayer. Even if Stevens was correct, and the workers were using the airless sprayer in the method described in the Response, it was not sufficient. Misting the air is not enough. The ceiling material must be sufficiently mixed or

[17] Response p. 11

penetrated with liquid to prevent the release of particulates. Misting the air can be a helpful secondary control for particulates released, but it could not sufficiently wet the ceiling material at the site. If the material was not wet enough to prevent the release of particulates, then it was not adequately wet. Either way, because they were not in a position to observe what Zappa observed on August 4, 2005, neither Stevens', nor Johnson's testimony does anything to refute the fact that Zappa observed workers removing ceiling material without using the airless sprayer.

Respondent's wetting argument also completely disregards the piles of ceiling material found on the first floor of the building. This material was removed on August 3, 2005 and was still sitting on the floor on August 4th. Even if that material was wetted while being removed, which is doubtful given the conditions observed by Zappa, it was not kept adequately wet until sealed in leak tight containers. This is a definite violation of 40 CFR 61.145(c)(6).

In its Response, Respondent dismisses or ignores multiple photographs that clearly depict dry ceiling material found throughout the site on August 4, 2010, and rejects the testimony of an experienced Illinois EPA inspector. In lieu of providing the testimony of a witness who was actually in the same room as Zappa, or its own samples showing that the material being removed was not RACM, Respondent resorts to misstating the Record and the Complaint in an attempt to advancing its ludicrous argument that it was not removing RACM.

A. Respondent's Statement of Facts is Incorrect

Respondent's Statement of Facts is seriously flawed.

- Respondent notes that the Farmer's Report ("People's Exhibit 5" or "Farmer's Report") does not identify the testing locations for the seven (7) samples of textured ceiling plaster" that tested positive for containing greater than 1% asbestos containing material.[18] This fact is

[18] Response p. 3

inconsequential. The Farmer's report was entered without objection and speaks for itself. It clearly shows that seven (7) samples of spray on ceiling material were taken at the site and that all seven tested positive. It also states that all spray on textured ceiling plaster was one homogeneous area, meaning that it was indistinguishable from room to room and floor to floor. Once the material was removed from the ceiling it would be impossible to distinguish one sample from another. At the time that Zappa inspected the building, Respondent had removed at least half of the ceilings in the building.[19] The original location of any material found in drums or on the floor could not be ascertained, therefore specific testing locations would not be determinative of which material removed by Respondent on August 3 and 4, 2005 was RACM. All spray on ceiling plaster at the site was identical and should be considered RACM.

- Respondent misstates the Record when it says that it relied on the Farmer's Report when creating the notification form ("People's Exhibit 2" or "notification") for the 3701 Memorial Drive asbestos removal project.[20] The second page of the notification clearly states that Polarlized Light Microscopy was used to detect the presence of asbestos at the site. The inspector listed on the notification by Respondent has an Illinois license number of **100-8353**. Respondent also certified that the PLM testing was conducted by an analytical testing laboratory listed as EMC. The Farmer's Report was created for the building owner, Memorial Hospital, and Darrel Moore, Illinois license number **100-02118**, conducted the sampling for Farmers. Farmers tested its own samples, EMC is not mentioned anywhere in the Farmer's Report. Neither of Respondent's witnesses testified that the Farmer's Report was relied on by Respondent in determining what material was RACM. Therefore, the Record does not support Respondent's claim that it relied upon the Farmer's Report.

At no point prior to or during either hearing did Respondent provide the sampling report

[19] People's Exhibit 6, 5/11/2010 Hearing Transcript pp. 60-61
[20] Response p. 4

of inspector number 100-8353 or the testing results of EMC. All that is present in the Record is the notification which was certified by the Respondent. Therefore, Respondent cannot hide behind its "contractor" status claim that it relied on the Farmer's Report or that it did not do its own testing. Obviously Respondent was confident enough that 6,714 sq. ft. of RACM was present at the site prior to its removal. If there wasn't 6,7114 sq. ft. of RACM, than Respondent would not have certified as such in the notification.

- Zappa specifically stated that no air sampling reports were submitted by Respondent for August 4, 2005.[21] Therefore, Respondent is putting words in Zappa's mouth when he states that Zappa agreed that no air standards were violated.[22] People's Exhibit 6, the final project report created by Respondent for the 3701 Memorial Drive Project, contains air sampling for August 3rd and August 5th, 2005. The results for August 4, 2005 are missing. Therefore, Respondent's claim that no air standards were violated on August 4, 2005, is unsupported by the Record and should be disregarded.

- Respondent misstates the Complaint when it states that "...the State's Complaint in this cause alleges that GWS failed to adequately wet RACM material *while* it was being removed on August 4, 2005, the only day the IEPA inspector was on site."[23] Paragraph 14 of the Complaint states as follows:

> 14. The Respondent failed to adequately wet the RACM during its removal and thereby violated Section 9.1(d) of the Act, 415 ILCS 9.1(d)(2004) and 40 CFR 61.145(c)(3).

The State alleges that Respondent failed to adequately wet the RACM during its removal. It does not specify which day. The Record clearly shows that Respondent removed ceiling

[21] 10/28/2009 Hearing Transcript pp. 69-70.
[22] Response p. 4
[23] Response p. 4

material on August 3rd through 5th, 2005.[24] Dry ceiling material was found on the first floor which according to Respondent's witnesses was removed on August 3, 2005. Therefore it is inaccurate to imply that the State only intended its allegations to apply to material removed on August 4, 2005 in the presence of Zappa.

Respondent's insistence on qualifying that it was only responsible for the material observed being removed on August 4, 2005, is wrong. It was required to adequately wet all material while it was being removed. Whether it was removed on August 3, 2005 or when Zappa was present, all material needed to be adequately wet. The evidence present in the Record supports a finding that it is more likely than not that Respondent failed to wet RACM on both August 3rd and August 4th, 2005. Therefore the State's allegations apply equally to all material removed on August 3rd and August 4th and are not limited to only the material removed in Zappa's presence.

- Respondent disregards the RACM found by Zappa in a drum on the first floor because it was not removed in the presence of Zappa stating, "Nothing about the belated condition of the material would or could speak to its degree of "wetness" at the time the material was gathered and placed in the drum."[25] This is red herring. Respondent was required to adequately wet that material when it was removed and keep it wet until properly containerized in a leak tight container. The material could only have been removed on either August 3rd or 4th. If the material was adequately wet when removed and kept wet, as required by the Clean Air Act, the material would have been wet when Zappa observed it. Zappa, an experienced and qualified inspector, observed that the material was too dry. He had to handle the material in order to sample it and it did not look or feel wet. Either the material was not adequately wetted while

[24] People's Exhibit 6
[25] Response p. 4, "Nothing about the belated condition of the material would or could speak to its degree of "wetness" at the time the material was gathered and placed in the drum."

being removed, or was improperly stored in an unsealed container, and allowed to dry out. Respondent's two witnesses were not in the room with Zappa. Johnson was outside of the building when Zappa took the sample and therefore is not qualified to determine if the material observed by Zappa was wet or dry. Stevens did not accompany Zappa when he was in the load out room. He did not see the material sampled by Zappa. Therefore he had no firsthand knowledge of whether the material was wet or dry. When shown a picture of the material[26] he was noncommittal at first, but did agree that if the material had been wetted when removed the day before, there should have been water present in the bag.

- Respondent once again misstates the Complaint and shows a fundamental misunderstanding of the State's allegations which fatally colors all of its arguments, by stating:

> Because the material collected and sampled in the actual work area was not ACM,and because the ACM sample found in the disposal drum in the waste storage area on site was already containerized for disposal, **it becomes difficult to discern the basis for the Complaint's assertion that Section 9(a) of the Act or NESHAP might be violated**, particularly in light of the fact that the IEPA Inspector's report states that "the containment that General Waste had constructed was excellent", (People's Exhibit 3, p.2.) **Of course, it is the integrity of the containment that assures that any emissions of ACM are controlled or captured during the abatement process**. (emphasis added).[27]

The State alleged two very specific violations of 40 CFR 61.145(c)(3) and (6) and 9.1(d) of the Act. Nowhere in its Complaint does the State allege a violation of Section 9(a) of the Act, 415 ILCS 5/9(a) (2004). Section 9(a) states in pertinent part as follows:

> No person shall:
>
> (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Since the State never alleged any 9(a) violations, it is true that it would be extremely hard for

[26] People's Exhibit 4z, 5/11/10 Hearing Transcript pp. 127-128
[27] Response p. 5

Respondent to discern the basis for a 9(a) violation. As the Board can plainly see, Section 9(a) concerns air pollution and the discharge or emission of contaminants into the environment. If the State had alleged a violation of Section 9(a), than many of Respondent's arguments would apply. Unfortunately for the Respondent, the State's Complaint does not allege air pollution. It simply alleges two workplace practice violations which are covered under Section 9.1(d) and the NESHAP. Therefore any talk of containment, air sampling, or anything else that does not relate to the wetting of RACM is of no consequence.

- Respondent asserts that the IEPA lab results "confirm to a certainty that the material being removed in the Inspector's presence was NOT ACM."[28] This is not accurate. The IEPA lab results merely confirm that two samples of the ceiling material gathered by Zappa did not contain greater than 1% asbestos containing material. This does not mean that all of the material removed by Respondent was non-RACM. The Record in this matter contains the test results of ten samples of ceiling material which were examined using PLM. Eight of those samples tested positive for containing greater than 1% asbestos containing material. Two did not. Therefore it is much more likely than not that the textured spray on ceiling plaster removed by Respondent on August 3 and 4, 2005 was RACM.

B. Respondent's Argument is Unpersuasive

- Respondent states that the spray on ceiling coating could not absorb water.[29] The Record contains evidence that the material could absorb water. People's Exhibit 4dd shows drums full of ceiling material. Some of the off-white, spray on coating is darker than the rest. This is evidence that the material had absorbed water. Unfortunately, only some of the material was wetted at the time it the picture was taken. The brightly colored material in the picture is dry and not adequately wet. This picture was taken after Stevens added water to the drums.

[28] Response p. 6
[29] Response p. 6

Even though Stevens had sprayed the drum with water while Zappa was present, the material inside was mostly dry, showing that there was no way that it could have been adequately wetted before it was put in the drum.

There are no additional pictures of ceiling material that had absorbed water, because Zappa only observed a small amount of wetted material. The vast majority of material observed by Zappa, and documented in photographs, was dry and friable, in violation of the NESHAP and the Act. Saying that the material could not absorb water is simply an excuse not supported by the Record.

Even if Respondent is correct and the material could not absorb water, than Respondent should have sprayed the coating with a material that could sufficiently mix or penetrate the material to prevent the release of fibers.[30] Merely misting the air and adding water to the drums after the ceiling material was already torn down does not meet the definition of adequately wet. As discussed more thoroughly in the State's Closing Argument and Post-Hearing Brief, if Respondent could not devise a way to adequately wet the material, it should have requested a waiver of the wetting requirement as allowed for in the NESHAP.[31]

- The State asserts that protecting the floors of a building renovation is not a consideration present in the NESHAP. If merely coating the floors with poly was not sufficient to protect the floors when an adequate amount of water is being used, then Respondent should have found a better way to protect the floors, not use less or no water. Respondent's rental car argument[32] is apples to oranges in this situation and adds nothing to the matter at hand. As such it should be ignored.

[30] 40 C.F.R. § 61.141
[31] 40 C.F.R. 61.145(c)(3)(i)(A)
[32] Response p. 7

- Respondent seems to be confused about the definition of adequately wet.[33]

Respondent's confusion should not sway the Board. The definition is clear and speaks for itself when it states that "Adequately wet means sufficiently mix or penetrate with liquid to prevent the release of particulates."[34] If the material has not been wetted enough to prevent the release of particulates, than it is too dry. Respondent seems to have stalled on the second part of the definition which states, "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." This second half of the definition merely states that the absence of visible emissions is not evidence of being adequately wet. Material that does not give off visible emissions when dry is still required to be adequately wetted under 40 CFR 61.145(c)(3) and (6).

Contrary to Respondent's argument, this is not a case where there are no visible emissions. Emissions where observed by Zappa. He saw dry dusty ceiling material at the site. Much of this material was documented in photographs which were entered as exhibits. People's Exhibits 4c, 4f, 4j, 4n, 4z, and 4bb all show evidence of dry dusty ceiling material. Part of this may be drywall but part of it may also be spray on ceiling coating. Either way, if the drywall is dry, then there is no way that the spray on ceiling affixed to and mixed with it could be wet. Either they would both be wet, or they would both be dry. The pictures don't lie. They are visual evidence that supports a finding that it is more likely than not that Respondent did not adequately wet the material during removal.

Even if no visible emissions are observed, there are other means for determining whether the material is wet. You can look at the material to see if it has darkened due to water

[33] Response p. 14
[34] 40 CFR §61.141

absorption.[35] You can see if it can be crumbled.[36] You can feel it and see if it is wet. Respondent states that Zappa did not handle the material and break it to see if emissions emerged.[37] This is false. Zappa took his samples by hand.[38] He had to break off pieces of material in order to fit them in his sample bag. Therefore, he had to handle the material. After looking at, examining and handling the material, he determined it was not adequately wet. Zappa's idea of adequately wet is consistent with the NESHAP definition and is well documented by many photographs. Respondent statement that the ceiling material at the site was adequately wet is wrong.

- Respondent attacks the State's justification for why two samples may have come up non-detect for greater than 1% asbestos containing material. Respondent fails to realize that in spray on acoustic coating the asbestos is held in suspension within the binder that affixes it to the drywall. There are circumstances where the asbestos material itself may not have been sufficiently mixed while being sprayed, therefore allowing for sections of ceiling that may not contain greater than 1% asbestos containing material. No one can say for certain why two of the ten samples taken at the site came up non-detect for asbestos. Zappa took samples of material that appeared identical to the ceilings he found throughout the site. What we do know is that eight of the samples did test positive for greater than 1% asbestos. Since you can't test every square inch of ceiling, you have to look at a representative sample of the ceiling as a whole. This is why the idea of a homogeneous area, although not defined in the NESHAP, is helpful. If 80% of the samples taken at the site test positive for containing greater than 1% asbestos containing material, than the Board can feel confident that the material being removed by Respondent was RACM.

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[35] 10/28/2009 Hearing Transcript p. 55
[36] *Id.*
[37] Response p. 14
[38] 10/28/2009 Hearing Transcript p. 83.

Respondent's "goose and gander" argument[39] does not fully grasp the idea of a homogeneous area. Under the homogeneous area system, if one sample out of many tests positive for greater than 1% asbestos containing material, than all material homogeneous to that sample must be considered asbestos containing material. So two non-detect samples and eight positive samples would not create a situation where the whole homogeneous area is considered non-ACM. In this case, we are not talking about one outlying sample testing positive. Here, we have eight positive samples and two non-detect. That means that 80% of the material tested at the site tested positive for a regulated amount of asbestos. With this in mind, the Board can be sure that the material removed by the Respondent was RACM.

- Respondent acts as if it is the Zappa's fault that no GWS employee accompanied him while he inspected the building or that he somehow "made sure" that no one could follow him.[40] Zappa did not tell Johnson that he could not accompany him. He could not have because Johnson wasn't even in the building. Johnson, who was supposed to be supervising his employees and making sure they did their jobs correctly, was outside the building fixing a tripped breaker. A breaker that controlled the airless sprayer that was supposed to be used to "mist" the air inside the building. It is not Zappa's fault that Johnson was outside the building instead of overseeing the conditions inside containment. There was no requirement for Zappa to wait for Johnson to reenter the building before sampling. Since no other employee volunteered to follow him, Zappa continued his inspection on his own.
- Even though no one followed Zappa, he did not hide his actions. On the contrary, he documented all of his steps with photos and in his inspection report. For example, to document sample three, Zappa took two photographs, one of the drum containing ceiling material, People's Exhibit 4z, and a second photo which shows the sample bag within the same drum,

[39] Response p. 11
[40] Response p. 12

People's Exhibit 4aa. 4aa might be blurry, but 4z is clear. Even with the blurriness, it is easy to see that both pictures depict the same material. An examination of 4z shows that there is no evidence of water in the barrel with the material sampled by Zappa. There is no condensation whatsoever. The material is dusty and particles of the spray on material are visible on the drywall inside the bag. Stevens himself stated that the material did not look wet to him and that if the material had been wetted on August 3rd, there would still be water present in the bag on August 4th.[41]

- Respondent's approach of adding water to the drums, once the material was already removed from the ceiling was not "better safe than sorry."[42] It truly was too late. Zappa observed GWS workers removing ceiling material without using the airless sprayer. At the time Zappa was in the building, there was no power being delivered to the airless sprayer because the breaker that supplied the power had tripped. There was no way that the employees could have been wetting the material. Zappa then observed Stevens adding water to the drums while the material was still dry. It is obviously easier to tear down a large section of ceiling, put the material in a drum and then add water to the drum. It is much more time consuming to make sure the ceiling material is properly wetted before it is torn down. However that is the technique mandated by the NESHAP. If ceiling material was first wetted when it reached a drum, then it was wetted too late. If the material was not adequately wetted while it was still on the ceiling, then it was not adequately wetted during removal.
- Respondent puts great weight on the testimony of Johnson and Stevens.[43] This is understandable, since they are his witnesses. Of course Respondent would assume its witnesses are better, they both work for GWS and are dependent on the Respondent for their

[41] 5/11/10 Hearing Transcript pp.127-128
[42] Response p.15
[43] Response p.15

daily income. Respondent's witnesses may have been "straightforward and free of editorial comment". This is because both witnesses were towing the company line. Also, although they were on the stand for a while, they did not add much to the Record. They simply stated what should have been done at the site. Respondent does not provide any further evidence supporting its witnesses' testimony. Also, it was easy for them to be straightforward because they did not have to be nervous of the State abusing them in the manner that Respondent's counsel abused Mr. Zappa.

The simple fact is, neither Johnson nor Stevens were in a position to observe what Zappa observed. Johnson was outside the building instead of overseeing his employees.[44] Stevens spent the morning in a small part of the upstairs hallway allegedly adding water to drums. He assumed the workers were properly using the airless sprayer because he had to occasionally refill a bucket that fed supplied water to it. He also could not see GWS workers using the airless sprayer when Zappa arrived because he was not in the same room. All of Steven's testimony of what he observed was circumstantial at best.

Furthermore, neither of Respondent's witnesses had any knowledge of the conditions present on the first floor on August 4, 2005.[45] Johnson, who was supposed to be in charge of the project, was not even the last one out of the building the night of August 3rd. He didn't take the time to inspect the first floor before work started on the second floor on August 4th.[46] Because of his negligence piles of dry RACM were left all over the first floor.

At the end of the May 11, 2010 Hearing, it was obvious that neither Johnson nor Stevens could be unbiased in their testimony. Johnson was responsible for the conditions present at the site on August 3 and 4, 2005. As such he is expected to say that he did nothing wrong.

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[44] 5/11/10 Hearing Transcript p. 60
[45] 5/11/10 Hearing Transcript pp. 33, 38, 62
[46] 5/11/10 Hearing Transcript p. 82

Stevens appeared to be offended by a comment made by Zappa, and it was clear that he spent most of his time in the hallway, not in the rooms where ceiling material was actually being removed. Neither of these witnesses could testify to the conditions observed by Zappa, and therefore their testimony should be given very little weight.

- The Record shows that Respondent was trying to get the job done quickly and was to ignoring problems with the wetting equipment. From the testimony of Johnson and what was entered in the project logs contained in People's Exhibit 6, Respondent's employees where working extremely fast and were ignoring problems which occurred at the site. By the time Zappa arrived at the site at least half of the 6,714 sq. ft. of ceiling had been removed.[47] The breaker for the circuit that supplied power to the airless sprayer, the only means to wet the ceiling present at the site, had tripped multiple times, but work continued nonetheless.[48] Even though electrical problems were first noticed on August 3, 2005, there were no hand sprayers or other wetting equipment present on August 4th as a backup to the airless sprayer. So every time the breaker tripped, the airless sprayer was useless and ceiling material was left dry. No electrician was called to remedy the situation. Johnson would just leave his post as supervisor, leave his workers unattended, and go outside to reset the breaker. All of this shows a disregard for following proper procedure.
- Respondent seems to completely ignore one major allegation in its Response. Respondent appears to focus all of its efforts discussing the 40 CFR 61.145(3) violation for failing to wet RACM during removal. The only mention of the 40 CFR 61.145(6) violations for failing to keep RACM wet until it is sealed in a leak-tight container awaiting transport to a proper disposal site, appears to be a statement that removal is only a "done deal" once the material is

[47] 5/11/10 Hearing Transcript pp. 60-61, People's Exhibit 6
[48] 5/11/10 Hearing Transcript pp. 46-47, 50-52

finally sealed for transport.[49] On August 3, 2005, piles of dry, friable, ceiling material were present throughout the site. By Respondent's own logic, all of this material was required to be kept wet until it was sealed in leak-tight drums. It is quite obvious that the material found on the first floor was neither wet nor in sealed, leak-tight drums. Many of the drums in the load out room, were not sealed shut, allowing the material to dry out, if it had ever been wet to begin with.

As evidenced by the piles of dry material on the floor on first floor, second floor, and unsealed drums containing dry material in the load out room, Respondent did not adequately wet all removed ceiling material until it was a "done deal." The piles and piles of dry material cannot be excused.

- The State's penalty demand is fair and adequate given the circumstances. The State alleged two violations, both of which continued for two days. Under section 42(a) of the Act, 415 ILCS 5/42(a) (2008), Respondent could have been liable for a penalty as high as $140,000. The State stands by the penalty argument set out in its Closing Argument and Post-Hearing Brief. All that Respondent has done to refute the State's argument is to say that they did nothing wrong. There is no argument in the alternative. Therefore if the Board finds in favor of the State, it should assess a penalty of no less than $30,000.

IV. CONCLUSION

In its Post Hearing Brief, the State clearly established the violations alleged in the Complaint. Nothing in Respondent's Response sufficiently refutes the allegations contained in the State's Complaint. Respondent was at the site to remove RACM. Respondent failed to adequately wet RACM that was being removed at the site. Finally, Respondent failed to keep

[49] Response p. 15

all of the removed RACM adequately wet until it was contained in leak tight containers prior to disposal. The evidence proves that the Respondent violated Sections 40 CFR. 61.145(c)(3) and (c)(6) and thereby violated Section 9.1(d) of the Act. Therefore, the Board should find in the State's favor.

The violations took place on August 3 and 4, 2005. An analysis of the Board's penalty factors suggest the need for a moderate penalty to accomplish the purposes of the Act and to aid further enforcement. Accordingly, the State believes that a penalty of $30,000 is necessary and appropriate to accomplish the purposes of the Act.

Respectfully submitted,

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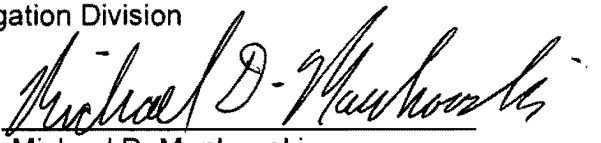
BY: 

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