

ILLINOIS POLLUTION CONTROL BOARD

April 7, 2011

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 07-45
)	(Enforcement - Air)
GENERAL WASTE SERVICES, INC.,)	
an Illinois corporation,)	
)	
Respondent.)	

MICHAEL MANKOWSKI, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT; and

THOMAS IMMEL, FELDMAN WASSER DRAPER AND BENSON, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On December 8, 2006, the Office of the Attorney General, on behalf of the People of the State of Illinois (complainant), filed a one-count complaint (complaint) against General Waste Services, Inc. (General Waste) for alleged violations of Section 9.1(d) of the Environmental Protection Act (Act) (415 ILCS 9.1(d) (2008)) and the Code of Federal Regulations (40 CFR §61.145(c)(3), (6)). The alleged violations occurred at a two-story apartment building (facility) located in Belleville, St. Clair County.

Based on the record in this proceeding, the Board finds General Waste violated Section 9.1(d) of the Act (415 ILCS 9.1(d) (2008)) and the Code of Federal Regulations (40 CFR §61.145(c)(3), (6))¹ by removing regulated asbestos containing material (RACM) and failing to properly wet the RACM during removal.

Having found a violation, the Board analyzes the factors in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2008)) and determines a civil penalty of \$10,000 is appropriate.

PROCEDURAL HISTORY

¹ The NESHAPs were promulgated by the United States Environmental Protection Agency under Section 112 of the federal Clean Air Act (CAA) (42 U.S.C. § 7412). Section 9.1(d)(1) of the Act prohibits anyone from violating any federal regulation adopted under Section 112 of the CAA. Consequently, any violation of the NESHAPs is also a violation of Section 9.1(d)(1) of the Act. See 415 ILCS 5/9.1(d) (2008).

On December 8, 2006, the complainant filed a one-count complaint against General Waste for alleged violations of the Act and federal regulations at a facility in Belleville, St. Clair County. The Board accepted the complaint for hearing on December 21, 2006.

The complaint specifically alleges that General Waste violated Section 9.1(d) of the Act (415 ILCS 9.1(d) (2008)) by failing to adequately wet and keep wet regulated asbestos containing material (RACM) removed during a renovation operation until such asbestos-containing waste materials were collected and contained in leak-tight wrapping in preparation for disposal. Complaint at 5.

General Waste filed an answer to the complaint on February 14, 2007 (Answer), and a motion for summary judgment on July 2, 2008. The complainant filed a response to General Waste's motion for summary judgment on September 8, 2008, and the Board denied General Waste's motion for summary judgment on September 30, 2008, finding that genuine issues of material fact existed.

On October 29, 2009, a hearing was held in Belleville before Board Hearing Officer Carol Webb. Another hearing was held on May 11, 2010 in Springfield before Board Hearing Officer Carol Webb. On August 2, 2010, complainant filed a brief in this proceeding (Comp. Br.) and on January 5, 2011, a reply (Reply). On December 3, 2010, General Waste filed a brief (Resp. Br.).

FACTS

General Waste is an Illinois corporation that was hired to conduct an asbestos abatement project at a two-story apartment building owned by Belleville Memorial Hospital between August 1 and August 12, 2005. Complaint at 1-2; People's Exh. 2. General Waste submitted a timely written notification of the asbestos abatement project to the Illinois Environmental Protection Agency (IEPA). *Id.* at 2. The notification stated that 6,714 square feet of RACM was to be removed from the facility. People's Exh. 2.

Prior to General Waste's abatement project, Farmers Environmental (Farmers) tested seven (7) samples of the ceiling material at the facility, and all seven (7) samples tested positive for 20-25% asbestos. People's Exh. 5. Farmers classified the ceiling material as homogenous. Tr. 1 at 65, People's Exh. 5.

On August 4, 2005, the IEPA inspected the facility and found General Waste employees removing some of the 6,714 square feet of ceiling material. Tr. 1 at 65. When the inspector walked into the building, some of the ceiling material was lying on the floor completely dry. *Id.* at 30-31. General Waste employees were tearing down dry ceiling material, placing the material into 55-gallon drums, and then watering down the material. *Id.* at 32.

Three (3) samples of the ceiling material being removed by the General Waste employees were collected by the IEPA inspector on August 4, 2005. Tr. 1 at 37. One sample tested positive for five percent asbestos, but two of the samples did not test positive for asbestos. *Id.* at 38.

Testimony

The following discussion summarizes the relevant testimony of Joseph Zappa, who is an environmental specialist III for the IEPA's Bureau of Land, Calvin Johnson, who was the supervisor for General Waste on the day of Mr. Zappa's inspection, and Kenneth Stevens, who worked for General Waste as a laborer in this project.

IEPA's Joseph Zappa

Mr. Zappa testified about his inspection of the apartment complex on August 4, 2005. Mr. Zappa stated that upon entering the apartment complex, he observed spray-on acoustical material that had been attached to the ceiling was lying on the floor completely dry. Tr. 1 at 30-31. Mr. Zappa said that he knew this ceiling material was the RACM listed in the notification form from his professional experience (*Id.* at 31), and because the spray-on acoustical ceiling material fit the description of the 6,714 square foot surface described in the notification. *Id.* at 34.

Mr. Zappa said that as he came up the stairs to the second floor, he saw General Waste employees tearing down completely dry RACM, placing it into 55-gallon drums, and then watering down the RACM. Tr. 1 at 32. Mr. Zappa said that he knew the material was not wet because there was no moisture on it, the material had not changed color, and there was no moisture on the plastic on the floor around the employees. *Id.* at 33.

Mr. Zappa took three samples of the ceiling material, one from the second floor hallway, one from the southwest room of the first floor, and one from a 55-gallon drum located in a bag out area. Tr. 1 at 37. Only the sample from the 55-gallon drum tested positive for asbestos. *Id.* at 38. Over objection of opposing counsel, Mr. Zappa stated that he believed two of the three samples did not test positive for asbestos because the ceiling is at least 50 years old and water leaks could have made it necessary to scratch the surface of the ceiling. *Id.* at 40. Mr. Zappa also stated that his failure to take a core sample may have led to sampling the wrong layer of material. *Id.* Mr. Zappa took bulk material samples which are pieces of material from the ground. *Id.*

Mr. Zappa thought the material in the 55-gallon drum in the bag out area was dry because there was no moisture in the drum at all. Tr. 1 at 43. Mr. Zappa stated that there would have been evidence of wetting in the drum if the ceiling material had been properly wetted. *Id.* at 130.

Mr. Zappa also testified that there were 55-gallon drums in the hallway on the second floor that contained dry RACM. Tr. 1 at 60, People's Exh. 4dd. Mr. Zappa stated that there were beads of moisture on the plastic bags in these drums, but only as a result of General Waste employees wetting the drums after seeing Mr. Zappa. Tr. 1 at 60. Mr. Zappa stated that the material in these drums was not adequately wet because of the bright white coloring of the spray on material and the bright tan coloring of the drywall. *Id.* at 61.

Mr. Zappa stated that he spoke to Calvin Johnson, General Waste's job supervisor, about the violations he had observed. Tr. 1 at 45. Mr. Zappa said that Mr. Johnson apologized, acknowledged the error, and explained that General Waste was not using water because of electrical problems. *Id.*

On cross examination, Mr. Zappa testified that air sample reports submitted by General Waste to IEPA on the day before and the day after Mr. Zappa's inspection showed no asbestos fiber releases. Tr. 1 at 70. However, Mr. Zappa testified that the air sampling machine was not functioning on the day he inspected the building. *Id.*

Mr. Zappa concluded his testimony by stating that he did not know what day the material that tested positive for asbestos was placed in the 55-gallon drum in the bag out area or where the material had come from. Tr. 1 at 121-122.

On redirect, Mr. Zappa testified that there would have been some evidence of water in the 55-gallon drum in the bag out room if General Waste had properly wetted the material inside that drum. Tr. 1 at 130.

General Waste's Calvin Johnson

Mr. Johnson testified that General Waste was using an airless sprayer on the day of Mr. Zappa's inspection. Tr. 2 at 20. Mr. Johnson stated that the ceiling was wetted with an airless sprayer before being torn down and again after it was torn down. *Id.* at 40. He also stated that finger hoses were used to wet all the drums that were packaged the day before Mr. Zappa's inspection. *Id.* at 59.

But Mr. Johnson also stated that General Waste was unable to wet the ceiling through spraying or misting because the coating on the ceiling was essentially impermeable. Tr. 2 at 34. Mr. Johnson testified that the spray on coating material thought to contain asbestos was impermeable because it had been painted over several times. *Id.* at 45. Mr. Johnson said that General Waste was also unable to access the ceiling from above in order to wet the ceiling. *Id.* at 34.

Mr. Johnson stated that the electrical breakers that were controlling the finger hoses and airless sprayers that General Waste employees were using to wet the material were shutting on and off the day of Mr. Zappa's inspection. Tr. 2 at 47, 50. He said that the cords that were plugged into the airless sprayer were tripping the breakers, and he thought this was probably happening as a result of the cords being wet. *Id.* at 52. Mr. Johnson said that the electricity would be shut off for roughly ten minutes at a time until Mr. Johnson was able to reset the electrical breakers. *Id.* at 53.

Mr. Johnson said that after Mr. Zappa had inspected the building, Mr. Zappa told the General Waste employees outside of the building that they should know better and that the material was not wet enough. Tr. 2 at 56. Mr. Johnson denied telling Mr. Zappa that he messed up. *Id.* Mr. Johnson also stated that he believed the material was wet enough to satisfy the regulations. *Id.* 58.

On cross examination, Mr. Johnson stated that one airless sprayer was being used on the day of Mr. Zappa's inspection. Tr. 2 at 62. When questioned about the regulations, Mr. Johnson said that material placed in a sealed container is supposed to be wet enough inside the container so that it does not dry out. *Id.* at 65. Mr. Johnson said that the back of the drywall in this instance would have readily accepted water. *Id.* at 68. He also said that General Waste used amended water² on this project which was supposed to make the water stick to the outside of the material but did not because of the paint. *Id.* at 69.

Mr. Johnson stated that some of the material being removed might have stayed on the floor for longer than 20 minutes and might have dried out because of the negative air machines being used. Tr. 2 at 69-70. He also said that he was not sure whether any of the material being removed on the first floor of the building was left there overnight. *Id.* at 82.

General Waste's Kenneth Stevens

Mr. Stevens testified that he watered the material after the material had been torn down and placed in drums. Tr. 2 at 97. Mr. Stevens said that the material he handled on the day of Mr. Zappa's visit was adequately wet. *Id.* at 112.

Mr. Stevens said that Mr. Zappa could not have seen the employees working on the second floor from the stairs. Tr. 2 at 110. Mr. Stevens said that Mr. Zappa would have had to have been in the hallway on the second floor to see into the rooms where the employees were working. *Id.*

On cross examination, Mr. Stevens stated that before removing the ceiling material, General Waste employees did not soak the ceiling material to the point where water would run off to the floor and damage the floor. Tr. 2 at 121. Mr. Stevens was shown a picture taken by Mr. Zappa on the day of his inspection (People's Exh. 4E), and Mr. Stevens testified that the picture was of dry ceiling material in a barrel. Tr. 2 at 126-127.

WITNESS CREDIBILITY

On cross examination, General Waste made an offer of proof regarding Mr. Zappa's credibility. Tr. 1 at 120. General Waste offered that if Mr. Zappa were permitted to answer, he would testify to having been convicted of a felony for drug conspiracy in 1995 and sentenced to prison. *Id.*

General Waste argues that Mr. Zappa is not a credible witness because of this felony conviction. Resp. Br. at 9. General Waste argues that it is not clear whether this conviction is admissible because General Waste was not allowed to question Mr. Zappa about the conviction. *Id.*

² Amended water is a type of soap. Tr. 2 at 69.

In the reply brief, complainant notes that the Illinois Supreme Court addressed the admissibility of prior convictions to be used for impeachment in People v. Montgomery 47 Ill. 2d 510, 268 N.E.2d 695 (1971). Reply at 3. In Montgomery, the court adopted a federal rule that prohibits introduction of a conviction more than 10 years old. *Id.* Thus, the complainant argues that the conviction was inadmissible and the offer of proof should not be allowed. *Id.* Furthermore, complainant maintains that Mr. Zappa is a credible witness and has a long history with asbestos abatement including four years as an asbestos laborer before joining the IEPA in 1999. Reply at 4-5.

The Board finds that for the purpose of this proceeding Mr. Zappa is a credible witness whose criminal history, if any, will not be taken into account. Evidence of a witness' prior conviction is inadmissible if the conviction or release of such witness, whichever occurred later, was more than ten years before the giving of his testimony. People v. Thibudeaux, 98 Ill. App. 3d 1105, 424 N.E.2d 1178, 1113, 54 Ill. Dec. 275 (1st Dist. 1981), citing Montgomery. The party seeking to impeach testimony has the responsibility of presenting proper evidence of an impeaching conviction, and a court should not presume confinement or the date of release from confinement. People v. Yost, 78 Ill. 2d 292, 399 N.E.2d 1283, 297, 35 Ill. Dec. 755 (1980). General Waste had the responsibility to present proper evidence of any impeaching conviction. Although General Waste made an offer of proof that Mr. Zappa was convicted of a felony in 1995 and sentenced to prison (Tr. 1 at 120), General Waste presented no evidence about when Mr. Zappa was released from confinement. Because General Waste had the obligation to prove when Mr. Zappa was released from confinement, the Board cannot find that less than ten years have lapsed between 1995 when Mr. Zappa may have been sentenced to prison and 2009 when Mr. Zappa testified. Thus the Board affirms the hearing officer's ruling that the conviction was not admissible to impeach Mr. Zappa and the offer of proof is denied. The Board finds that there is no evidence in the record, including any criminal history, which detracts from Mr. Zappa's credibility.

STATUTORY BACKGROUND

Section 9.1(d)(1) of the Act provides no person shall:

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. 415 ILCS 5/9.1(d)(1) (2008).

The regulations on National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos, 40 CFR Part 61, Subpart M, were adopted pursuant to Section 112 of the Clean Air Act, 42 USC § 7412.

40 CFR § 61.145 provides in pertinent part as follows:

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, including any individual nonscheduled renovation operation, 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) of 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.

* * *

(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.

Section 33(c) of the Act 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. 415 ILCS 5/33(c) (2008)

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.” 415 ILCS 5/33(c) (2008).

COUNT I FAILURE TO WET

In count I, the complainant alleges that General Waste failed to adequately wet and keep wet all RACM removed during renovation operations in violation of Section 9.1(d) of the Act (415 ILCS 9.1(d) (2008)). Complaint at 5. The following summarizes the parties’ arguments on this count.

Complainant’s Argument

Complainant asserts that General Waste was the operator of a facility where a renovation occurred. Comp. Br. at 13-14. Complainant first asserts that General Waste disturbed more than a jurisdictional amount of RACM at the facility *Id.* at 14. Next the complainant argues that the material General Waste removed from the facility actually was RACM. *Id.* at 16. The complainant maintains that the material was not adequately wet while being removed and, and the material was not kept wet until collected for disposal. *Id.* at 24, 32. Complainant argues that by taking these actions, General Waste violated Section 9.1(d) of the Act (415 ILCS 9.1(d) (2008)) and should be assessed a civil penalty. *Id.* at 34, 36.

Jurisdictional Amount of RACM Was Removed

To support the contention that General Waste removed more than the jurisdictional amount of 160 square feet of RACM, complainant points to a notification form General Waste submitted to the IEPA specifying that General Waste intended to remove an estimated 6,714 square feet of RACM from the Memorial Drive facility. Comp. Br. at 3. Complainant also points to an inspection conducted prior to the removal project by Farmers which found that the ceilings at the site were covered with a textured, spray-on ceiling plaster. Comp. Br. at 4. Farmers classified the ceiling as a homogenous area and tested seven samples of the spray-on plaster using polarized light microscopy. *Id.* All seven samples contained greater than one percent asbestos. *Id.*

Complainant also argues that General Waste removed more than the jurisdictional amount of one cubic meter of RACM when General Waste removed 35 cubic meters of RACM. Comp. Br. at 15. Complainant supports this assertion by pointing to General Waste's waste shipment form certifying that 35 cubic meters of RACM were shipped to the Roxana Landfill. *Id.*

Material Removed Was RACM

To support the contention that the material General Waste removed was actually RACM, complainant relies on the notification form submitted by General Waste indicating that General Waste was to remove 6,714 square feet of RACM. Comp. Br. at 16. Complainant further relies on the samples taken by Farmers which tested positive for asbestos and the sample taken by Mr. Zappa which also tested positive for asbestos. *Id.* at 18. Complainant argues that the two samples taken by Mr. Zappa that did not test positive for asbestos do not detract from the entire ceiling being a homogenous area of RACM. *Id.* at 22.

Material Not Properly Wet

In support of the assertion that the material was not adequately wet while being removed, complainant relies on IEPA inspector Zappa's inspection. Complainant contends that Mr. Zappa witnessed General Waste employees removing ceiling material without any water on the second floor. Comp. Br. at 9. Further, complainant asserts that Mr. Zappa's inspection found large amounts of dry, friable ceiling material lying in piles on the floor of the first level of the facility. *Id.* at 8.

General Waste's Argument

General Waste argues that the material IEPA inspector Zappa observed General Waste employees removing was not RACM because two samples of that material taken by Mr. Zappa did not test positive for asbestos. Resp. Br. at 2. General Waste further argues that the material was not RACM by challenging Farmers' classification of the ceiling material as homogenous. *Id.* at 10. General Waste asserts that the term "homogenous" is not applicable to NESHAP regulations. *Id.* at 11. General Waste also asserts that Farmers' classification of the ceiling material as homogenous is improper because the location of Farmers' samples is unknown. *Id.* at 3.

General Waste argues that submitting a notification form to the IEPA to remove 6,714 square feet of RACM does not necessarily mean that General Waste removed any RACM. Resp. Br. at 4. General Waste maintains that General Waste conducted no testing and relied entirely on Farmers' report to determine if the material in the facility was RACM. *Id.*

General Waste also argues that the material being removed was adequately wet. Resp. Br. at 12. General Waste relies on Calvin Johnson's assessment of the material as adequately wet (*Id.*), and argues that Mr. Zappa's assessment of the material as dry is not credible because no General Waste employees were present when Mr. Zappa took the sample. *Id.* at 13. General

Waste argues that Mr. Zappa failed to properly determine whether the material was adequately wet by breaking the material to see whether visible emissions would emerge. *Id.* at 14.

Complainant's Reply

Complainant argues that Calvin Johnson and Kenneth Stevens were not present and did not see the area where Mr. Zappa observed dry removal. Reply at 7. Complainant argues that even if General Waste used an airless sprayer to mist the air, misting the air was not enough to adequately wet the material. *Id.* Complainant argues that the ceiling material found on the first floor of the building was not kept adequately wet until sealed in leak tight containers. *Id.* at 8. Complainant maintains that when Mr. Zappa took his samples, Mr. Zappa did break the material to see if visible emissions would emerge. *Id.* at 16. Complainant argues that the ceiling material was not adequately wet. *Id.*

DISCUSSION

The Board begins by noting that the complainant bears the burden of proving by a preponderance of the evidence that General Waste committed the alleged violations. People v. Community Landfill, Inc., PCB 97-193, 04-207 (consl'd) slip op. at 13 (Aug. 20, 2009), People v. Blue Ridge Construction Corp., PCB 02-115, slip op. at 12 (Oct. 7, 2004); *see also* Processing and Books, Inc. v. PCB, 64 Ill. 2d 68,75-76, 351 N.E.2d 865 (1976), Lefton Iron & Metal Company, Inc. v. City of East St. Louis, PCB 89-53 at 3, (Apr. 12, 1990); Bachert v. Village of Toledo Illinois, et al., PCB 85-80 at 3, (Nov. 7, 1985); Industrial Salvage Inc. v. County of Marion, PCB 83-173 at 3-4, (Aug. 2, 1984), *citing* Arrington v. Water E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50,58, (1st Dist. 1975). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage at 4, *citing* Estate of Ragen, 79 Ill. App. 3d 8, 198 N.E.2d 198, 203, (1st Dist. 1979). A complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. Lake County Forest Preserve District v. Neil Ostro, PCB 92-80, (Mar. 31, 1994). Once the complainant presents sufficient evidence to make a *prima facie* case, the burden of going forward shifts to the respondent to disprove the propositions (Illinois Environmental Protection Agency v. Bliss, PCB 83-17, (Aug. 2, 1984)). *See* Nelson v. Kane County Forest Preserve, et. al., PCB 94-244 (July 18, 1996); People v. Chalmers, PCB 96-111 (Jan. 6, 2000).

In this instance, in order to prove the violations, the complainant must prove 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).

First, General Waste admits to being the operator of a facility where a renovation activity occurred. Answer at 3. An examination of the evidence establishes that the Farmers' report documented seven samples of material which tested positive for greater than one percent asbestos containing material and classified the ceiling material as a homogenous area. People's Exh. 5. General Waste's notification form to the IEPA certified that 6,714 square feet of RACM

were to be removed from the facility. People's Exh. 2. Also, one of Mr. Zappa's samples taken during his inspection tested positive for asbestos. Tr. 1 at 38. General Waste argues that Mr. Zappa's samples are less credible because no General Waste employees witnessed the sampling (Resp. Br. at 13); however, the Board does not view the samples as any less credible because Mr. Zappa was not required to take his samples in the presence of General Waste employees. The evidence indicates that General Waste more likely than not disturbed more than 160 square feet of RACM. Therefore, based on the record, the Board finds that the combined amount of RACM disturbed was greater than 15 square meters (160 square feet) on facility components. The Board finds that the renovation involved a homogeneous area of 6,714 square feet of RACM on facility components.

As to adequate wetting, Mr. Zappa's stated that during his inspection he took a sample of material from a 55-gallon drum located in a bag out area which tested positive for five percent asbestos. Tr. 1 at 37-38. Mr. Zappa testified that the material was dry, and there was no moisture in the drum. *Id.* at 43. Mr. Zappa said that he knew the material was dry by the color of the ceiling tile and the color of the insulation. *Id.* at 53.

Mr. Zappa also testified that during his inspection he witnessed General Waste employees tearing down completely dry RACM. *Id.* at 32. Mr. Zappa said that he knew this material was not wet because there was no moisture on the material, the material had not changed color, and there was no moisture on the plastic on the floor around the employees. *Id.* at 33.

Mr. Zappa also testified that he observed ceiling material lying on the floor completely dry. *Id.* at 30. Mr. Johnson did not deny that ceiling material may have been left on the floor of the facility and acknowledged that some of the material being removed might have stayed on the floor for longer than 20 minutes and might have dried out. *Id.* at 69-70, 82.

Furthermore, the pictures included in Exhibit 4 of the site, show that while some moisture may have been present, the material appears dry. Based on the totality of the evidence, the Board finds that General Waste removed RACM from the facility without adequately wetting the RACM. Based on the dry ceiling material lying on the first floor, the Board also finds that General Waste failed to keep the RACM wet until it was collected or contained for disposal.

Therefore, the Board finds that General Waste violated Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2004)) and Sections 61.145(c)(3) and (6) of the Code of Federal Regulations (40 CFR 61.145(c)(3), (6)) by failing to adequately wet and keep wet RACM during its removal until the RACM was collected and contained in leak-tight wrapping in preparation for disposal.

PENALTY

The following discussion will begin with general comments on penalties in Board cases. Then, the Board will discuss the factors from Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2008)) which must be considered when determining the appropriate penalty before the Board. Finally, the Board will assess the appropriate penalty and explain the Board's reasons for the penalty amount.

Having found violation, the Board must now determine the penalty to be assessed. In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. People v. Gilmer, PCB 99-27 (Aug. 24, 2000). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exists, and all facts and circumstances must be reviewed. Gilmer PCB 99-27, slip. op. at 8.

The Board has stated that the statutory maximum penalty “is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts.” Gilmer, PCB 99-27, slip. op. at 8, citing IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990), slip. op. at 72. The basis for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act 415 ILCS 5/42(a) and (b) (2008). Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act and an additional civil penalty not to exceed \$10,000 for each day during which the violation continues. By multiplying the number of sections of the Act that respondents are alleged to have violated (one) a potential civil penalty of \$50,000 is reached. Add to that sum, a civil penalty of \$10,000 a day for each day of noncompliance with those sections (one), the total maximum penalty that could be assessed against respondents is \$60,000. The complainant requests an imposition of civil penalties in the amount of \$30,000.

Section 33(c) Factors

Both parties have presented arguments which relate to the Board’s consideration of the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2008)). The Board will summarize the arguments and then discuss the Board’s findings on the factors.

Complainant’s Argument

Complainant argues that the actual injury to the health and general welfare of the public was minimal, but General Waste’s lack of regard for the asbestos NESHAP regulations has the potential to increase regulatory costs. Comp. Br. at 37. Complainant further argues that General Waste’s improper removal of RACM was a detriment to the site and the surrounding area, improperly handling RACM is not suitable at any location, and General Waste faced no significant technical or economic obstacles to reducing or eliminating the risk of releasing contaminants into the air. *Id.* at 38. Complainant notes that General Waste came into compliance one day after Mr. Zappa’s inspection. *Id.* at 39.

General Waste’s Argument

General Waste argues that there was no injury to the public as a result of General Waste’s activities. Resp. Br. at 15. General Waste further argues that the social or economic value of the building was not impaired, and the apartment building was suitable to the area in which the

apartment was located. *Id.* at 16. Finally, General Waste maintains that General Waste did not create a risk of releasing contaminants into the environment, and General Waste was in compliance after the inspection. *Id.*

Discussion

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People. The degree of injury to the health and general welfare of the people was minimal because the building where General Waste was performing the asbestos removal project was under negative air containment. The Board finds that this factor must be weighed in favor of General Waste.

The Social and Economic Value of the Pollution Source. Renovation of a building is a socially and economically valuable endeavor. The Board finds that this factor must be weighed in favor of General Waste.

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. Improper removal of RACM is not suitable to any location. The Board finds that this factor must be weighed in favor of complainant.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source. Wetting RACM is technically practicable and economically reasonable. The Board finds that this factor must be weighed in favor of complainant.

Any Subsequent Compliance. General Waste came into compliance one day after Mr. Zappa's inspection. The Board finds that this factor must be weighed in favor of General Waste.

Section 42(h) Factors

Both parties have presented arguments which relate to the Board's consideration of the factors set forth in Section 42(h) of the Act (415 ILCS 5/42(h) (2002)). The Board will summarize the arguments and then discuss the Board's findings on the factors.

Complainant's Argument

Complainant argues that the limited duration of the violations and the fact that the asbestos renovation work occurred within a negative air equipped containment should mitigate the gravity component of the penalty calculation. Comp. Br. at 41. Complainant states that General Waste did not act diligently to ensure the RACM was adequately wet during removal or that the RACM remained wet after removal. *Id.* However, complainant does acknowledge that General Waste acted diligently in coming into compliance. *Id.* Complainant concedes that General Waste did not derive any economic benefit from noncompliance. *Id.* However, the complainant argues that the Board should place a high priority on assessing a penalty that is substantial enough to encourage future compliance by General Waste and the regulated

community. *Id.* at 42. Further, the complainant notes there are no previously adjudicated violations by General Waste and General Waste's non compliance was not voluntarily disclosed. *Id.* The complainant also notes that no supplemental environmental project has been accepted by IEPA. *Id.*

General Waste's Argument

General Waste contends that no violation occurred, General Waste has no prior violations of record, and the supplemental environmental project requirement does not apply. Resp. Br. at 16-17.

Discussion

The factors in Section 42(h) of the Act (415 ILCS 5/42(h) (2008)) include the duration and gravity of the violation, the presence or absence of due diligence in attempting to comply with the Act, any economic benefit accrued, the amount of penalty that will deter future violations, and the number, proximity in time, and gravity of previously adjudicated violations. The Board will discuss each of the factors in detail below.

Duration and Gravity of the Violation. The violation adjudicated in this proceeding occurred over two days and are minimal in light of the negative air containment General Waste employed, which help to prevent asbestos escaping. The Board finds that consideration of this factor mitigates against assessing a substantial penalty in this case.

Due Diligence. General Waste achieved compliance with the Act and federal regulations one day after the violation. The Board finds that consideration of this factor mitigates against assessing a substantial penalty in this case.

Economic Benefits Accrued. General Waste accrued only minimal economic benefits from noncompliance in this case because General Waste used electrical equipment and assigned an employee specifically to wet the material. The Board finds that consideration of this factor mitigates against assessing a substantial penalty in this case.

Penalty Which Will Serve To Deter Further Violations. General Waste has not previously been penalized by the Board. In light of this history, the Board finds that consideration of this factor mitigates against assessing a substantial penalty in this case.

The Number, Proximity In Time, And Gravity Of Previously Adjudicated Violations Of This Act By The Violator. General Waste has no previously adjudicated violations of the Act. The Board finds that consideration of this factor mitigates against assessing a substantial penalty in this case.

Penalty Discussion

The Board is authorized by the Act (415 ILCS 5/42 (2008)) to levy financial penalties to aid in enforcement of the Act. In the instant case, the Board has found two violations of the Act

at the facility operated by General Waste. The 33(c) and 42(h) factors justify a penalty in this case; however, mitigating circumstances find against the maximum penalty. Therefore, the Board finds that a penalty of \$10,000 is appropriate for the violations.

CONCLUSION

The Board finds that General Waste violated the Act by failing to wet and keep wet RACM during a renovation that took place at a facility located in Belleville, St. Clair County. Because General Waste has no history of noncompliance and the resulting negative impacts of the violations were minimal, the Board fines General Waste \$10,000.

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

ORDER

1. The Board finds that respondent, General Waste Services, Inc, has committed the violation as alleged in the complaint.
2. The Board hereby assesses a penalty of ten thousand dollars (\$10,000) against General Waste. General Waste must pay this penalty no later than May 9, 2011, which is the first business day following the 30th day after the date of this order. General Waste must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and General Waste's federal employer identification numbers must be included on the certified check or money order.
3. General Waste must send the certified check or money order to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2008)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2008)).
5. General Waste must cease and desist from the alleged violations.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706.

Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 7, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board