

Finally, while this order resolves the case as to respondent Knauer, the case against respondent Morfrey is still pending. The parties are directed to proceed with discovery consistent with the orders of the hearing officer.

THE COMPLAINT AND DEEMED ADMITTED FACTS

As will be explained in more detail below, the People's complaint (Comp.) alleged violations of various air pollution prohibitions contained in Sections 9(a), 9.1(d), 9.13(a) and 9(c) of the Act, 415 ILCS 5/9(a), 9.1(d), 9.13(a), 9(c) (2006). Complainant also alleged violations of Sections 61.145(a) and (b), 61.145(c)(i), (c)(2), (c)(6) and (c)(8), 61.150(b) of the National Emissions Standards for Hazardous Air Pollutants (NESHAPs) for asbestos, 40 C.F.R. 61.145(a) and (b), 61.145(c)(i), (c)(2), (c)(6) and (c)(8), 61.150(b).¹ These alleged regulatory violations included Air Pollution, Failure to Inspect and to Submit Complete and Accurate Notification of Demolition and Renovation, Failure to Remove and Contain Regulated Asbestos Containing Materials (RACM)² in compliance with NESHAP Requirements, Improper Disposal of Regulated Asbestos-Containing Materials, and Failure to Pay Asbestos Fee.

As previously stated, the People filed their complaint against respondents on June 15, 2007, and provided proof that respondent Knauer had been served with the complaint on June 18, 2007. Mot. at 2 and Exh. 1. As of the date of this order, respondent Knauer has not appeared and has not filed an answer or other appropriate pleading in response to the complaint.

Under the Board's procedural rules, respondent has 60 days in which to file an answer or appropriate motion in response to the complaint. See 35 Ill. Adm. Code 103.204(d), (e). Based on Knauer's June 18, 2008 receipt of the complaint, any answer or motion was due August 17, 2007.

Section 103.204(d) provides, in pertinent part, that

¹ While the Board generally does not have jurisdiction of enforcement of USEPA rules, Section 9(b) of the Act provides that the federal NESHAPs "are applicable to the state and enforceable under the Act." 415 ILCS 5/9(b)(2006). Pursuant to Section 112(b)(1) of the Clean Air Act (CAA), 42 U.S.C. 7412(b)(1) (2007), the Administrator of the United States Environmental Protection Agency (U.S. EPA) lists asbestos as a hazardous air pollutant. Asbestos is a known human carcinogen for which there is no known safe level of exposure. Comp. para. 18-19.

² Regulated asbestos containing material (RACM) includes friable asbestos material, which is any material containing more than 1 percent asbestos that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure as defined in Section 61.141 of Title 40 of the Code of Federal Regulations, 40 C.F.R. 61.141. Comp. para. 12.

the respondent may file an answer within 60 days after receipt of the complaint if respondent wants to deny any allegations in the complaint. All material allegations of the complaint will be taken as admitted if no answer is filed or if not specifically denied by the answer, unless respondent asserts a lack of knowledge sufficient to form a belief. 35 Ill. Adm. Code 103.204(d).

The People base their February 21, 2008 motion to deem facts admitted on Knauer's failure to file any answer to their complaint. The Board grants the People's motion, based on Knauer's failure to answer, as well as his failure to file any response in opposition to the motion on or before March 6, 2008.

The facts alleged by the People in the complaint, and now deemed admitted, concern activities concerning removal and handling of asbestos and RACM. On or before January 13, 2006, Mick Morfey retained William Knauer to remove and dispose of asbestos-containing siding material, asbestos-containing pipe covering, scrap metal, and waste material located at barracks buildings 266 and 267, situated within the former Savanna Army Depot, Savanna, Carroll County, Illinois (the Site), prior to the planned demolition of each barracks building. Knauer removed asbestos-containing transite siding shingles located on at least one exterior wall of barracks building 267, and deposited dry friable asbestos-containing waste and refuse within an open dumpster located at the Site. Comp. para. 1-6.

On January 13, 2006, the Illinois Environmental Protection Agency (IEPA) first observed the presence of dry broken and crushed asbestos-containing transite siding shingles and waste resulting from open burning activities near barracks buildings 266 and 267. On January 17, 2006, an IEPA inspector visited the site. During this inspection, he observed:

- 1) broken, crushed, dry, asbestos-containing transite material next to barracks building 267 resulting from the removal of approximately 480 linear feet of asbestos-containing transite siding located on at least one exterior wall of building 267;
- 2) broken, dry, suspect asbestos-containing magblock pipe insulation, floor tile, and mastic at various locations within building 267 and in an open dumpster adjacent to the building;
- 3) suspect asbestos-containing pipe insulation that had been removed from within barracks building 266; and
- 4) presence, near the dumpster, of open-burned refuse from building 266, including but not limited to wooden doors removed from the building, was open burned near the dumpster. Comp. para. 7-10.

On or before January 17, 2006, respondents engaged in waste disposal activities within at least one barracks building by sweeping dry asbestos-containing pipe insulation and debris located on the floor and depositing the material in the open dumpster. On January 17, 2006, the Illinois EPA inspector conducted friability testing on the dry, suspect asbestos-containing pipe insulation, transite siding, canvas wrap, floor tile, and floor tile mastic, from within and adjacent to barracks buildings 266 and 267, and the open dumpster located at the Site and determined that the dry suspect asbestos-containing materials could be crumbled, pulverized, or reduced to powder by hand pressure. On that same day, the inspector also collected eight samples of dry, suspect asbestos-containing pipe insulation, transite siding, canvas wrap, floor tile, and floor tile mastic, from within and adjacent to barracks buildings 266 and 267, and the open dumpster located at the Site. Analytical testing of the eight samples revealed concentrations of chrysotile asbestos within each sample ranging from 1% to 25%.³ Comp. para. 11-15.

RACM remained at the Site, until October 30, 2006. At that time, Respondents' contractor completed the remediation at the Site with final clearance. Comp. para. 17. 27.

STANDARD OF DECISION FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, deposition, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant's right to relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

DISCUSSION

Findings of Violation

The Board grants the People's uncontested motion for summary judgment, finding that the People are entitled to judgment as a matter of law on the undisputed facts as alleged in the complaint and deemed admitted. The Board accordingly finds respondent

³ The dry, suspect asbestos-containing pipe insulation, transite siding, canvas wrap, floor tile, and floor tile mastic, from within and adjacent to barracks buildings 266 and 267, and the open dumpster located at the Site was friable asbestos material and RACM as those terms are defined in Section 6 1.14 1 of Title 40 of the Code of Federal Regulations, 40 C.F.R. 6 1.141. Comp. para. 16.

Knauer has committed the violations of the Act, Board air rules and the asbestos NESHAPs as alleged in the complaint, namely:

- Count I: Air Pollution: Violation of Section 9(a) of the Act, 415 ILCS 5/9(a) (2006) and Section 201.141 of the Board's air rules, 35 Ill. Adm. Code 201.141;
- Count II: Failure to Inspect and to Submit Complete and Accurate Notification of Demolition and Renovation: Violation of 9.1 (d) of the Act, 415 ILCS 5/9.1(d), and Sections 61. 145(a) and (b) of the NESHAP for asbestos, 40 C.F.R. 61. 145(a) and (b);
- Count III: Failure to Remove and Contain RACM in Compliance with NESHAPs Requirements: Violation of Section 9.1 (d) of the Act, 415 ILCS 5/9.1(d), and Sections 61.145(c)(1), (c)(2), (c)(6) and (c)(8) and 61. 150(a)(1)(iii), (iv) and (v) of the NESHAPs for asbestos, 40 C.F.R. 61.145(c)(1), (c)(2), (c)(6) and (c)(8) and 61.150(a)(1)(iii), (iv) and (v);
- Count IV: Improper Disposal of Regulated Asbestos-Containing Materials: Violation of Section 9.1 (d) of the Act, 415 ILCS 5/9.1 (d), and Section 61. 150(b) of the NESHAP for asbestos, 40 C.F.R. 61.150(b);
- Count V: Failure to Pay Asbestos Fees: Violation of Section 9.13(a) of the Act, 415 ILCS 5/9.13(a); and
- Count VI: Open Burning of Refuse: Violation of Section 9(c) of the Act, 415 ILCS 5/9(c).

Remedy

Upon making a finding of violation, the Board must assess the factors of Section 33(c) of the Act to determine the proper remedy. Section 33(c) of the Act, 415 ILCS 5/33(c) (2006), 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:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. 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;

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance. 415 ILCS 5/33(c)(2006).

Consistent with the directions the Board made in its June 21, 2007 order setting the complaint for hearing, as part of their motion for summary judgment the People have proposed a remedy: imposition of a \$100,000 civil penalty. The People have supported their request by discussion of the relevant factors of Sections 33(c) and 42(h) of the Act. Mot. at 10.

The Board, in the main, agrees with the People's assessment of these factors. The character and degree of injury to the public was high. Knauer's failure to comply with the work practice standards of the asbestos NESHAPs in connection with regulated building renovation activities resulted in the emission of asbestos fibers, a known carcinogen, which threatened human health and the environment. This was increased by Knauer's failure to notify IEPA prior to the commencement of asbestos removal activities at the Site. *See* Mot. at 6. The buildings at the Site have social and economic value. *Id.* Knauer's renovation activities also have value, but their value is undercut by his failure to conduct them in accordance with the Act and rules. The Site's buildings are suitable to the area in which they are located, *Id.*, but the manner in which Knauer conducted his asbestos removal, handling, and disposal activities were not so suited. The economic reasonableness and technical practicability of compliance with the Act, Board rules, and NESHAPs are clear, the latter having been proven through the rulemaking process. Finally, the Site has been in compliance with applicable requirements since October 30, 2006.

Considering all of these factors, the Board concludes, as do the People, that a civil penalty is an appropriate remedy for the proven violations. The Board will also issue a cease and desist order against Mr. Knauer, as is the Board's usual practice in enforcement cases.

As to the appropriate penalty amount, the People state that Knauer's violations began on January 13, 2006 and continued to October 30, 2006. The People calculate that the maximum statutory penalty to which Knauer is subject under Section 42(a) is \$6,400,00, including the penalty for continuing violations of \$10,000 per day. *See* Mot. at 8-9, for calculations relating to each individual violation. But, after discussion of the Section 42 (h) factors, the People suggest a civil penalty of \$100,000. *Id.* at 10.

Section 42(h) provides, in pertinent part:

In determining the appropriate civil penalty to be imposed. . . 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, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
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 violator 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 violator;
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," [SEP] which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform. 415 ILCS 5/42(h) (2006).

The Board has no reason to disagree with the statements made by the People concerning these Section 42(h) penalty factors. Mot. at 10-11. The Board finds that most of these factors must be weighed against Knauer in aggravation of the penalty assessment. A major factor weighing against Knauer is the number, duration, and gravity of the violations. These violations lasted a period of over nine months, and involved release of carcinogenic asbestos fibers into the environment by means including open burning. There is no evidence of any diligence by Knauer in determining what requirements might be applicable to the asbestos removal and handling, or in complying with them. Knauer accrued some unquantified benefit by delaying proper asbestos abatement, which Section 42(h)(7) requires must be recouped in the penalty assessed. Knauer did not offer to perform a SEP, which could potentially offset any penalty to be paid. There are no issues of self-disclosure. The sole factors weighing in Knauer's favor are that the People know of no previously adjudicated violations committed by him, and that the site was remediated, although not until October 30, 2006.

The People do not detail the rationale for their suggestion that \$100,000, rather than the statutory maximum of \$6,400,000, is "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 violator and other persons similarly subject to the Act". 415 ILCS 5/42(h)(4) (2006). As this violation is a first offense, the Board sees

no reason to assess a penalty higher than that recommended by the People. The Board accordingly assesses a civil penalty of \$100,000 for the proven violations.

The major points of this order are summarized below. This constitutes the Board's findings of fact and conclusions of law as to respondent Knauer.

Conclusion

1. The Board finds that William Knauer has violated Sections 9(a), 9.1(d), 9.13(a) and 9(c) of the Environmental Protection Act (Act), 415 ILCS 5/9(a), 9.1 (d), 9. 13(a), 9(c) (2006), and Sections 61.145(a) and (b), 61.145(c)(i), (c)(2), (c)(6) and (c)(8), 61.150(b) of the National Emissions Standards for Hazardous Air Pollutants (NESHAP") for asbestos, 40 C.F.R. 61.145(a) and (b), 61.145(c)(i), (c)(2), (c)(6) and (c)(8), 61.150(b).
2. William Knauer must pay a civil penalty of \$100,000 no later than April 21, 2008, which is the first business day following the 30th day after the date of this order. William Knauer must pay the civil penalty by certified check or money order payable to the Illinois Environmental Protection Trust Fund. The case name, case number, and William Knauer's Social Security Number or Federal Employer Identification Number must appear on the face of the certified check or money order.
3. William Knauer must submit payment of the civil penalty 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 Act, 415 ILCS 5/42(g) (2006), at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2006)).
5. William Knauer 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) (2006); *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.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2008, by a vote of 4-0.

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