



motion for summary judgment, requires EHSS to pay a \$56,500 civil penalty, and also requires EHSS to cease and desist from further violations.

In this opinion and order, the Board first reviews the procedural history of this case. The Board then summarizes the People's amended complaint. Next, the Board sets forth the relevant statutory and regulatory provisions and describes the standard of review applied by the Board in considering summary judgment motions. After summarizing the People's motion for summary judgment, the Board provides a discussion of and ruling on that motion before issuing its final order.

### **PROCEDURAL HISTORY**

On September 13, 2004, the People filed a seven-count complaint against Randy Oldenberger d/b/a Environmental Health and Safety (Oldenberger). The Board accepted this complaint on September 16, 2004. On October 18, 2004, Oldenberger filed a motion to dismiss, asserting that EHSS, an Illinois corporation, performed all of the work referenced in the complaint. On November 22, 2004, the People filed a response to the motion acknowledging that EHSS is a corporation in good standing and indicating that it would drop Oldenberger from the complaint and file an amended complaint against EHSS, the corporation. On December 6, 2004, the People filed a seven-count amended complaint against EHSS alleging that EHSS committed air pollution violations. The amended complaint does not allege any violations against Oldenberger, but is otherwise substantially identical to the initial complaint. In an order dated January 6, 2005, the Board found Oldenberger's motion to dismiss moot and accepted the amended complaint for hearing.

On January 13, 2005, and March 21, 2005, the Hearing Officer granted EHSS' motions for extension of time to file an answer. People v. Environmental Health and Safety Services, Inc., PCB 05-51, Hearing Officer Order, (Jan. 13, 2005); People v. Environmental Health and Safety Services, Inc., PCB 05-51, Hearing Officer Order, (March 21, 2005). On May 23, 2005, EHSS timely filed an answer (Ans.) to the amended complaint. On December 19, 2005, the People served a request for admission of facts on EHSS. EHSS served the People with a response to the request on January 17, 2006. The response was signed only by an attorney, and not by a representative from EHSS. On January 31, 2006, the People filed a motion to deem facts admitted. On March 3, 2006, EHSS filed an amended response to the request for admission of facts (Am. Resp.) and a response to the motion to deem facts admitted. On March 9, 2006, EHSS made an oral motion to file both pleadings *instanter*. The Hearing Officer granted the oral motion with respect to the response to the motion to deem facts admitted. People v. Environmental Health and Safety Services, Inc., PCB 05-51, Hearing Officer Order, (March 9, 2006). However, in light of an objection by the People, the Hearing Officer directed EHSS to file a written motion for extension of time with respect to the amended response to the request for admission of facts. On March 14, 2006, EHSS filed a motion for extension of time to file an amended response to the request for admission of facts. The People filed a response to the motion for extension of time on March 15, 2006. In an April 6, 2006 order, the Board accepted EHSS' amended response to the People's request to admit facts, granted EHSS' motion for extension of time to file an amended response, and denied the People's motion to deem facts admitted.

On April 7, 2006, the People served on EHSS a set of interrogatories and a request for production of documents. On May 26, 2006, EHSS faxed partial answers to the People's interrogatories. On June 22, 2006, the People filed a motion to compel answers or responses to written discovery. EHSS did not file a response to the People's motion.

On March 31, 2009, the People filed a motion for summary judgment (Mot.). EHSS has filed no response to the People's motion for summary judgment. On May 21, 2009, EHSS indicated to the Hearing officer that EHSS will not file a response to the motion. People v. Environmental Health and Safety Services, Inc., PCB 05-51, Hearing Officer Order, (May 21, 2009).

### **PEOPLE'S AMENDED COMPLAINT**

The People allege that EHSS conducts asbestos consulting, removal, and disposal services and is located at 1304 Derby Lane in Rockford. Am. Comp. at 2 (PP4-5). The People further allege that EHSS is a "person" as the term is defined by the Act. Am. Comp. at 5 (P18); *see* 415 ILCS 5/3.315 (2008) (definition of "person"). The People also allege that EHSS is an Illinois corporation in good standing. Am. Comp. at 2 (P3).

#### **Count I**

The People allege that EHSS contracted with the Lincoln Park School located at 4103 West State Street in Rockford (Facility) to remove and dispose of RACM from the Facility's boiler room. Am. Comp. at 2 (P6). The People also allege that asbestos is a "contaminant" under the Act. Am. Comp. at 6 (P21). *See* 415 ILCS 5/3.165 (2008) (definition of "contaminant").

The People allege that on December 9, 2002, the Illinois Environmental Protection Agency (Agency) received a Notification of Demolition and Renovation (Notification) from EHSS. Am. Comp. at 2 (P7). The People also allege that the Notification indicated that asbestos removal activities were scheduled to occur at the Facility from January 2 until January 24, 2003, but failed to provide an estimate of the amount of nonfriable asbestos that would not be removed prior to demolition of the Facility. Am. Comp. at 2-3 (P7-8). The People further allege that on January 7, 2003, the Agency conducted an inspection of the Facility and EHSS informed the Agency that asbestos removal activities at the Facility had begun on January 6, 2003, two working days after the starting date scheduled in the Notification. Am. Comp. at 3 (P9-10).

The People allege that, on the inspection date and date(s) better known to EHSS, employees of EHSS removed and then dropped dry friable<sup>3</sup> asbestos containing material (ACM) insulation from boiler structures, causing visible emissions of ACM. Am. Comp. at 3 (P11). The People also allege that EHSS' employees conducted asbestos removal activities "without

---

<sup>3</sup> *Friable asbestos material* is "any material containing more than 1 percent asbestos . . . that, when dry, can be pulverized, or reduced to powder by hand pressure." 40 C.F.R. 61.141.

utilizing a containment area with negative air, decontamination unit, bagout area, or water spray to control the emissions.” *Id.*

The People allege that the Agency inspected one of several bags in the boiler room that EHSS’ employees utilized to contain ACM and discovered that at least one bag contained dry friable ACM and “could easily be crushed and crumbled by hand pressure.” Am. Comp. at 3-4 (P12). The People further allege that “neither water nor condensation were visible within at least one bag.” Am. Comp. at 4 (P12).

The People also allege that the Agency collected three samples of dry friable RACM for testing: two samples from the boiler room and one sample from an area adjacent to the work area’s entry door. Comp. at 4 (P13). The People further allege that, on January 24, 2003, the Agency received test data from EnviroHealth Technologies, Inc., which documented that all three samples contained concentrations of amosite asbestos from 10% to 30%, with one sample also containing concentrations of chrysotile asbestos from 10% to 30%. Am. Comp. at 14 (P14).

The People allege that, “[a]s operator of an asbestos removal activity, [EHSS] caused, threatened or allowed the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution” in violation of Section 9(a) of the Act (415 ILCS 5/9(a) (2008)) and 35 Ill. Adm. Code Section 201.401, because EHSS removed dry friable RACM “without utilizing wet methods or measures to control asbestos emissions.” Am. Comp. at 6 (P22).

### **Count II**

The People allege that EHSS’ removal of asbestos from the Facility constituted a “renovation” of a “facility” as those terms are defined in Section 61.141 of NESHAP (40 C.F.R. 61.141). Am. Comp. at 10 (P22-23). The People also allege that EHSS was “the operator of a renovation activity” as that term is defined in Section 61.141 of NESHAP (40 C.F.R. 61.141). Am. Comp. at 10 (P24). The People further claim that EHSS’ Notification to the Agency stated that the Facility was to be demolished after removal of 1000 linear feet of RACM from the boiler room, 630 square feet of RACM from the pipes, and 12,500 square feet of Category I nonfriable asbestos-containing floor tile. Am. Comp. at 11 (P26). The People allege that, given the amount of asbestos to be removed, removal activities performed by EHSS at the Facility were subject to Notification requirements in Sections 61.145(b) and (c), and Section 61.150 of NESHAP (40 C.F.R. 61.145 (b), (c), 61.150). Am. Comp. at 12 (P27).

The People allege that EHSS failed to set forth in the Notification an estimate of the approximate amount of Category I and Category II nonfriable RACM that would not be removed from the affected area before demolition of the Facility. Am. Comp. at 12 (P29). The People further allege that, “by [EHSS’] failure to submit a complete notification in accordance with the requirements of 40 C.F.R. 61.145(b)(4)(iv),” EHSS “violated section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008), and 40 C.F.R. 61.145(b)(4)(iv).” Am. Comp. at 12-13 (P30).

### **Count III**

The People allege that EHSS “failed to submit a notification to the Agency revising the scheduled starting date for asbestos removal prior to the expiration of the original scheduled starting date of January 2, 2003.” Am. Comp. at 15 (P31). The People further allege that by EHSS’ “failure to notify the Agency of the new starting date for asbestos removal activity,” EHSS “violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008), and 40 C.F.R. 61.145(b)(1) and (3)(iv) (January 17, 2003).” Am. Comp. at 15 (P32).

#### **Count IV**

The People allege that EHSS “failed to adequately wet all RACM during asbestos removal activities within the Facility.” Am. Comp. at 17 (P29). The People further allege that “in failing to adequately wet the RACM during asbestos removal activities,” EHSS “violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9(d)(1) (2008), and 40 C.F.R. 61.145(c)(3).” Am. Comp. at 17 (P30).

#### **Count V**

The People allege that EHSS “failed to wet and maintain wet all RACM until collected and contained prior to disposal” at a permitted waste site. Am. Comp. at 18 (P29). The People further allege that “[b]y failing to ensure that the RACM and regulated asbestos-containing waste material remained wet until collected and contained, [EHSS] violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008), and 40 C.F.R. 61.145(c)(6)(i).” Am. Comp. at 19 (P30).

#### **Count VI**

The People allege that EHSS failed to adequately wet and keep wet, containerize, and label all regulated asbestos-containing waste material, “thereby causing or allowing the discharge of visible emissions” in violation of Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008), and 40 C.F.R. 61.150(a)(1). Am. Comp. 20-21 (PP29-30).

#### **Count VII**

The People allege that EHSS “failed to dispose of all RACM and asbestos-containing waste material generated during the renovation as soon as is practical,” in violation of Section 9.1 (d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008). Am. Comp. at 22 (P29).

#### **EVIDENCE**

In support of their motion for summary judgment, the People have submitted the affidavits of Dennis Hancock, an Inspector in the Agency’s Bureau of Air (BOA), Jan McDow, an Office Associate in BOA, and Shannon Coe, an Office Assistant at BOA. In addition, the People have submitted the affidavit of William J. Lowry, President of EnviroHealth Technologies, Inc. (EnviroHealth), as part of their motion. These affidavits lay the foundation for the documents appended to the People’s motion. Therefore, the Board will consider this evidence in addition to the complaint and answer filed in this matter, and EHSS’ admissions on file. The Board’s findings of fact which follow are based on these sources.

## **FACTUAL BACKGROUND**

EHSS is an asbestos removal contractor located at 1304 Derby Lane in Rockford, Winnebago County. Ans., Count I, P5; Am. Resp. P8. EHSS was hired by the former Lincoln Park School to remove 1000 linear feet of RACM from the boiler room, 630 square feet of RACM from the pipes, and 12,500 square feet of Category I nonfriable asbestos-containing floor tile from the Facility prior to demolition. Ans., Count I, P6; Mot. Exh. F, Attachment 1. On December 9, 2002, the Agency received a Notification of the asbestos removal project from EHSS. Mot. Exh. F (PP8, 10, 11); Mot. Exh. G (PP8-9). According to the Notification, the project was scheduled to begin on January 2, 2003, and end on January 24, 2003. Mot. Exh. F, Attachment 1. The Notification did not indicate the amount of nonfriable asbestos that would not be removed from the Facility prior to demolition. Mot. Exh. F, Attachment 1. Prior to January 7, 2003, the Agency received no notification from EHSS revising the scheduled start date for asbestos removal at the Facility. Mot. Exh. F (P12).

On January 7, 2003, Agency inspector Dennis Hancock inspected the Facility and Oldenberger, EHSS' President, informed Hancock that asbestos removal activities had commenced at the Facility on January 6, 2003, two working days after the scheduled starting date. Mot. Exh. D (P6). At the Facility, Hancock observed EHSS' employees remove dry friable RACM from the boiler and drop it on the floor, causing the visible emission of particulate ACM. Mot. Exh. D (P5). Hancock inspected one of several bags in the boiler room used by EHSS to contain ACM, and observed that the bag contained ACM and could easily be crushed by hand. Mot. Exh. D (P11). Hancock also observed that the bag contained no water or condensation. *Id.* Hancock further observed that there was no evidence of any wet methods or other measures being used at the Facility to control asbestos emissions. Mot. Exh. D (P5, 10,11). Specifically, Hancock observed that no water was visible on the ACM, boiler, boiler pipes, or floor, and dry RACM was visible on the floor. *Id.* Hancock further observed that there was no containment in the work area, no negative air machine in the area, no bag out area, no decontamination unit water being used, and no Hudson sprayers. Mot. Exh. D (P5).

During the inspection, Hancock collected two samples of dry friable RACM from the boiler room, and one sample from the area adjacent to the work area's entry door. Mot. Exh. D (P7). On January 24, 2003, the Agency received test data from EnviroHealth documenting that one of the samples collected by Hancock contained from 10% to 20% chrysotile asbestos concentration, while all three samples contained from 10% to 30% amosite asbestos concentration. Mot. Exh. E (P21); Mot. Exh. D (P9).

## **STATUTORY AND REGULATORY PROVISIONS**

### **Statutory Authorities**

Section 3.315 of the Act provides that a “[p]erson’ is an individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.” 415 ILCS 5/3.315 (2008).

Section 3.165 of the Act provides that a “contaminant” is any solid, liquid or gaseous matter, an odor, or any form of energy, from whatever source.” 415 ILCS 5/3.165 (2008).

Section 3.115 of the Act provides that “[a]ir pollution is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property. 415 ILCS 5/3.115 (2008).

Section 9(a) of the Act provides in pertinent part that 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. 415 ILCS 5/9(a) (2008).

Section 9.1(d)(1) of the Act provides that no person shall “[v]iolate any provisions of Sections 111, 112, 165, or 173 of the Clean Air Act, as now amended or hereafter amended, or federal regulations adopted pursuant thereto.” 415 ILCS 5/9.1(d)(1) (2008).

Section 112 of the Clean Air Act provides that asbestos is a “hazardous air pollutant.” 42 U.S.C. § 7412(b)(1) (2008); 40 C.F.R. § 61.01(a).

### **Federal Regulations**

The Code of Federal Regulations provides the following definitions at 40 C.F.R. 61.141:

*Asbestos* means the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthrophyllite and actinolite-tremolite.

*Category I nonfriable asbestos-containing material (ACM)* means asbestos-containing packagings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1 percent asbestos as determined using methods specified in appendix E, subpart E, 40 C.F.R. part 763, Section 1, Polarized Light Microscopy.

*Category II nonfriable ACM* means any material, excluding Category I nonfriable ACM, containing more than 1 percent asbestos as determined using the methods specified in appendix E, subpart E, 40 C.F.R. part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

*Facility* means any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or

building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or few dwelling units); any ship; and any active or inactive waste disposal site. For purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation or building. Any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function.

*Friable asbestos material* means any material containing more than 1 percent asbestos as determined using the method specified in appendix E, subpart E, 40 C.F.R. Part 763, Section 1, Polarized Light Microscopy, that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure. If the asbestos content is less than 10 percent as determined by a method other than point counting by polarized light microscopy (PLM), verify the asbestos content by point counting using PLM.

*Owner or operator of a demolition or renovation activity* means any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation, or both.

*Demolition* means the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations or any intentional burning of any facility.

*Renovation* means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component. Operations in which load supporting structural members are wrecked or taken out are demolitions.

*Regulated asbestos-containing material (RACM)* means (a) Friable asbestos material, (b) Category 1 nonfriable ACM that has become friable, (c) Category 1 nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

*Remove* means to take out RACM or facility components that contain or are covered with RACM from any facility.

The Code of Federal Regulations provides at 40 C.F.R. 61.145:

- (a) **Applicability.** To determine which requirements of paragraph (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 paragraph (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:

- 1) In a Facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM 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.

\* \* \*

- (b) Each owner or operator of a demolition or renovation activity to which this section applies shall:

- 1) Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.

\* \* \*

- 3) Postmark or deliver the notice as follows:

\* \* \*

- (iv) For asbestos stripping or removal work in a demolition or renovation operation described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section, and for a demolition described in paragraph (a) (2) of this section, that will begin on a date other than the one contained in the original notice, notice of the new start date must be provided to the Administrator as follows:

- (a) When the asbestos stripping or removal operation or demolition operation covered by this paragraph will begin after the date contained in the notice,

- (1) Notify the Administrator of the new start date by telephone as soon as possible before the original start date, and

- (2) Provide the Administrator with a written notice of the new start date as soon as possible before, and no later than, the original start date. Delivery of the updated notice by the U.S. Postal Service, commercial delivery service, or hand delivery is acceptable.  
\* \* \*
- (4) Include the following in the notice:  
\* \* \*
- (vi) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on the other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.  
\* \* \*
- (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 s 61.150.

The Code of Federal Regulations provides at 40 C.F.R. 61.150 that:

Each owner or operator of any source covered under the provisions of §§ 61.144, 61.145, 61.146, and 61.147 shall comply with the following provisions:

- (a) Discharge no visible emissions to the outside air during the collection, processing (including incineration), packaging, or transporting of any asbestos-containing waste material generated by the source, or use one of the emission control and waste treatment methods specified in paragraphs (a)(1) through (4) of this section.

(1) Adequately wet asbestos-containing waste material as follows:

\* \* \*

(b) All asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at:

(1) A waste disposal site operated in accordance with the provisions of Section 61.145.

### **Board Regulations**

Section 201.141 of the Board's Air Pollution Regulations provides in pertinent part that no person shall "cause or threaten or allow the discharge of emission of any contaminant into the environment in any State so as, either alone or in combination with contaminants from other sources, to cause or tend to cause air pollution in Illinois, or so as to violate the provisions of this Chapter . . . ." 35 Ill. Adm. Code 201.141.

### **Civil Penalty Provisions**

Section 33(c) of the Act provides in its entirety that

- (c) 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 provides that:

In determining the appropriate 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:

- (i) the duration and gravity of the violation;
- (ii) 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;
- (iii) 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;
- (iv) 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;
- (v) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (vi) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to ; and
- (vi) whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement brought under this Act, but which the respondent is not otherwise legally required to perform. 415 ILCS 5/42(h) (2008)

### **STANDARD OF REVIEW**

Summary judgment is appropriate when the pleadings, depositions, 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); *see* 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment). 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.” Dowd & Dowd, 693 N.E.2d at 370 (1998).

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.” Dowd & Dowd,

693 N.E. 2d at 370 (1998), 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).

### **PEOPLE’S MOTION FOR SUMMARY JUDGMENT**

In their motion for summary judgment, the People argue that “the complaint and answer filed in this matter, and [EHSS’] admissions on file, together with the affidavits supporting the People’s motion, establish all material facts necessary to prove liability on all counts of the amended complaint.” Mot. at 2. The People further argue that, “because there is no genuine issue of material fact,” the People are “entitled to judgment as a matter of law.” Mot. at 3; *see* 35 Ill. Adm. Code 101.516(b).

The Board’s procedural rules provide that, “within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion.” 35 Ill. Adm. Code 101.500(d). EHSS’ failure to respond to the motion for summary judgment has resulted in EHSS waiving any objection to the Board’s granting of the motion.

### **DISCUSSION**

Below, the Board reviews the motion and the evidence and arguments offered in support of the motion before making findings and reaching the conclusions of the Board.

#### **Count I**

The record demonstrates that EHSS caused, threatened or allowed the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution. Specifically, the record shows that EHSS contracted with Lincoln Park School located at 4103 West State Street in Rockford to remove and dispose of RACM from the Facility’s boiler room. The record also shows that on December 9, 2002, the Agency received a Notification from EHSS which indicated that asbestos removal activities were scheduled to occur at the Facility from January 2 until January 24, 2003, but did not provide an estimate of the amount of nonfriable asbestos that would not be removed during demolition of the Facility.

The record further shows that on January 7, 2003, the Agency conducted an inspection of the Facility and EHSS informed the Agency that asbestos removal activities at the Facility had begun on January 6, 2003, two working days after the starting date scheduled in the Notification. The record demonstrates that EHSS did not amend the date in the Notification prior to commencing asbestos removal activities.

The record also demonstrates that, on the inspection date, the Agency observed EHSS’ employees remove and then drop dry friable asbestos containing insulation from one boiler and boiler pipes, causing visible emissions of particulate ACM. The record further demonstrates that

EHSS' employees conducted asbestos removal activities without utilizing any technology to prevent emission of asbestos particles into the outside air, such as a containment area with negative air, decontamination unit, bagout area, or Hudson sprayers to control the emissions.

The record shows that the Agency inspected one of several bags in the boiler room that EHSS' employees used to contain boiler insulation and discovered that at least one bag contained dry friable ACM. The Agency observed that the RACM could easily be crushed and crumbled by hand pressure and no water or condensation was visible within the bag.

In addition, the record demonstrates that the Agency collected three samples of dry friable RACM during the inspection: two samples from inside the boiler room, and another from the area adjacent to the entry door to the work area. Test data demonstrate that all three samples contained concentrations of 10%-30% amosite asbestos, while one sample also contained chrysotile asbestos from 10-20%.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count I. *See* 35 Ill. Adm. Code 101.516(b). Consequently, the Board grants the People's motion for summary judgment as to Count I and finds that EHSS violated Section 9(a) of the Act, 415 ILCS 5/9(a) (2008)), and 35 Ill. Adm. Code Section 201.401.

### **Count II**

The record shows that EHSS failed to provide a complete Notification of Demolition and Renovation to the Agency, as required by the NESHAP for asbestos. Specifically, the record demonstrates that the Agency received a Notification from EHSS stating that EHSS was going to remove 1000 linear feet of RACM from pipes, 630 square feet of RACM from the boilers, and 12,500 square feet of RACM Category I nonfriable asbestos containing floor tiles from the Facility. The record also demonstrates that EHSS failed to set forth in the Notification an estimate of the approximate amount of Category I and Category II nonfriable RACM that would not be removed from the affected area before demolition of the Facility. The record further demonstrates that EHSS, as an asbestos removal contractor, was an operator of a demolition and renovation activity at the Facility.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count II. Consequently, the Board grants the People's motion for summary judgment as to Count II and finds that EHSS violated section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008) and 40 C.F.R. 61.145(b)(4)(iv).

### **Count III**

The record demonstrates that EHSS failed to timely notify the Agency of the new start date of asbestos removal activities at the Facility, as required by the NESHAP for asbestos.

Specifically, the record shows that EHSS did not submit a notification to the Agency revising the scheduled starting date for asbestos removal prior to the expiration of the original scheduled starting date of January 2, 2003. The record also shows that EHSS commenced asbestos removal activities at the site on January 6, 2003, instead of the scheduled date.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count III. Consequently, the Board grants the People's motion for summary judgment as to Count III and finds that EHSS violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008) and 40 C.F.R. 61.145(b)(1) and (3)(iv).

#### **Count IV**

The record demonstrates that EHSS failed to adequately wet all RACM during asbestos removal activities within the Facility. Specifically, the record shows that during the agency's inspection, EHSS' employees were not using any water. The record also shows that the Agency observed that there was no water visible on the ACM, boiler, boiler pipes, or on the floor. The record further shows that dry ACM material was visible on the boiler room floor.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count IV. Consequently, the Board grants the People's motion for summary judgment as to Count IV and finds that EHSS violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9(d)(1) (2008), and 40 C.F.R. 61.145(c)(3).

#### **Count V**

The record demonstrates that EHSS failed to adequately wet all RACM until collection. Specifically, the record shows that EHSS did not use water at the Facility during asbestos removal activities. Accordingly, the record demonstrates that EHSS failed to wet and maintain wet all RACM and regulated asbestos-containing waste material until collected and contained prior to disposal at a permitted waste site.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count V. Consequently, the Board grants the People's motion for summary judgment as to Count V and finds that EHSS violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008), and 40 C.F.R. 61.145(c)(6)(i).

#### **Count VI**

The record demonstrates that EHSS failed to adequately wet and keep wet, containerize, and label all asbestos-containing waste materials. Specifically, the record shows that, upon the

Agency's request, EHSS' employees provided a bag containing RACM to the Agency inspector. The record further shows that the bag did not contain moisture and that the material in the bag could easily be crumbled by hand. The record also shows that the bag was not labeled with an OSHA-specific label. Further, the record demonstrates that the asbestos removal conditions at the Facility resulted in the discharge of visible asbestos emissions.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count VI. Consequently, the Board grants the People's motion for summary judgment as to Count VI and finds that EHSS violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008), and 40 C.F.R. 61.150(a)(1).

### **Count VII**

The record shows that EHSS failed to dispose of all RACM and asbestos-containing waste material generated during the renovation as soon as practical. The record demonstrates that the Agency inspector observed bags containing RACM removed from facility components being stored within the building.

The Board finds that the complaint and answer filed in this matter, EHSS' admissions on file, together with the affidavits supporting the People's motion, are sufficient to prove that there are no genuine issues of material fact and that the People are entitled to judgment as a matter of law on Count VII. Consequently, the Board grants the People's motion for summary judgment as to Count VII and finds that EHSS violated Section 9.1 (d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2008).

### **Remedies**

Pursuant to the Board's September 16, 2004 order accepting the complaint for hearing and January 6, 2005 order accepting the amended complaint for hearing, the People propose a remedy for EHSS' violations. Mot. at 23.

### **Section 33(c)**

In addressing the first factor at Section 33(c) of the Act (415 ILCS 5/33(c) (2008)), the People argue that "[t]he impact to the public resulting from [EHSS'] failure to utilize work practice standards prescribed by the asbestos NESHAP during asbestos removal activities resulted in the emission of asbestos, a known carcinogen, which threatened . . . workers on site and the nearby neighborhood." Mot. at 25. The People further argue that EHSS' failure to state the amount of asbestos that would not be removed from the Facility or notify the Agency that removal activities commenced on January 6, 2003, resulted in a situation where the Agency and the public "were not privy to information that is important to the control of air pollution in Illinois." Mot. at 25. The Board finds that the emission of asbestos, and EHSS' failure to notify the Agency of the scope and starting date of asbestos removal activities resulted in a significant "injury to or interference with the protection of the health, general welfare, and physical property

of the people.” *See* 415 ILCS 5/33(c)(1) (2008). As such, the Board weighs this factor in favor of imposing remedies sought by the People.

Regarding the “social and economic value of the pollution source,” the People claim that the site of the Facility “has potential social and economic value in the event that the land is sold and developed as commercial property.” Mot. at 25; *see* 415 ILCS 5/33(c) (2). The Board declines to weigh this factor in favor of or against the remedies sought by the People because the record does not indicate the potential value of the land. Further, EHSS is not the owner of the Facility, and there is no evidence that EHSS would benefit from the sale. The Board also allocates no weight to “the suitability or unsuitability of the pollution source to the area in which it is located,” agreeing instead with the People’s assertion that this factor “is not an issue in this matter,” given that the violations resulted from EHSS’ improper handling and disposal of RACM at the Facility.

The People also argue that “[c]omplying with the applicable provisions of the Act, the Board’s Air Pollution Regulations and the NESHAP for asbestos was both technically practicable and economically reasonable” in this case. Mot. at 25; *see* 415 ILCS 5/33(c) (4) (2008). The People further argue that EHSS “failed to take even the most minimal actions necessary to control asbestos emissions . . . .” Mot. at 25. EHSS has not opposed this argument, and the Board finds that this factor weighs in favor of imposing remedies sought by the People.

In addressing the final factor, subsequent compliance, the People state that EHSS has subsequently complied with the Act, the Board’s regulations, and the NESHAP for asbestos. Mot. at 26; *see* 415 ILCS 5/33(c) (5) (2008). The Board finds that this factor weighs in favor of EHSS.

On the basis of the record, the Board finds that the Section 33(c) factors weigh in favor of granting relief requested by the People, including assessing a civil penalty. In reaching this finding, the Board places considerable emphasis on the impact of the emission of asbestos upon the people’s health, general welfare, and property. To determine the appropriate penalty amount, the Board considers factors listed in Section 42(h) of the Act. *See* 415 ILCS 5/42(h) (2008).

## **Section 42**

The People note that, under Section 42(a) of the Act, violators are liable for a civil penalty of up to \$50,000 for each violation and an additional penalty of \$10,000 for each day that the violations continue. Mot. at 26; *see* 415 ILCS 5/42(a) (2008). The People argue that, if the Board finds that EHSS committed the nine violations alleged in the complaint and that four of those violations continued at least seventeen days, then the maximum penalty authorized by Section 42(a) is \$1,130,000, as follows:

Count I	
1 violation of Section 9(a)	\$50,000
1 violation of Section 201.141	\$50,000

Count II

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(b)(iv)(6) \$50,000

Count III

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(b)(1) \$50,000

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(b)(3)(iv) \$50,000

Count IV

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(c)(3) \$50,000

1 violation continuing 17 days \$170,000

Count V

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(c)(6)(i) \$50,000

1 violation continuing 17 days \$170,000

Count VI

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(a)(1) \$50,000

1 violation continuing 17 days \$170,000

Count VII

1 violation of Section 9.1(d)(1)/ 40 C.F.R. 61.145(b)(1) \$50,000

1 violation continuing 17 days \$170,000

Mot. at 26-27, citing 415 ILCS 5/42(a) (2008).

With respect to the aggravating and mitigating factors that the Board weighs in determining the appropriate civil penalty (*see* 415 ILCS 5/42(h) (2008)), the People first argue that for a period beginning on at least January 7, 2003, “[EHSS] caused or threatened air pollution exposing persons . . . to the severe health effects of carcinogenic asbestos fibers . . . .” Mot at 29; *see* 415 ILCS 5/42(h)(1) (2008). The Board notes that the People indicate that, on August 25, 2003, the Agency received information that asbestos removal activities at the site were not completed until August 14, 2003. Based on the duration and gravity of the violation, the Board weighs this factor against EHSS.

On the issue of EHSS’ diligence, the People claim that “[EHSS] did not act diligently in this matter.” Mot. at 29; *see* 415 ILCS 5/42(h)(2) (2008). Specifically, the People allege that EHSS “failed to ensure that all asbestos containing material was properly removed, wetted, maintained wet, sealed in a leak-proof container, and transported to a waste disposal site permitted to receive such waste.” *Id.* The People also allege that EHSS “failed to inform the Illinois EPA that the asbestos removal activities commenced on January 6, 2003,” rather than the January 2, 2003 date listed in the Notification. *Id.* The People further allege that the Notification “did not state the amount of asbestos that would not be removed during demolition of the building.” *Id.* This claim is supported by the record, and EHSS has not opposed it. Therefore, the Board weighs this factor against EHSS.

The People argue that “[r]espondent received an economic benefit by failing to properly conduct asbestos removal activities,” but acknowledge that “[i]t is unclear the extent of this economic benefit.” Mot. at 29; *see* 415 ILCS 5/42(h)(3) (2008). The People maintain that EHSS “delayed or avoided costs associated with the proper removal of RACM” through non-compliance. *Id.* However, since the record contains no evidence that EHSS received an economic benefit from non-compliance, the Board declines to weigh this factor against EHSS.

In addition, the People state that EHSS “has had no previously adjudicated violations of the pertinent laws and regulations.” Mot. at 30; *see* 415 ILCS 5/42(h)(5)(2008). The Board weighs this factor in favor of EHSS.

With regard to self disclosure, the People state that “self disclosure is not at issue in this matter.” Mot. at 30; *see* 415 ILCS 5/42(h)(6) (2008). The Board agrees, and does not weigh this factor in favor of or against EHSS.

The People also state that EHSS “has not offered to perform a supplemental environmental project.” Mot. at 30; *see* 415 ILCS 5/42(h)(7) (2008). The record shows no evidence of such an offer and the Board finds this factor weighs neither for nor against EHSS.

Finally, on the issue of deterrence, the People argue that \$56,500, or 5% of the maximum civil penalty of \$1,130,000 “will serve to deter future violations by [EHSS] and to otherwise aid in enhancing voluntary compliance . . . .” Mot. at 30; *see* 415 ILCS 5/42(h)(4) (2008). EHSS has offered no facts or arguments to dispute this conclusion.

The Board finds that the Section 42(h) factors justify the imposition of a \$56,500 penalty on EHSS as proposed by the People. *See People v. Ogoco, Inc.*, PCB 06-16, slip op. at 10 (Sept. 21, 2008) (imposing People’s unopposed penalty request), citing *People v. J&F Hauling, Inc.*, PCB 02-21 (Feb. 6, 2003). In reaching this finding, the Board places particular weight on the duration and gravity of the violation and on EHSS’ lack of diligence in attempting to comply with the Act and the Board’s regulations.

In their amended complaint, the People’s request for relief included “[r]equiring [EHSS] to pay all costs of this proceeding pursuant to Section 42(f) of the Act [415 ILCS 5/42(f) (2008)], including expert witness, consultant, and attorney fees” expended by the State in pursuit of this action. Am. Comp. at 6, 13, 16, 17, 19, 21, 23. The People did not renew this request in their motion for summary judgment. *See* Mot. at 23-30 (Remedy). As the record includes no amount for these costs and fees and no argument that the violations were “willful, knowing, or repeated” (415 ILCS 5/42(f) (2008)), the Board declines to grant this relief.

### **CONCLUSION**

The Board finds that there is no genuine issue of material fact and grants the People’s unopposed motion for summary judgment. The Board therefore finds that EHSS violated the Act, the Board’s regulations, and the NESHAP for asbestos as alleged in the seven counts of the amended complaint and imposes the People’s requested civil penalty of \$56,500 on EHSS. In addition, the Board requires EHSS to cease and desist from further violations of the Act, the

Board's regulations, and the NESHAP for asbestos. However, the Board declines to order EHSS to pay costs or fees.

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

### **ORDER**

1. The Board grants the Office of the Attorney General, on behalf of the People of the State of Illinois, summary judgment on all seven counts of the amended complaint as alleged against Environmental Health and Safety Services, Inc. (EHSS). The Board thus finds that EHSS has violated Sections 9(a) and 9.1(d)(1) of the Act (415 ILCS 5/9(a) and 9.1(d)(1) (2008)); 35 Ill. Adm. Code 201.141; and 40 C.F.R. 61.145(b)(1), (b)(3)(iv), (b)(4)(vi), (c)(3), and (c)(6)(i) and 61.150(a)(1) and (b).
2. EHSS must pay a civil penalty of \$56,500.00 no later than Monday, August 24, 2009, which is the first business day after 30 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and EHSS' social security number or federal employer identification number must be included on the certified check or money order.
3. EHSS must send the certified check, money order, or confirmation of electronic funds transfer 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. EHSS must cease and desist from further violations of the Act and the Board's regulations.

**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 T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 23, 2009, 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 stroke at the end.

---

John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board