BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	**PCB NO. 02-115**
	)	**(Enforcement – Air, Water)**
BLUE RIDGE CONSTRUCTION CORPORATION,	)	
An Illinois corporation,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Mr. Delbert D. Haschemeyer
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706

PLEASE TAKE NOTICE that on March 29, 2004 I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, Respondent's Post-Hearing Brief, a copy of which is herewith served upon you.

Respectfully submitted,

Blue Ridge Construction Corporation, Respondent

BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that I did on March 29, 2004 send by first-class mail, with postage thereon fully prepaid, by depositing in a United States Post Office box true and correct copies of the foregoing instrument entitled **Notice of Filing** to:

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph – Suite 11-500
Chicago, Illinois 60601

Mr. Delbert D. Haschemeyer
Assistant Attorney General
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William R. Kohlhase, for Miller, Hall & Triggs

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Respondent.	)	

RESPONDENT'S POST-HEARING BRIEF

This action arose out of demolition activities occurring at a part of the mental health facility formerly operated by the State of Illinois in Bartonville, Illinois, known as the Dining Hall. The Complaint alleged an air pollution violation (Count I), violations of the regulations under the National Emission Standards for Hazardous Air Pollutants ("NESHAP") (Count II), open dumping violations (Count III), and a water pollution threat (Count IV). Complainant and respondent, Blue Ridge Construction Corporation ("Blue Ridge"), entered into a comprehensive stipulation of facts ("Stipulation") concerning the matters which were the subject of the Complaint. Based on that Stipulation, the complainant moved for partial summary judgment on the issue of whether all the alleged violations, except certain NESHAP violations, had occurred. Blue Ridge did not oppose the complainant's motion for partial summary judgment. The Board granted complainant's motion and directed that the parties proceed to hearing on the penalty issue.

Certain of the NESHAP violations alleged in Count II were dependent upon proof that minimum or threshold quantities of regulated asbestos-containing material ("RACM") were present at the Dining Hall site. Specifically, complainant did not move for summary judgment on the issues raised in paragraphs 11 through 14 of Count II because there was insufficient documentation to support a motion for summary judgment on the issue of whether the threshold

amounts of RACM were present at the Dining Hall site. (Tr. At 8-9) * At the hearing, the parties presented evidence on the issue of whether the threshold amount of RACM was present at the site. With respect to the factors to be considered under Sections 33(c) and 42(h) of the Illinois Environmental Protection Act, 415 ILCS 5 ("Act"), the parties relied upon the Stipulation which was admitted into evidence at the hearing as complainant's Exhibit 3.

The evidence introduced at the hearing failed to show that the quantity of RACM required as a predicate for establishing the unresolved NESHAP violations was present. Accordingly, the Board should find those violations unproved. With respect to the penalty, if any, which is appropriate, the facts set forth in the Stipulation show that there is no justification for the penalty being sought by the complainant in Complainant's Closing Brief and Argument ("Closing Brief"). Also, while the Complaint requested attorneys' fees and costs under Section 42(f) of the Act, no argument was made in the Closing Brief that attorneys' fees or costs should be awarded. Any such claim should now be deemed waived. In any event, there is no basis for an award of fees or costs under Section 42(f) of the Act because the violations at issue were not willful, knowing, or repeated.

I. COMPLAINANT FAILED TO PROVE THE THRESHOLD QUANTITIES OF RACM WERE PRESENT AT THE SITE

Paragraphs 11 through 14 of Count II of the Complaint alleged violations of Section 9.1(d)(1) of the Act which specifies that any violation of the NESHAP regulations is a violation of the Act. The NESHAP regulations at issue, other than those requiring notification, depend upon the existence of certain minimum quantities of RACM. In order for those requirements to apply to a facility being demolished, the amount of RACM must be either

* "Tr." refers to the transcript of the hearing held in this matter on February 3, 2004.

> "(i) At least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components, or
>
> "(ii) At least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously."

40 C.F.R. §61.145(a)(1).

As this is an enforcement action, the complainant bears the burden of persuasion on the essential elements of the offense charged. *Processing and Books, Inc. v. Pollution Control Board,* 64 Ill. 2d 68, 351 N.E.2d 865, 869 (1976). Thus, the complainant had the obligation to establish, by a preponderance of the evidence, that the threshold quantities of RACM existed. *E.g., Village of South Elgin v. Waste Management of Illinois, Inc.* (Feb. 20, 2003), PCB 03-106.

The Illinois Environmental Protection Agency ("Agency") on whose behalf the Complaint was brought, did not perform any measurements or tests to determine the quantity of RACM present at the Dining Hall site. The only RACM at the site was associated with pipe insulation. (Tr. pp. 38-39; R. Exs. 1 and 3) Test results showed that the only RACM present was inside the Dining Hall itself. (Tr. pp. 41-43; R. Exs. 3 and 5) No tests showed RACM outside the Dining Hall. (*Id.*)

The Agency's representative, Dennis Hancock, estimated after the fact that there were 160 feet of pipe in the Dining Hall. (Tr. pp. 27, 51-53) Mr. Hancock testified that he saw a pipe in the ravine adjacent to the Dining Hall, but did not measure it. (Tr. p. 53) In the absence of its own measurements taken at the time of its inspections, the Agency relies on a 10-day notice that was submitted in connection with the remediation of the property on which a contractor had indicated that there were 1000 cubic feet of RACM. (C. Ex. 2) Mr. Hancock, the Agency's sole witness at the hearing, however, acknowledged that he was not involved in connection with the preparation

of the 10-day notice and did not know what the contractor who filled out the form was thinking when completing the form.

The record is bare of any tests showing RACM at the site in quantities anything remotely like 1000 cubic feet. Debris and waste were removed from the area near the ravine outside the Dining Hall. The 10-day report appears to correspond to the removal of that waste and debris. There are, however, no tests showing the extent of RACM in that waste and debris. The only tests of material outside the Dining Hall showed no RACM. (R. Ex. 3) Moreover, the testimony of Blue Ridge's witness, John Palmer, established that the Dining Hall was an old building that had been open for many years and subject to vandalism and removal of materials. (Tr. p. 70) Mr. Palmer's testimony established that the length of pipe that Dennis Hancock had estimated based on his after the fact assessment, was not present in the building at the time Blue Ridge began demolition. (Tr. p. 71)

Complainant had the burden of proof and persuasion on the quantity issue. While it attempted to meet its burdens with after the fact assessments by Mr. Hancock, the largest quantity he could testify to was 160 feet of pipe with insulation constituting RACM. While even that amount is disputed, it falls short of the amount required under the NESHAP regulations for the violations alleged in paragraphs 11 through 14 of Count II. In view of the fact that the only evidence in the record of tests of material outside the Dining Hall showed that there was no RACM present in the ravine, a 10-day notice containing an unexplained estimate which is inconsistent with all other facts cannot reasonably be said to establish by a preponderance of the evidence that the threshold quantities of RACM were present. The Board should find in favor of Blue Ridge on this issue.

II. THERE IS NO JUSTIFICATION IN THE RECORD FOR THE PENALTY SOUGHT BY THE COMPLAINANT.

Other than the issue of the presence of threshold quantities of RACM under the NESHAP regulations, respondent has never contested the factual basis for the violations already found by the Board in granting complainant's partial summary judgment motion. In fact, respondent, consistent with its cooperation with the Agency since it first received notice of the alleged violations, worked with complainant to prepare the Stipulation which expedited resolution of the issue of the existence of violations. Since Blue Ridge violated the Act, the Board may impose a civil penalty. (Act. §33(b)) Even though there are violations, however, a civil penalty is not required under the Act. *Southern Illinois Asphalt Company, Inc. v. Pollution Control Board,* 60 Ill. 2d 204, 326 N.E.2d 406, 408 (1975).

Whether the Board should impose a penalty and the amount of that penalty must be determined based on the application of the factors set forth in Sections 33(c) and 42(h) of the Act. Complainant discusses the Section 33(c) factors at pages 9 and 10 of its Closing Brief. Blue Ridge does not take issue with complainant's discussion of those factors. It should be noted with respect to Section 33(c)(i) that there is no evidence of actual air or water pollution. Additionally, it is important to note that, as stated by complainant with respect to Section 33(c)(v), once respondent was notified of the problem, it ". . . implemented measures to properly contain, remove and dispose of all regulated asbestos-containing waste and refuse." (Closing Brief, p. 10) There is no issue as to whether respondent is currently in compliance.

Complainant's analysis of the Section 42(h) factors, however, is seriously flawed. All of the evidence concerning the Section 42(h) factors is found in the Stipulation. The old Bartonville Mental Health Facility, of which the Dining Hall was a part, was located in the Village of Bartonville. (Stipulation, ¶2) Prior to commencing demolition, the principals of Blue Ridge went

to the Village of Bartonville offices and consulted with Village officials concerning the need for permits for the work which they planned to do which involved converting the Dining Hall into a metal fabrication shop. (Stipulation, ¶¶2, 4) The owners were advised by the Village Mayor, the Village Building Commissioner, and the Village Clerk that no permits were required. (Stipulation, ¶4)

Blue Ridge commenced the demolition of the Dining Hall on May 11, 2000. At that time, others had already dumped waste at the Dining Hall site. (Stipulation, ¶13) Between May 11 and May 17, 2000, respondent was not in compliance with certain provisions of the Act. Once, however, Mr. Hancock arrived at the Dining Hall site on May 17, 2000, respondent was cooperative and voluntarily complied with Mr. Hancock's directions and requests. (Stipulation, Ex. A, p. 2) Respondent's efforts are detailed in chronologies of activities made Exhibits G and L to the Stipulation. Those exhibits clearly demonstrate that once respondent was notified that it was not proceeding in a manner consistent with the Act, it at all times diligently followed the direction of its consultants and the Agency. Exhibit L shows persistence on the part of respondent in pursuing compliance with the Act and that any delays arose from communications with and among its consultants and the Agency and waiting on the Agency for approvals. The design and approval process took until December of 2000. As a result, the remediation project could not be completed until the spring of 2001. The remediation project was completed by April 19, 2001. (Stipulation, ¶27)

The Dining Hall property was purchased from the Village of Bartonville. (Stipulation, Ex. G, p. 1) Since at the time the Dining Hall property was acquired there was already open dumping on the property and respondent had proceeded with its activities without any permit pursuant to the advice and direction of the Village of Bartonville, the Village voluntarily determined to reimburse

respondent for remediation costs except those expenses directly related to asbestos on pipes. (Stipulation, ¶¶29, 30)

Neither the Stipulation nor any other evidence shows any knowledge on the part of the respondent that asbestos was present at the Dining Hall facility or that any permits were required for its activities. Neither the Stipulation nor any other evidence shows that respondent had previously been involved in any demolition activities or had any knowledge of the NESHAP regulations. Neither the Stipulation nor any other evidence shows any adjudicated or unadjudicated prior or subsequent violations of the Act by the respondent.

The first Section 42(h) factor which the Board is to consider in determining an appropriate civil penalty is the duration and gravity of the violation. Complainant asserts that the theoretical maximum penalty provides a measure of the duration and gravity of the violations. (Closing Brief, p. 13) By complainant's reckoning, the total possible penalty is $30,850,000.00. Most of that sum is generated by complainant's assertion that violations continued for a cumulative total of 3,156 days which in turn was based on the contention the number of violations continued for 340 days. The Stipulation, however, does not establish that any or all of those violations continued for 340 days. The fact that the final remediation was not complete until April 19, 2001 does not mean that all of the violations continued up to that point. Moreover, to the extent that there might have been violations continuing beyond May 17, 2000, respondent was diligently working with its consultants and the Agency to resolve the situation. It did not control when the consultants and the Agency would perform their responsibilities. Thus, while respondent does not seek to minimize any violation of the Act, complainant's assessment of the first Section 42(h) factor unfairly inflates the duration, and therefore the gravity, of the violations.

The second Section 42(h) factor is the violator's due diligence in attempting to comply with the Act. Complainant asserts a complete absence of due diligence on respondent's part prior to May 17, 2000. Complainant says this is disturbing because respondent is a construction company. The record does not establish, however, the nature of respondent's business. The record does not show any prior involvement by respondent in demolition activities or working with asbestos.

Respondent checked with the local municipality having jurisdiction over the Dining Hall to determine what permits were required. That was customary and reasonable. It is undisputed that respondent was advised that no permits were required. The fact that neither the municipality nor respondent knew that there were additional requirements in connection with demolition resulted in the violations. Respondent, however, clearly made an effort to meet legal requirements. After being given notice of the violations, respondent clearly was diligent.

Complainant says that respondent had little choice but to comply and that it took too long for the site to be cleaned up. First, respondent's diligence after notice of the violation is clearly relevant. Complainant cites no authority for the proposition that the only due diligence looked at under Section 42(h)(2) is due diligence prior to notice of a violation. Further, there is nothing in the record that supports that "it took too long" for the site to be cleaned up. Respondent's detailed chronology shows that it was not delaying the process. The record does not show how long a typical clean up under such circumstances takes. Complainant says that if it delayed the clean up, that should be respondent's responsibility. It would be inequitable and illogical, however, to punish respondent for delays over which it had no control.

The third Section 42(h) factor is whether any economic benefits accrued to respondent because of delay in compliance with the Act. Complainant essentially acknowledges that respondent did not receive any economic benefit due to any delay in compliance. That should end

any analysis of this factor. Complainant goes on, however, to argue that the fact that the Village of Bartonville chose to reimburse respondent for certain expenses related to the remediation somehow shows an economic benefit to respondent that is to be considered under Section 42(h)(3). Any reimbursement from the Village of Bartonville, however, was not economic benefit "because of delay."

Complainant asserts that "respondent has managed to escape relatively unscathed as a result of its non-compliance." (Closing Brief, p. 15) It argues that the Village of Bartonville's determination to reimburse respondent is inconsistent with the purpose of the Act. Apparently, complainant takes the view that any insurance or collateral source for payment for environmental clean up would be contrary to the policy of the Act because violators would not fully bear all adverse effects of their conduct. Obviously, neither law nor logic supports such a position.

The fourth Section 42(h) factor is the amount of monetary penalty that would serve to deter future violations by respondent and aid in enhancing voluntary compliance with the Act. Complainant says that a substantial penalty is necessary based on the facts in this case, but fails to identify those facts that support a substantial penalty. Complainant also fails to cite any authority for the proposition that the facts of this case call for a substantial penalty. Respondent argues for a $72,000.00 "minimum" penalty which it says consists of the $56,000.00 that respondent "shifted" to the Village resulting in a "financial windfall" to respondent plus $16,000.00 because respondent failed to exercise due diligence, was guilty of a large number of violations, some of which continued for a long time. (Closing Brief, p. 16)

Respondent submits that no decision by the Board or any court supports the imposition of such a severe penalty based on the facts of this case. The Board's comprehensive review of the law of penalty determinations in *IEPA v. Berry* (May 10, 1990), PCB 88-71, shows that over a long

period of time the average penalty imposed by the Board was significantly less than $10,000.00. *Id. Slip Op.* at 66-67. Significantly, the Board in its opinion in *IEPA v. Berry* did not identify obtaining reimbursement for clean up costs as a factor to consider in assessing a penalty. If anything, the decision of the Village of Bartonville to reimburse respondent demonstrates respondent's good faith in proceeding as advised by the Village, and the Village's recognition of the fact that when it sold the property there were already open dumping violations present.

The Board's decision in *People v. Aabott Asbestos, Inc.* (April 5, 2001), PCB 99-189, provides guidance as to what might be an appropriate penalty here. Aabott Asbestos, Inc. ("Aabott") was an asbestos removal contractor which undertook asbestos removal activities at two different power plants. Despite its actual knowledge of the NESHAP regulations, Aabott committed multiple violations of the Act and was charged with two counts of air pollution violations, two counts of failure to follow emission control procedures, and one count of improper disposal of asbestos. There was testimony that there were enormous amounts of visible emissions of RACM as Aabott conducted its work.

Aabott failed to appear at the hearing. The complainant sought a penalty of $65,000.00. In its opinion, the Board noted that Aabott had engaged in multiple serious violations in less than a one year period and ignored the gravity of the case by failing to participate. Nevertheless, after reviewing its precedents, the Board found that the appropriate civil penalty was $30,000.00.

Respondent's conduct here pales in comparison to Aabott's flagrant and knowing violations of the Act. The Board's decision in *People v. Aabott Asbestos, Inc.* demonstrates the complainant's request for a $72,000.00 penalty here involves a significant overreaching.

The final Section 42(h) factor focuses on previously adjudicated violations of the Act by respondent. As acknowledged by complainant, there are no such violations.

Respondent submits that neither the facts nor the law require the imposition of a civil penalty. To the extent, however, that the Board determines that a penalty is appropriate, it clearly should not exceed $3,000.00.

III. NO AWARD OF FEES OR COSTS IS APPROPRIATE.

Despite seeking an award of attorneys' fees and costs pursuant to Section 42(f) of the Act in the Complaint, the complainant did not argue for such an award in its Closing Brief. The failure to advance an argument supported by citations to the record and authority should be deemed a waiver of this claim.

Even in the absence of waiver, there is no basis for such an award because the Act requires that the violation be willful, knowing, or repeated in order for an award to be made under Section 42(f). The facts discussed above make it clear that there was simply no willful, knowing, or repeated violation of the Act by the respondent.

IV. CONCLUSION.

As complainant failed to meet its burden of proof, the Board should find in favor of Blue Ridge on paragraphs 11 through 14 of Count II. No penalty is needed here, but any penalty assessed should not exceed $3,000.00. Complainant should not be awarded any attorneys' fees or costs as the statutory basis for such award is absent.

Respectfully submitted,

Blue Ridge Construction Corporation, Respondent

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