

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
OCT 06 2003

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
-vs-)
)
4832 S. VINCENNES, L.P., an)
Illinois limited partnership, and)
BATTEAST CONSTRUCTION COMPANY OF)
ILLINOIS, INC., an Illinois)
corporation,)
)
Respondents.)

No. 04-7
(Enforcement - Air)

TO: Mr. Gregory V. Miller, Esq.
Attorney for Respondent
4832 S. Vincennes, L.P.
Miller and Ferguson
9415 South State Street
Chicago, Il. 60619

Mr. Zachary Hamilton
Attorney for Respondent
Batteast Const. Co. of Ill.
3340 E. Forest View Trail
Crete, IL. 60417

NOTICE OF FILING

PLEASE TAKE NOTICE that we have today, October 6, 2003 filed with the Office of the Clerk of the Illinois Pollution Control Board an original and nine copies of our Motion for leave to file a First Amended Complaint, a copy of which is attached herewith and served upon you.

Failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the clerk's office or an attorney.

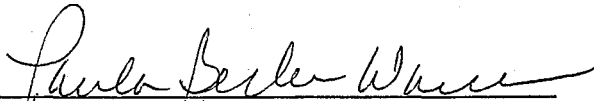
NOTIFICATION

YOU ARE HEREBY NOTIFIED that financing may be available through the Illinois Environmental facilities financing act [20 ILCS 3515/1 et seq.] to correct the alleged pollution.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
Attorney General of the
State of Illinois

BY:



PAULA BECKER WHEELER
Assistant Attorney General
Environmental Bureau
188 W. Randolph St., 20th Flr.
Chicago, IL 60601
(312) 814-1511

THIS FILING IS MADE ON RECYCLED PAPER

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STATE OF ILLINOIS
Pollution Control Board

No. 04-7
(Enforcement - Air)

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby moves the Board, pursuant to Section 101.500 of the Illinois Pollution Control Board's Rules and Regulations, 35 Ill. Adm. Code 101.500, and Section 2-616 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-616 (2002), for an order granting it leave to file its first amended complaint. In support of its motion, Complainant states as follows:

1. On July 14, 2003, Complainant("People") filed its initial complaint against Batteast Construction Company of Illinois, Inc., ("Batteast of Illinois"). The complaint alleges that Batteast of Illinois is an Illinois corporation that operated and managed the renovation of a residential building from about August of 2001 through at least February of 2002 at 4832-S. Vincennes, Chicago, Cook County, Illinois, wherein asbestos containing materials were found("Site").

2. The allegations in the complaint state that in Count I Batteast of Illinois managed or conducted the renovation of the Site and therefore caused, threatened or allowed the discharge or emission of asbestos in the air so as to cause or tend to cause air pollution in violation of Section 9(a) of the Environmental Protection Act, ("Act"), 415 ILCS 9(a)2002. Count II alleges that as operator of the Site, Batteast of Illinois failed to conduct a thorough inspection of the facility for the presence of asbestos, failed to remove all regulated asbestos containing materials ("RACM") from the site before the activity began that would break up the material, and failed to adequately wet all the RACM and ensure that it remained wet until collected in violation of Section 9.1(d) of the Act, 415 ILCS 9.1(d)(2002) and 40 CFR 61.145(a), (c)(1) and (c)(6).

3. Ms. Valerie Batteast-Flemming is the President of Batteast Construction Company of Illinois, Inc. She is also a principal although not President of Batteast Construction Company, Inc. ("Batteast"). Her father, Robert Batteast, is the President. This company is an Indiana corporation licensed to do business in Illinois. Ms. Batteast-Flemming coordinates and manages this company for her father. The registered agents for each of the two corporations is the same: Charles Murdock, 1 East Pearson, Chicago, Il. 60611, according to the Secretary of State records.

4. On information and belief, pursuant to statements made by Ms. Batteast-Flemming, Batteast Construction Company, Inc. is the

proper respondent in this case and performed the renovation at the Site. Batteast has an office located at 1900 W. Van Buren, Suite 2625, Chicago, Illinois which serves as one of the local Illinois offices used by the Indiana corporation. This office was used as the location from which the 4832 S. Vincennes renovation was coordinated by Batteast.

5. On or around September 22, 2003, Batteast Construction Company of Illinois filed a motion to dismiss it from this case as being a wrongly named party. This motion should be read in conjunction with the Motion to Dismiss.

6. Section 2-616 of the Code of Civil Procedure provides, in relevant part:

(a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.

(b) The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading grew out of the same

transaction or occurrence set up in the original pleading.

7. Based on what the People now believes is more accurate information as to the identity of the operator and manager of the renovation of the Site, the People now seek to dismiss Batteast Construction Company of Illinois, Inc. as a respondent and substitute, for the reasons set forth above, Batteast Construction Company, Inc.

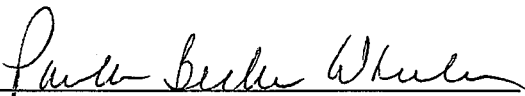
8. A proposed First Amended Complaint, which dismisses Batteast Construction Company of Illinois as a respondent and substitutes Batteast Construction Company, Inc. as respondent, is attached to and incorporated by reference into this motion as Exhibit 1.

9. Section 2-616(b) of the Code of Civil Procedure provides that the amendment is not time barred so long as the initial complaint was timely filed and the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading.

10. There is no statute of limitations applicable to enforcement actions brought under the Act. Thus, the People's initial complaint was timely filed. Moreover, the People's claims of violations of the Act and request civil penalties that the People seek to assert in the amended complaint grows out of the same transaction or occurrence - the renovation of the Site which contained asbestos - that gave rise to the original complaint. Accordingly, the requirements of Section 2-616 are satisfied, and amendment should be allowed.

WHEREFORE, complainant, PEOPLE OF THE STATE OF ILLINOIS, moves for an order granting it leave to file its First Amended Complaint, *instanter*.

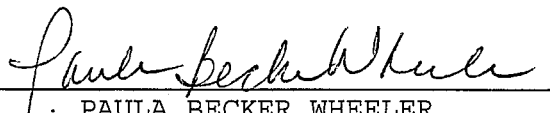
PEOPLE OF THE STATE OF ILLINOIS,
By LISA MADIGAN, Attorney
General of the State of Illinois

By: 
PAULA BECKER WHEELER
Assistant Attorney General

Environmental Bureau
188 W. Randolph St., 20th Fl.
Chicago, Illinois 60601
(312) 814-1511

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this motion are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she believes the same to be true.


PAULA BECKER WHEELER
Assistant Attorney General

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STATE OF ILLINOIS
Pollution Control Board

No. 04-7
(Enforcement - Air)

FIRST AMENDED COMPLAINT

Complainant, People of the State of Illinois, by LISA MADIGAN, Attorney General of the State of Illinois, complains of Respondents, 4832 S. VINCENNES, L.P., an Illinois limited partnership, and BATTEAST CONSTRUCTION COMPANY, INC., an Indiana corporation, as follows:

COUNT I

AIR POLLUTION

1. This First Amended Complaint is brought on behalf of the PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois EPA pursuant to Section 31 of the Illinois Environmental Protection Act, 415 ILCS 5/31 (2002) ("Act").

2. The Illinois EPA is an administrative agency established in the executive branch of the State government by

Section 4 of the Act, 415 ILCS 5/4 (2002), and charged, *inter alia*, with the duty of enforcing the Act.

3. At all times relevant to this Complaint, Respondent, 4832 S. Vincennes, L.P. ("Vincennes") was and is the owner of the property and building located at 4832 South Vincennes Avenue, Chicago, Cook County, Illinois ("Site"). The building is a residential four story brick apartment building, containing sixty seven(67) units.

4. On information and belief, at all times relevant to this Complaint, Respondent, Batteast Construction Company, Inc., ("Batteast") was the operator and manager of the renovation of the Site. Batteast is an Indiana corporation, licensed to do business in the State of Illinois.

5. On or about August of 2001, or a time better known to the Respondents, the Respondents began the renovation of the Site.

6. On or about December of 2001, or at a time better known to the Respondents, in the course of the renovation, when replacing the floors on the first floor, Batteast discovered suspect asbestos-containing material("ACM") in the basement area.

7. After the discovery, Batteast contacted two asbestos contractors to bid on the removal of 3750 linear feet of ACM thermal system insulation, and 480 square feet of ACM surface material on the boiler.

8. After the discovery of the suspect ACM, the Respondents continued to employ workers on the site to complete the renovation.

9. On January 31, 2002, the Illinois EPA performed an inspection of the building on the Site.

10. On information and belief, no asbestos contractors had been hired by the Respondents as of January 31, 2002.

11. On January 31, 2002, there was dry, friable suspect ACM on the pipes and on the floor of the basement. The suspect ACM appeared in very poor condition and was falling off the pipes. Demolition debris from the first floor had fallen through and disturbed a significant amount of the suspect ACM. Various samples from the basement area were later tested and were positive for 55-75% chrysotile asbestos.

12. On January 31, 2002, Vincennes refused to stop work, and Respondent Batteast continued to work on the premises.

13. On January 31, 2002, there were several workers at the Site doing work in and around the first floor area. Most of the windows and doors were open to the atmosphere. None of the workers were wearing personal protective equipment or were utilizing any emission control measures.

14. After the inspection on January 31, 2002, the City of Chicago, which was providing some of the funding for the renovation, was contacted.

15. On February 5, 2002, the City of Chicago issued a stop work order and the renovation work ceased at the site.

16. On February 14, 2002, an approved asbestos abatement and remediation plan commenced, and was completed on February 19, 2002.

17. The total amount of ACM removed was 2400 linear feet of disturbed ACM, and 6000 square feet of ACM tiles.

18. Section 9(a) of the Act, 415 ILCS 5/9(a) (2002), provides as follows:

No person shall:

- a. Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

19. Section 201.141 of the Board's Air Pollution Regulations, 35 Ill. Adm. Code 201.141, provides as follows:

No person shall cause or threaten or allow the discharge or 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 . . .

20. Section 3.115 of the Act, 415 ILCS 5/3.115 (2002), defines air pollution as:

"AIR 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.

21. Section 3.165 of the Act, 415 ILCS 5/3.165 (2002), defines contaminant as:

"CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

22. Section 3.315 of the Act, 415 ILCS 5/3.315 (2002), defines person as:

"PERSON" is any 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.

23. Respondents are "persons" as that term is defined in Section 3.315 of the Act, 415 ILCS 5/3.315(2002).

24. Asbestos is a "contaminant" as that term is defined by Section 3.165 of the Act, 415 ILCS 5/3.165 (2002).

25. From December of 2001, or a date better known to Respondents, through at least February 5, 2002, Respondents caused or allowed dry friable asbestos containing material to enter into the environment.

26. As the owner of the property on which the renovation activity was taking place, the Respondent, Vincennes, caused, threatened or allowed the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution in that dry, friable asbestos fibers were released into the atmosphere during the renovation activities.

27. As the party that conducted or managed the renovation activities, the Respondent, Batteast, caused, threatened or allowed the discharge or emission of asbestos into the environment so as to cause or tend to cause air pollution in that dry, friable asbestos fibers were released into the atmosphere during renovation activities.

28. By allowing dry friable asbestos containing materials to remain in a friable state, exposed to the environment, Respondents have caused or allowed air pollution in Illinois in violation of Section 9(a) of the Act, 415 ILCS 5/9(a) (2002) and 35 Ill. Adm. Code 201.141.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order against Respondents, 4832 S. VINCENNES, L.P., and BATTEAST CONSTRUCTION COMPANY, INC., on this Count I:

1. Authorizing a hearing in this matter at which time the Respondents will be required to answer the allegations herein;

2. Finding that Respondents have caused or allowed violations of Section 9(a) of the Act and 35 Ill. Adm. Code 201.141;

3. Ordering the Respondents to cease and desist from any further violations of Section 9(a) of the Act and 35 Ill. Adm. Code 201.141;

4. Assessing a civil penalty of \$50,000.00 against each Respondent for each violation of the Act and pertinent Board regulations, with an additional penalty of \$10,000.00 per day for each day that the violations continued;

5. Taxing all costs in this action, including expert witness, consultant and attorneys fees, against Respondents; and

6. Granting such other relief as the Board deems appropriate and just.

COUNT II

FAILURE TO INSPECT AND TO FOLLOW PROPER EMISSION CONTROL PROCEDURES

1 - 22. Complainant realleges and incorporates herein by reference paragraphs 1 through 17 and 20 through 24 of Count I as paragraphs 1 through 22 of this Count II.

23. Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2002), provides as follows:

No person shall:

1. Violate any provisions of Sections 111, 112, 165, 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto.

24. Pursuant to Section 112(b)(1) of the Clean Air Act ("CAA"), 42 USC 7412(b)(1), the Administrator of the United States Environmental Protection Agency ("USEPA") has listed asbestos as a hazardous air pollutant.

25. Section 112(d) of the CAA, 42 USC 7412(d), titled, Emission Standards, provides in pertinent part as follows:

1. The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation. . .

26. Section 112(h) of the CAA, 42 USC 7412(h), titled, Work Practice Standards and Other Requirements, provides in pertinent part as follows:

1. For the purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate a design, equipment, work practice, operation standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section
. . .

27. On June 19, 1978, the Administrator determined that work practice standards rather than emission standards are appropriate in the regulation of asbestos, 43 Fed. Reg. 26372 (1978), and therefore, pursuant to Section 112 of the CAA, the USEPA has adopted National Emission Standards for Hazardous Air Pollutants (NESHAPs), including asbestos, 40 CFR 61, Subpart M.

28. Section 61.141 of the USEPA's NESHAPs, 40 CFR 61.141 (July 1, 1997), provides, in part, as follows:

All terms that are used in this subpart and are not defined below are given the same meaning as in the Act and in subpart A of this part.

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

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 A, subpart F, 40 CFR part 763, section 1, Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

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

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 fewer 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 A, subpart F, 40 CFR 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 demolition or renovation operation, or both.

Regulated asbestos-containing material (RACM) means (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I 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.

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.

29. The building as referenced herein is a "facility" as that term is defined in 40 CFR 61.141.

30. The replacement of the floors at the building constitutes a "renovation" as that term is defined in 40 CFR 61.141.

31. Respondent Vincennes, as the owner of the building, was the "owner" of the renovation activities, as that term is defined in 40 CFR 61.141.

32. Respondent Batteast, as the person that operated, controlled or supervised the renovation activities, was the "operator" of the renovation activities, as that term is defined in 40 CFR 61.141.

33. Section 61.145(a) of Title 40 of the Code of Federal Regulations, 40 CFR 61.145(a) (July 1, 1998), as adopted in

Section 9.1(d) of the Act, titled, Standard for demolition and renovation: provides, in pertinent part, as follows:

(a) *Applicability.* To determine which requirements of paragraphs (a) (b) and (c) of this Section apply to the owner or operator of a demolition or renovation activity and prior to the commencement of the demolition or renovation, thoroughly inspect the affected facility or part of the facility where the demolition or renovation operation will occur for the presence of asbestos, including Category I and Category II nonfriable ACM.

* * *

34. Section 61.145(c) (1) of USEPA's NESHAPs, 40 CFR 61.145(c) (1) (July 1, 2002), titled, Standard for demolition and renovation: Procedures for asbestos emission control, provides in pertinent part as follows:

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:

(1) Remove all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

* * *

35. Section 61.145(c) (6) of USEPA's NESHAPs, 40 CFR 61.145(c) (6) (July 1, 2002), as adopted in Section 9.1(d) of the Act, titled, Standard for demolition and renovation: Procedures for asbestos emission control, provides, in pertinent part, as follows:

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:

* * * *

(6) For all RACM, including material that has been removed or stripped:

(i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with §61.150; . . .

* * *

36. Respondents, as owners and operators of a renovation activity, failed to conduct a thorough inspection of the facility for the presence and location of asbestos before commencing renovation activities in violation of the Clean Air Act, or more specifically the NESHAP for asbestos and therefore were in violation of Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1)(2002) and 40 CFR 61.145(a).

37. Respondents, as owners and operators of a renovation activity, failed to remove all RACM from a facility being renovated or demolished before an activity began that would break up, dislodge, or similarly disturb the material or preclude access for subsequent removal in violation of the Clean Air Act, or more specifically the NESHAP for asbestos and therefore are in violation of Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1)(2002) and 40 CFR 61.145(c)(1).

38. Respondents failed to adequately wet all RACM and ensure that it remained wet until collected and contained or treated in preparation for disposal in violation of Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1)(2002) and 40 CFR 61.145(c)(6).

39. The Respondents, by the actions or inactions as alleged herein, have violated Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1)(2002), and 40 CFR 61.145(a), (c)(1), and (c)(6).

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board enter an order against Respondents, 4832 S. VINCENNES, L.P., and BATTEAST CONSTRUCTION COMPANY, INC., on this Count II:

1. Authorizing a hearing in this matter at which time the Respondents will be required to answer the allegations herein;

2. Finding that Respondents have caused or allowed violations of Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1)(2002), and 40 CFR 61.145(a), (c)(1), and (c)(6);

3. Ordering the Respondents to cease and desist from any further violations of Section 9.1(d)(1) of the Act and 40 CFR 61.145(a), (c)(1), and (c)(6);

4. Assessing a civil penalty of Fifty Thousand Dollars (\$50,000.00) against each Respondent for each and every violation of the Act and pertinent regulations, with an additional penalty

of Ten Thousand Dollars (\$10,000.00) per day for each day of violation;

5. Ordering Respondents to pay all costs, including attorney, expert witness and consultant fees expended by the State in its pursuit of this action; and

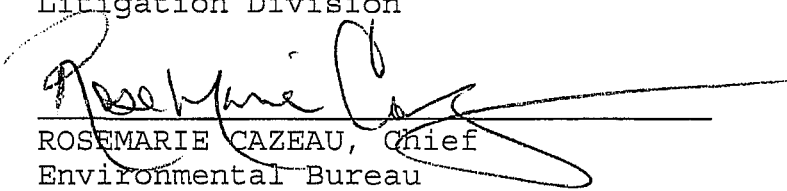
6. Granting such other relief as this Board deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

By:

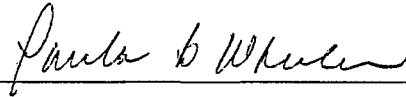

ROSEMARIE CAZEAU, Chief
Environmental Bureau
Assistant Attorney General

Of Counsel:

PAULA BECKER WHEELER
Assistant Attorney General
Environmental Bureau
188 West Randolph Street, 20th Floor
Chicago, IL 60601
(312) 814-1511

CERTIFICATE OF SERVICE

I, PAULA BECKER WHEELER, an attorney, do certify that I caused to be served this 6th day of October, 2003, the foregoing Motion for leave to file its First Amended Complaint and Notice of Filing upon the persons listed on said Notice, by Certified Mail and regular U.S. Mail.



PAULA BECKER WHEELER