ILLINOIS POLLUTION CONTROL BOARD
October 7, 2004

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 02-115
	)	(Enforcement – Air, Water)
BLUE RIDGE CONSTRUCTION CORP., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

DELBERT D. HASCHMEYER, APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS; and

WILLIAM R. KOHLHASE, APPEARED ON BEHALF OF BLUE RIDGE CONSTRUCTION CORP.

OPINION AND ORDER OF THE BOARD (by J.P. Novak):

In an August 7, 2003 order, the Board granted the People's Motion for Partial Summary Judgment and found that respondent Blue Ridge Construction Corp. (Blue Ridge) had committed a number of violations arising from a demolition project at the former Bartonville Mental Health Facility in Peoria County. Today the Board addresses the four remaining contested counts and the issue of a civil penalty for all violations.

Specifically, the Board decides whether a Peoria County demolition site contained sufficient regulated asbestos-containing material (RACM) to trigger asbestos control requirements under National Emission Standards for Hazardous Air Pollutants (NESHAP) and, if so, whether respondent Blue Ridge violated those requirements. For the reasons stated below, the Board finds that the site contained an amount of RACM sufficient to trigger NESHAP requirements and that Blue Ridge failed to comply with those requirements. The Board also imposes a civil penalty of $66,000 on Blue Ridge for all of the violations.

In this opinion, the Board first provides the procedural background of this matter, followed by the Board's findings of fact. The Board then discusses the remaining alleged violations, including the statutory and regulatory provisions at issue, the parties' arguments, and the Board's legal conclusions. Next, the Board evaluates the various statutory factors relating to a penalty before reaching its conclusion on the appropriate penalty.

PROCEDURAL BACKGROUND

The Board first sets forth the procedural history of this case and then describes the violations already found on summary judgment and the remaining alleged violations.

Procedural History

On February 21, 2002, the People of the State of Illinois (People) filed a four-count complaint (Comp.) against Blue Ridge alleging air and water violations arising from the demolition of the former dining hall at the old Bartonville Mental Health Facility in Peoria County. Blue Ridge filed its answer (Ans.) to the complaint on August 5, 2002. On June 13, 2003, the People filed a Motion for Partial Summary Judgment and a Memorandum of Law and Argument in Support of Complainant's Motion for Partial Summary Judgment. That motion did not seek summary judgment for the violations alleged in paragraphs 11, 12, 13, and 14 of count II. Blue Ridge did not respond to the People's motion. On August 7, 2003, the Board granted the People's Motion for Partial Summary Judgment, finding that Blue Ridge violated Sections 9(a), 9.1(d), 12(d), 21(a), (e), (p)(1), and (p)(2) of the Environmental Protection Act (Act), Section 201.141 of the Board's regulations (35 Ill. Adm. Code 201.141), and 40 C.F.R. 61.145(a) and 40 C.F.R. 61.145(b)(1). People v. Blue Ridge Construction Co., PCB 02-115, slip op. at 2-4 (Aug. 7, 2003). The Board sent the parties to hearing to address the remaining alleged violations and remedy. *Id*. at 4.

On February 3, 2004, Board Hearing Officer Bradley P. Halloran conducted a hearing (Tr.) in Peoria. At the hearing, Assistant Attorney General Delbert Haschmeyer appeared and participated on behalf of the People, and William R. Kohlhase appeared and participated on behalf of Blue Ridge. Two witnesses testified during the hearing: Mr. Dennis Hancock of the Agency on behalf of the People, and Mr. John G. Palmer, Sr. on behalf of Blue Ridge. Based on his legal experience and judgment, Hearing Officer Halloran found no issue with the credibility of the two witnesses who testified at the hearing.

The People offered four exhibits, three of which were admitted into the record as Complainant's Exhibits (Comp. Exh.) 2-4. Tr. at 11, 27, 31. Blue Ridge offered five exhibits, all of which were admitted into the record as Respondent's Exhibits (Resp. Exh.) 1-5. Tr. at 35, 41, 58, 59. On March 8, 2004, the People filed a Closing Brief and Argument (Comp. Brief). On March 30, 2004, Blue Ridge filed its Post-Hearing Brief (Resp. Brief), to which the People filed a Reply Brief (Comp. Reply) on April 13, 2004.

Remaining Alleged Violations

The remaining alleged violations are in count II of the People's complaint.

11. During the demolition, Respondent failed to remove all RACM prior to commencing demolition activities at the dining hall of the Bartonville Mental Health Facility in violation of 40 CFR 61.145(c)(1) and Section 9.1(d) of the Act, 415 ILCS 5/9.1(d)(1) (2000).

12. During the demolition of the dining hall, Respondent failed to adequately wet and maintain as wet all RACM and regulated asbestos-containing waste material until collected and contained in preparation for disposal at a

site permitted to accept such waste in violation of 40 CFR 61.145(c)(6) and Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2000).

13. During the demolition of the dining hall, respondent failed to have on site during demolition activities at least one representative trained in the provisions of the NESHAP for asbestos and compliance methods requirements prescribed therein in violation of 40 CFR 61.145(c)(8) and Section 9.1(d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2000).

14. During the demolition of the dining hall, Respondent failed to adequately wet and maintain as wet, asbestos-containing material, thereby causing or allowing the discharge of visible emission to the outside air during the processing of such material in violation of 40 CFR 61.150(a)(1) and Section 9.1 (d)(1) of the Act, 415 ILCS 5/9.1(d)(1) (2000). Comp. at 8.

Violations Found in August 7, 2003 Board Order Granting People's Motion for Partial Summary Judgment

On summary judgment, the Board found that Blue Ridge had committed all of the violations alleged in the complaint as follows. People v. Blue Ridge Construction Co., PCB 02-115, slip op. at 4 (Aug. 7, 2003). Count I of the complaint alleged that Blue Ridge "failed to utilize asbestos emission control methods and properly remove, handle and dispose of all RACM and regulated asbestos-containing waste material during the demolition activities causing, threatening, or allowing the emission of asbestos into the environment so as to cause air pollution in violation of Section 9(a) of the Act, 415 ILCS 5/9(a) (2000) and 35 Ill. Adm. Code 201.141 (1999)." Comp. at 2.

Count II of the Complaint alleged in part as follows:

9. Prior to the demolition of the dining hall of the Bartonville mental Health Facility, Respondent failed to thoroughly inspect the Facility for the presence of asbestos, including category I and II non-friendly (sic) ACM in violation of 40 CFR 61.145(a) (1999) and Section 9.1 of the Act, 415 ILCS 5/9.1(d) (2000).

10. Prior to the demolition, the Respondent failed to submit a written notification of intention of demolition of the former dining hall of the Bartonville Mental Health Facility in violation of 40 CFR 61.145(b)(1) and Section 9(d)(1) of the Act, 415 ILCS 5/9.1(d) (2000). Comp. at 7-8.

Count III alleged that "[o]n or before May 17, 2001, Respondent caused or allowed the open dumping of demolition debris generated by the demolition activities within the former dining hall, including but not limited to wooden desks, pipe, metal and other debris in or near a ravine on property owned by the Respondent in violation of Sections 21(a), (e), (p)(1), and (p)(7) of the Act, 415 ILCS 5/21(a), (e), (p)(1), and (p)(7) (2000)." Comp. at 10.

Count IV alleged that "[o]n or about May 17, 2001, Respondent caused or allowed the open dumping of demolition debris generated by Respondents demolition activities within and adjacent to a ravine owned by Respondent so as to create a water pollution hazard in violation of Section 12(d) of the Act, 415 ILCS 12(d) (2000)." Comp. at 11.

FACTS

Blue Ridge is an Illinois corporation whose officers are David L. Krubac, President; Randall J. Palmer, Vice President; and John G. Palmer, Sr., Secretary-Treasurer. Comp. Exh. 3 at 1. On or about April 13, 2000, Krubec, Palmer, and Palmer, Sr. (collectively, "owners") acquired the old Bartonville Mental Health Facility ("facility") located in Bartonville, Illinois, including a building known as the Dining Hall. *Id.* Before April 2000, Mr. Palmer, Sr. had walked through and examined the facility, taking note of features including pipes. Tr. at 62-63. The owners intended to convert the Dining Hall into a metal fabrication shop. Comp. Exh. 3 at 1. At some time before April 13, 2000, part of the roof of the Dining Hall had collapsed, although outer walls remained standing. *Id.* The facility had been unoccupied and vandalized over a period as long as 30 years. Tr. at 62-63.

Blue Ridge planned to open the east end of the Dining Hall and remove collapsed sections of the roof. Comp. Exh. 3 at 2. Blue Ridge also planned to put up steel columns and a metal roof within the existing walls of the Dining Hall and also to install overhead doors on the east end of the building. *Id.* On or about April 19, 2000, the owners consulted with officials of the Village of Bartonville regarding any permits that may be needed for the work they planned to do at the facility. Comp. Exh. 3 at 1. The village's mayor, building commissioner, and clerk all advised the owners that they required no permits. *Id.* Before beginning demolition of the Dining Hall, Blue Ridge did not notify the Illinois Environmental Protection Agency (Agency) in writing of its intention to demolish the Dining Hall. Comp. Exh. 3 at 2.

On May 11, 2000, Blue Ridge began demolition of the dining hall. Comp. Exh. 3 at 2. From May 11, 2000 to May 17, 2000, Blue Ridge workers opened a hole approximately 40 feet in size in the east wall of the Dining Hall, removed collapsed roofing material, pulled down and removed the rest of the roof, and cut off and removed steel pipe roof support columns from four to six locations. *Id.* Blue Ridge dumped material including splintered boards, metal wiring, insulation, bricks and mortar, and other demolition debris in or near a ravine on the grounds of the facility. Comp. Exh. 3 at 3. The ravine contained all of the demolition debris. Comp. Exh. 3; Exh. A at 3 ("Mr. Palmer stated that this was where he put all the demolition debris."); *see also* Comp. Exh. 4 (locating "asbestos contaminated construction debris" in ravine), Resp. Exh. 4 (locating "asbestos contaminated construction debris" in ravine). An intermittent stream is situated at the bottom of that ravine. Comp. Exh. 3 at 3. Before the owners acquired the facility and before they dumped debris in the ravine, others had dumped waste in the same area of the property. Comp. Exh. 3 at 3.

Before beginning demolition of the Dining Hall, Blue Ridge did not remove any RACM. Comp. Exh. 3 at 2. The parties have stipulated that, in the course of its demolition activities until May 17, 2000, Blue Ridge did not use asbestos emission control methods and did not properly remove, handle, and dispose of regulated ACM. *Id.* In the course of its demolition activities and

until May 17, 2000, Blue Ridge did not wet or maintain as wet RACM. *Id.* In the course of its demolition activities until May 17, 2000, Blue Ridge did not have on site any representative trained in the provisions of NESHAP for asbestos. Comp. Exh. 3 at 3.

On May 17, 2000, Dennis Hancock inspected Blue Ridge's demolition of the Dining Hall. Comp. Exh. 3 at 3; Tr. at 14. The Agency employs Mr. Hancock as a licensed inspector of renovation and demolition contractors with regard to asbestos and NESHAP compliance. Tr. at 13-14. Mr. Hancock performed this inspection in response to a phone call to his office regarding dust at a demolition site. Tr. at 14-15. On arriving at the facility, Mr. Hancock observed two workers wearing paper respirators or masks. Tr. at 15-16, 32. Those workers were using cutting torches to cut pipes that lay on the ground and that contained material suspected of containing asbestos. Tr. at 15-16.

In the course of his May 17, 2000 inspection of the facility, Mr. Hancock estimated the size of the facility by walking the length of both sides of the building. Tr. at 50. His estimate generally corresponded to the building's 80-feet square dimensions. Tr. at 50, 52, 54. Mr. Hancock also walked the length of pipe he observed to estimate that the facility contained 160 linear feet of pipe in two sections. Tr. at 51-53. At the time he estimated this length, Mr. Hancock could not measure all of the pipe that had been in the building because some of it had been discarded into the ravine. Tr. at 53. Mr. Palmer put all of the demolition debris in the ravine, and Mr. Hancock observed that the material in the ravine appeared to be the same material that had come from the demolition. Comp. Exh. 3, Exh. A at 3. Because the ravine was unstable and he could not walk down into it, he could not determine how much pipe was in it. Tr. at 53.

During his May 17, 2000 inspection, Mr. Hancock obtained seven samples of pipe insulation from inside the facility for analysis of asbestos content. Comp. Exh. 3 at 3; Tr. at 36-39. He obtained his first sample from the pipe that he had observed workers cutting. Comp. Exh. 3, Exh. A at 2. Test results identified five of those samples, including his first, as ACM, one contained a trace amount of chrysotile asbestos, and one showed "[n]o asbestos detected." Comp. Exh. 3, Exh. A at 4; Comp. Exh. 3, Exh. C at 3-11; Resp. Exh. 1 at 4; Tr. at 36-38.

Also on May 17, 2000, Agency inspector James Jones also examined the property. Comp. Exh. 3 at 3-4; Comp. Exh. 3, Exhs, D, E. "During the investigation, Jones observed building demolition waste consistent with the make-up of the materials in the building on the property," including apparent asbestos piping insulation, in the ravine. Comp. Exh. 3, Exh. D at 4. In the course of his inspection, Mr. Jones took 15 photographs, which accurately portrayed the site as he observed it at that time. Comp. Exh. 3 at 4; Comp. Exh. 3, Exh. E.

Also during this May 17, 2000 inspection, Mr. Hancock took 14 photographs of the site of the facility. These photographs accurately portray the scene as observed by Mr. Hancock at the time. Comp. Exh. 3 at 3. Those photographs show workers cutting pipe suspected of containing asbestos (Comp. Exh. 3, Exh. B at 1, 2, 4, 5); broken suspect pipe (Comp. Exh. 3, Exh. B at 3, 6), various pipes with suspect insulation (Comp. Exh. 3, Exh. B at 8, 9, 10), and suspect insulation debris on the floor (Comp. Exh. 3, Exh. B at 11).

On May 24, 2000, Bodine Environmental Service, Inc. (Bodine) conducted asbestos sampling for Blue Ridge's facility as preparation for a pre-remediation survey to be approved by the Agency. Resp. Exh. 3 at 1. Bodine's laboratory analysis demonstrated that wall plaster and roofing samples tested negative for asbestos. *Id*. at 1, 5, 9-10. Five soil samples, one of which was taken near the backfill, also tested negative for asbestos. *Id*. at 1, 9. Bodine's report noted that the Agency's sampling revealed that pipe insulation within the collapsed structure had asbestos concentrations of up to 30% amosite and chrysotile. *Id*. at 1; *see also id.* at 7, 9. The Bodine report also noted that, although a visual inspection of the backfill in the ravine did not show any visible or suspect ACM in the ravine, Mr. Hancock had observed pipe insulation in the ravine when he visited the site. *Id*. at 1.

On June 22, 2000, the Agency sent to John Palmer a violation notice alleging violations of provisions of the Act, the Code of Federal Regulations, and Board regulations. Comp. Exh. 3 at 4; Comp. Exh. 3, Exh. F at 3. On August 2, 2000, Mr. Palmer responded to the violation notice. Comp. Exh. 3 at 4; Comp. Exh. 3, Exh. G at 1-4. Attached to Mr. Palmer's response was a copy of a letter from Mark J. Otten of Clark Engineers describing the results of inspections and their remediation plan. Comp. Exh. 3, Exh. G at 5-6. In his remediation plan, Mr. Otten noted that, "since the roof had collapsed taking any and all pipe insulation with it, there was also pipe insulation located sporadically in and around the debris placed in the ravine." Comp. Exh. 3, Exh. G at 6. Instead of separating contaminated and non-contaminated materials, Mr. Otten stated that the owners "have elected to remove all of the debris which had been deposited in the ravine from the building and dispose of all of it as asbestos-contaminated waste." *Id*. On September 7, October 10, and December 19, 2000, Mr. Otten submitted asbestos abatement plan revisions for the facility to Mr. Hancock. Comp. Exh. 3, Exh. J (containing cover letters corresponding to those submissions and identifying plan changes).

On October 19, 2000, Agency inspector James Jones reinspected the facility. Comp. Exh. 3 at 4; Comp. Exh. 3, Exh. H. In his report of that reinspection, Mr. Jones stated that he once again observed the apparent violations identified in his original May 17, 2000 inspection. Comp. Exh. 3, Exh. H at 4; *see* Comp. Exh. 3, Exh. D. In the course of his October 19, 2000 reinspection, Mr. Jones took 24 photographs, which accurately portrayed the site as he observed it at that time. Comp. Exh. 3 at 4; Comp. Exh. 3, Exh. I. On March 27, 2001, Mr. Jones again reinspected the facility. Comp. Exh. 3 at 5; Comp. Exh. 3, Exh. K. In his report of the second reinspection, Mr. Jones stated that the apparent violations found had been identified in his October, 19, 2000, reinspection. Comp. Exh. 3, Exh. K at 4; *see* Comp. Exh. 3, Exhs. D, H.

The parties have stipulated that, on or about April 16, 2001, the owners, in compliance with all applicable requirements, began asbestos removal and removal of waste in the ravine, and have also stipulated that the removal was accomplished on April 19, 2001. Comp. Exh. 3 at 5. On May 15, 2001, Terry McIntyre of Sentry, a division of Williams Power Corp., prepared a "Notification of Demolition and Renovation." Comp. Exh. 2. NESHAP regulations require that this notice must be submitted to the Agency ten working days before beginning any demolition or renovation. Tr. at 28-29. The notice states that the Dining Hall site contained 1,000 cubic feet of RACM, an amount in excess of one cubic meter. Comp. Exh. 2. After removal of material from the ravine, soil samples there tested positive for asbestos. Tr. at 45, 48. After removal of

two inches of soil, the ravine retested positive for asbestos and required additional clean-up. Tr. at 45; *see also* Comp. Exh. 4 (Clearance Note 5).

The owners spent a total of $59,965.67 to remove asbestos from the facility and to remove waste from the ravine. Comp. Exh. 3 at 5; Comp. Exh.3, Exh. M. On April 11, 2002, the Village Council of Bartonville voted 4-2 to reimburse the owners $56,000 "for the expenses associated with the clean-up except for the expenses directly related to the asbestos on the pipes." Comp. Exh. 3 at 5; *see also* Comp. Exh. 3, Exh. N at 2.

DISCUSSION

Here, the Board first discusses the remaining alleged violations and then turns to the issue of a civil penalty for all violations.

Remaining Alleged Violations

Statutory and Regulatory Provisions

Section 9.1(d)(1) of the Act provides that "[n]o person shall violate any provisions of Section 111, 112, 165, or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto . . . ." 415 ILCS 5/9.1(d)(1) (2002).

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.
>
> 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.
>
> 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.

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) off facility components where the length or area could not be measured previously.

* * *

(c) Procedures for asbestos emission control. Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures:

(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.

* * *

(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;

(ii) Carefully lower the material to the ground and floor, not dropping, throwing, sliding, or otherwise damaging or disturbing the material;

(iii) Transport the material to the ground via leak-tight chutes or containers if it has been removed or

stripped more than 50 feet above ground level and was not removed as units or sections.

(iv) RACM contained in leak-tight wrapping that has been removed in accordance with paragraphs (c)(4) and (c)(3)(i)(B)(3) of this section need not be washed.

* * *

(8) Effective 1 year after promulgation of this regulation, no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one on-site representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present. 40 C.F.R. 61.145

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:

(i) Mix control device asbestos waste to form a slurry; adequately wet other asbestos-containing waste material; and

(ii) Discharge no visible emissions to the outside air from collection, mixing, wetting, and handling operations, or use the methods specified by § 61.152 to clean emissions containing particulate asbestos material before they escape to, or are vented to, the outside air; and

(iii) After wetting, seal all asbestos-containing waste material in leak-tight containers while wet; or, for materials that will not fit into containers without additional breaking, put materials into leak-tight wrapping; and

(iv) Label the containers or wrapped materials specified in paragraph (a)(1)(iii) of this section using warning labels specified by Occupational Health and Safety Standards of the Department of Labor, Occupational Safety and Health Administration (OSHA) under 29 CFR 1910.1001(j)(2) or 1926.58(k)(2)(iii). The labels shall be printed in letters of sufficient size and contrast so as to be readily visible and legible.

(v) For asbestos-containing waste material to be transported off the facility site, label containers or wrapped materials with the name of the waste generator and the location at which the waste was generated. 40 C.F.R. 61.150.

* * *

People's Arguments

As a preliminary matter, the People note that they did not seek summary judgment for the violations alleged in paragraphs 11, 12, 13, and 14 of count II because, at the time of filing the motion, the People were not confident that they could establish with the certainty required to support a motion for summary judgment that the quantity of asbestos present was sufficient to trigger NESHAPS requirements alleged to have been violated. Pet. Brief at 5; Tr. at 9. At the time of his May 17, 2000 inspection of the facility, Dennis Hancock could not measure the amount of pipe containing asbestos because demolition of the facility had begun. Pet. Brief at 6; Comp. Exh. 3, Exh. A; Tr. at 53. Mr. Hancock reported that pipe containing insulation had been deposited in a ravine near the facility. Pet. Brief at 6. Based on a drawing of the building, Mr. Hancock estimated that the facility contained 160 linear feet of RACM on pipe. *Id*.; *see also* Tr. at 27. Since that is less than the threshold measurement of 260 linear feet established in 40 C.F.R. 61.145(a)(1)(i), the People acknowledge that they must instead establish that the facility contained at least one cubic meter (35 cubic feet) of RACM where the length or area could not previously have been measured. Pet. Brief at 6; *see* 40 C.F.R. 61.145(a)(1)(i).

The People assert that "[t]he only evidence in the record addressing that issue is Exhibit 2, the Notification of Demolition and Renovation filed by Respondent's asbestos contractor, Sentry. . . ." Comp. Brief at 7. That notification states that 1,000 cubic feet of RACM was to be removed from the facility. Comp. Exh. 2. Because that amount is the equivalent of more than 28 cubic meters, the People assert that Section 61.145(c) applies to the respondent's demolition. Comp. Brief at 7; *see* 40 C.F.R. 61.145(a)(1)(ii).

The People note that the respondent "admits that it failed to remove all RACM before it commenced its activities . . . ." Pet. Brief at 7; Ans. at 2, Comp. Exh. 3 at 2 ("did not remove any regulated ACM"). The People thus argue that the respondent violated the Code of Federal

Regulations and the Act as alleged in paragraph 11 of count II of the Complaint. Pet. Brief at 8; *see* 40 C.F.R. 61.145(c)(1), 415 ILCS 5/9.1(d)(1) (2002).

The People further note that the respondent "admits that during its activities in the dining hall it failed to wet and maintain as wet all RACM and regulated asbestos-containing waste material. . . ." Pet. Brief at 7; Ans. at 2; Comp. Exh. 3 at 2. The People thus argue that respondent violated the Code of Federal Regulations and the Act as alleged in paragraph 12 of count II of the Complaint. Pet. Brief at 8; *see* 40 C.F.R. 61.145(c)(6), 415 ILCS 5/9.1(d)(1) (2002).

The People further note that the respondent "admits that during its activities in the dining hall it did not have a representative trained in the provisions of the NESHAP. . . ." Pet. Brief at 7; Ans. at 3; Comp. Exh. 3 at 3. The People thus argue that the respondent violated the Code of Federal Regulations and the Act as alleged in paragraph 13 of count II of the Complaint. Pet. Brief at 8; *see* 40 C.F.R. 61.145(c)(8), 415 ILCS 5/9.1(d)(1) (2002).

Last, the People note that the respondent "admits that during its activities in the dining hall it failed to wet and maintain as wet all RACM and regulated asbestos-containing waste material . . . ." Pet. Brief at 7; Ans. at 2; Comp. Exh. 3 at 2. The People thus argue that respondent violated the Code of Federal Regulations and the Act as alleged in paragraph 14 of count II of the Complaint. Pet. Brief at 8; *see also* 40 C.F.R. 61.150(a)(1), 415 ILCS 5/9.1(d)(1) (2002).

Blue Ridge's Arguments

Blue Ridge argues that "[t]he evidence introduced at hearing failed to show that the quantity of RACM required as a predicate for establishing the unresolved NESHAP violations was present" (Resp. Brief at 2) and that the Board should find no violation of those provisions. Specifically, Blue Ridge argues that the Agency "did not perform any measurements or tests to determine the quantity of RACM present at the Dining Hall site." Resp. Brief at 3. Blue Ridge further argues that "[t]he only RACM at the site was associated with pipe insulation" (*Id*., citing Tr. at 38-39; Resp. Exhs. 1, 3) and that "[n]o tests showed RACM outside the Dining Hall." Resp. Brief at 3, citing Tr. at 41-43; Resp. Exhs. 3, 5.

Blue Ridge notes that the People rely on a 10-day notice, a "Notification of Demolition and Renovation" submitted by a contractor as part of the remediation of the property and indicating the presence of 1,000 cubic feet of RACM. Resp. Brief at 3, citing Comp. Exh. 2. Blue Ridge further notes that the People's sole witness at hearing did not participate in the preparation of that 10-day notice. Resp. Brief at 3-4.

Blue Ridge thus characterizes the 10-day notice as containing "an unexplained estimate which is inconsistent with all other facts." Resp. Brief at 4. Specifically, Blue Ridge argues that the notice refers only to the removal of waste and debris from the area near the ravine outside the Dining Hall and that no tests show the extent of RACM in that material. *Id*., citing Resp. Exh. 3. Blue Ridge further argues that, because the building had been unused and open for a number of years, it had long been subject to vandals and removal of scrap material. *Id*., citing Tr. at 70.

People's Response

The People characterize Blue Ridge's arguments regarding the 10-day notice as having "no merit." Comp. Reply at 1. First, the People note that the building name, address, size, and description contained in the document plainly refer to Blue Ridge's facility. Comp. Reply at 2. Second, the People also note that the document was prepared by Terry McIntire of Sentry, a division of Williams Power Corporation and an asbestos contractor with which the Agency has frequent contact. *Id*. at 2, citing Tr. at 28-29. Third, the People note that the 10-day notice is a legal document required by federal regulation. Comp. Reply at 1-2, citing 40 C.F.R. 61.145; *see also* Tr. at 28. Fourth, the People note that the 1,000 cubic feet of RACM indicted in the 10-day notice is obtained through measurement and inspection. Comp. Reply at 2, citing Tr. at 56. Fifth, the People also argue that, while the document shows that the surface area and pipe length of RACM are 0, that figure is not inconsistent with other facts in the record. Comp. Reply at 2. Specifically, testimony showed that it was not possible to measure pipe length and surface area because demolition had begun and debris had fallen to the ground in the building and had been pushed into the ravine. Comp. Reply at 2. Last, the People note that the 10-day notice was submitted by a representative of Blue Ridge and thus constitutes an admission by it. *Id*. Consequently, the People argue that they have met their burden of proof, establishing that the quantity of RACM at the site exceeded the threshold amount of one cubic meter and also establishing the violations alleged. Comp. Reply at 3.

Board Discussion

In an enforcement action such as this, the complainant bears the burden of proving, by a preponderance of the evidence, that the alleged violation occurred. Processing and Books, Inc. v. PCB, 64 Ill. 2d 68, 75-76, 351 N.E.2d 865 (1976). Under the circumstances of this case, the People must therefore establish that it's more likely than not than that the regulatory threshold quantity of RACM existed at the facility. *See* Village of South Elgin v. Waste Management of Illinois, Inc., PCB 03-106, slip op. at 3 (Feb. 20, 2003); *see also* Comp. Brief at 6; Resp. Brief at 3.

At hearing and in their brief, the People stated that they did not include the contested violations in Count II in their earlier motion for partial summary judgment because they were not confident that they could establish with that level of certainty that the quantity of asbestos present triggered the relevant NESHAP requirements. Tr. at 9; Comp. Brief at 5. The People acknowledge that the evidence does not show that the facility included 260 linear feet of RACM. Comp. Brief at 6; *see* 40 C.F.R. 61.145(a)(1)(i). Consequently, the People must demonstrate that the facility included at least one cubic meter (35 cubic feet) of RACM where the area could not be measured previously. Comp. Brief at 6; *see* 40 C.F.R. 61.145(a)(1)(ii).

When the facility first came to the Agency's attention on May 17, 2000, it was not possible to measure precisely the amount of RACM at the site. Part of the roof had already collapsed, and the owners had already spent at least six days demolishing the facility. Mr. Palmer stated on May 17, 2000, that all of the demolition debris had been dumped into the ravine area adjoining the facility. Mr. Hancock noted that the material in the ravine matched the

material resulting from the demolition of the building, and five samples of material inside the building tested positive for asbestos. Mr. Hancock could not measure or sample that demolition debris because rainfall had made the debris pile unstable. Nonetheless, both Mr. Hancock and Mr. Jones observed asbestos pipe insulation in the ravine. In a remediation plan prepared for the respondents, Mr. Otten noted that there was pipe insulation located in and around the debris in the ravine. Also, Mr. McIntyre prepared a ten-day notice stating that the Dining Hall site contained 1,000 cubic feet of RACM, an amount well in excess of one cubic meter. Finally, after removal of material from the ravine, soil samples there tested positive for asbestos. After soil removal, the ravine still tested positive for asbestos and required additional clean-up.

The Board finds that these facts demonstrate by a preponderance of the evidence that Blue Ridge's demolition activities generated an amount of RACM well in excess of one cubic meter. Specifically, the Board places considerable weight on the 10-day notice prepared for the owners and cannot accept Blue Ridge's characterization of that notice as an "unexplained estimate." *See* Resp. Brief at 4. On its face, the notice states that the requested information is required by law to be disclosed. It is certified as correct by the signature of Mr. McIntyre, who prepared it for the owners. The volume of RACM indicated on that notice is based on the inspection and measurement of an experienced asbestos contractor. Furthermore, the notice refers by name, address, size, and description to Blue Ridge's facility. Blue Ridge states without convincing explanation that the 1,000 cubic feet figure contained in that notice is inconsistent with other facts. While the notice does not specify a measurement of the linear feet of RACM in the form of pipes, Blue Ridge had dumped the waste at issue and combined it with other debris in a ravine where it could not be measured. The Board will not allow Blue Ridge to cast doubt on its own contractor because Blue Ridge's own actions had made that contractor's job much more difficult.

Blue Ridge admitted that "it failed to remove all RACM before it commenced its activities" (Ans. at 2) and stipulated that, "[p]rior to commencing demolition of the dining hall at the facility, [it] did not remove any regulated ACM." Comp. Exh. 3. at 2. The Board finds that Blue Ridge has violated 40 C.F.R. 61.145(c)(1) and Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2002)) as alleged in paragraph 11 of count II of the complaint.

Blue Ridge admitted that, "during its activities in the dining hall it failed to wet and maintain as wet all RACM and regulated asbestos-containing waste material," (Ans. at 2) and stipulated that, "[d]uring that demolition of the dining hall at the facility up to May 17, 2000, . . . [it] did not wet, or maintain as wet, regulated ACM." Comp. Exh. 3 at 2. The Board finds that Blue Ridge has violated 40 C.F.R. 145(c)(6) and Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2002)) as alleged in paragraph 12 of count II of the Complaint.

Blue Ridge admitted that, "during its activities in the dining hall it did not have a representative trained in the provisions of the NESHAP" (Ans. at 3) and stipulated that, "[d]uring the demolition of the dining hall at the facility up to May 17, 2000, . . . [it] did not have on site any representative trained in the provisions of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos. " Comp. Exh. at 3. The Board finds that Blue Ridge has violated 40 C.F.R. 61.145(c)(8) and Section 9.1(d)(1) of the Act (415 ILCS 5/9.1(d)(1) (2002)), as alleged in paragraph 13 of count II of the complaint.

Blue Ridge has admitted that, "during its activities in the dining hall it failed to wet and maintain as wet all RACM and regulated asbestos-containing waste material." Ans. at 2. When Mr. Hancock first arrived at the facility on May 17, 2000, he observed two workers using cutting torches to cut pipes that lay on the ground. Those workers wore a paper respirator or mask. Mr. Hancock's photographs show that the workers performed this cutting in an area where the facility's wall and roof had been almost completely removed, exposing their activity to the outside air. His photographs also show that the pipe cut by workers showed frayed material where it had been broken. Mr. Hancock obtained his first testing sample from this pipe, and it tested positive for asbestos. Blue Ridge admitted that, "during its activities in the dining hall it failed to wet and maintain as wet all RACM and regulated asbestos-containing waste material," (Ans. at 2) and stipulated that, "[d]uring that demolition of the dining hall at the facility up to May 17, 2000, . . . [it] did not wet, or maintain as wet, regulated ACM." Comp. Exh. 3 at 2.

Considered together, this evidence makes it more probable than not than not that Blue Ridge's failure to adequately wet RACM resulted in discharging visible emissions to the outside air. That conclusion is consistent with the Board's precedent. In People v. the State of Illinois v. Spirco Environmental, PCB 97-203 (Apr. 15, 1999), the Board concluded that there was no visible emission and found that the People had failed to meet their burden in proving the existence of visible emissions, but only where the Agency's acting NESHAP coordinator specifically admitted on cross examination "that he did not see dust or asbestos fibers leave the . . . structure." Spirco, PCB 97-203, slip op. at 30-31. There the Board stated that it must base its finding on that admission. Unlike Spirco, Mr. Hancock's testimony and photographs meet the burden of proving by a preponderance of the evidence that visible emissions resulted from Blue Ridge's activities. The Board finds that Blue Ridge has violated 40 C.F.R. 61.150(a)(1) and Section 9.1(d)(1) of the Act (415 ILCS 5/9/1(d)(1) (2000)), as alleged in paragraph 14 of count II of the complaint.

Relief

Blue Ridge acknowledges that, since the People's Motion for Partial Summary Judgment has already resulted in findings of violations, the Board may impose a civil penalty, although one is not required by the Act. Resp. Brief at 5; *see* 415 ILCS 5/33(b) (2002). The four additional violations found today may also serve as an additional basis for a civil penalty. The People ask that the Board impose a minimum penalty of $72,000 on Blue Ridge. Comp. Brief at 16.

Civil Penalties

In determining whether to impose a civil penalty, the Board must consider specified statutory factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (2002)) to determine whether a civil penalty should be imposed. The Section 33(c) factors bear upon the reasonableness of the circumstances surrounding the violation. Specifically, Section 33(c) reads:

> 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) (2002).

Whether Civil Penalties Should Be Imposed. The Board addresses each of these factors in turn.

Section 33(c)(i): Character and Degree of Injury or Interferenc. The Board agrees that this case presents a significant risk of endangering the public health through the potential release of contaminants including asbestos into the air. The case also poses a significant risk of water pollution resulting from the dumping of varied demolition debris into the ravine on the property, at the bottom of which is located an intermittent stream. While Blue Ridge argues with respect to this factor "that there is no evidence of actual air or water pollution," (Resp. Brief at 5), the Board finds that the nature of contaminants such as asbestos and the volume of material dumped into the ravine both constitute "interference with the protection of the health, general welfare, and physical property of the people." 415 ILCS 5/33(c)(i) (2002). Consequently, the Board weighs this factor in favor of assessing a civil penalty against Blue Ridge.

Section 33(c)(ii): Social and Economic Value of the Pollution Source. The record is clear that the facility had been abandoned for many years, had partly collapsed, and had experienced vandalism. Given that condition, the underlying value of the facility at the time of demolition was slight. While the owners planned to convert the facility to a metal fabrication shop presumably having some value, the record does not specify and the Board will not speculate as to that value. Thus, the Board does not weigh this factor either in favor of or against assessing a civil penalty.

Section 33(c)(iii): Suitability or Unsuitability of the Pollution Source. Disposing of asbestos-containing waste into a ravine in this manner is not suitable to any location, and the Board weighs this factor in favor of assessing a civil penalty. *See* People of the State of Illinois v. Dennis Fults, PCB 96-118, slip op. at 9 (Mar. 20, 1997) ("Uncontrolled burning is not suitable in any area, and thus the Board weighs this factor against Fults.").

Section 33(c)(iv): the Technical Practicability and Economic Reasonableness. The record shows that Blue Ridge faced no significant technical or economic obstacles to compliance

with the various applicable requirements. In fact, Blue Ridge has now removed asbestos from the facility and wastes from the ravine. The Board further finds that compliance would have substantially reduced if not eliminated the risk of releasing contaminants into the air and water and weighs this factor heavily in favor of assessing a civil penalty.

Section 33(c)(v): Subsequent Compliance. The parties have stipulated that "on or about April 16, 2001, Respondent, in compliance with all applicable requirements, commenced asbestos removal and removal of waste in the ravine. The asbestos and waste removal was accomplished on April 19, 2001." Comp. Exh. 3 at 5 (emphasis added). The People have noted and Blue Ridge has stressed that the respondent "implemented measures to properly contain, remove, and dispose of all regulated asbestos-containing waste and refuse." Comp. Brief at 10 (emphasis added); Resp. Brief at 5. Thus, the Board weights this factor against assessing a civil penalty.

Board Finding Whether Civil Penalties Should Be Imposed. Having considered the statutory factors under Section 33(c) (415 ILCS 5/33(c) (2000)), and placing particular emphasis on the risk posed to the people by the material dumped into the ravine and upon the reasonableness of complying with all applicable requirements, the Board finds that it is clearly appropriate to assess a civil penalty in this case.

The Appropriate Amount of Civil Penalties. The maximum civil penalties the Board can assess are established in Section 42(a) of the Act:

> [A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable for a civil penalty of not to exceed $50,000 for the violation and an additional civil penalty of not to exceed $10,000 for each day during which the violation continues . . . . 415 ILCS 5/42(a) (2002).

The People argue that Blue Ridge has committed fourteen violations, at least six of which continued for 340 days. Comp. Brief at 12. The People calculate the maximum penalty to be in excess of $30 million but acknowledge that they seek a considerably smaller penalty. Comp. Brief at 13.

In determining the amount of a civil penalty, the Board is authorized by the Act to consider a number of matters in either mitigation or aggravation of penalty, including those specified in Section 42(h) of the Act.[1] 415 ILCS 5/42(h) (2002). Section 42(h) specifically provides:

[1] Section 42(h) of the Act was substantially amended by P.A. 93-575, effective January 1, 2004. Among other things, the amendments establish that a violator's economic benefit from delayed compliance is to be the minimum penalty amount. Because the complaint in this proceeding was filed before the effective date of P.A. 93-575, the Board did not use the amendments in determining the appropriate penalties to impose on Blue Ridge, nor do the parties argue for their applicability here.

> In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> (1) the duration and gravity of the violation;
>
> (2) the presence or absence of due diligence on the part of the violator in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
>
> (3) any economic benefits accrued by the violator because of delay in compliance with requirements;
>
> (4) the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly situated subject to the Act; and
>
> (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2002).

The parties disagree sharply over the application of the statutory factors to this case. Resp. Brief at 5 ("Complainant's analysis of the Section 42(h) factors . . . is seriously flawed."). The Board evaluates those factors separately below.

Section 42(h)(1): the Duration and Gravity of the Violation. Taking together the four counts of the complaint, the People argue that the Blue Ridge has committed the following fourteen violations:

a) three separate NESHAP requirements;

b) two separate NESHAP requirements continuing 7 days each;

c) one NESHAP requirement continuing 7 days;

d) Sections 9 and 9.1 of the Act for 340 days each;

e) Board air pollution regulations continuing for 340 days;

e) four requirements of Section 21 of the Act continuing for 340 days; and

g) Section 12(d) of the Act continuing for 340 days. Comp. Brief at 12.

While the People calculate the maximum penalty to be in excess of $30 million, they acknowledge that they seek an actual penalty far smaller than that amount. Comp. Brief at 13. Nonetheless, they stress that the asbestos at issue in this case is defined as a hazardous pollutant under the federal Clean Air Act and argue that numerous violations continued from the start of demolition on May 11, 2000, until remediation was complete on April 16, 2001. *Id*.

Blue Ridge responds that the fact that remediation was not complete until April 19, 2001 does not meant that every violation continued until that date. Resp. Brief at 7. Blue Ridge argues that, beginning May 17, 2000, it worked diligently with the Agency and with consultants, whose schedules it could not control.

Under this subsection (h)(1), the Board must consider the duration and gravity of the offense, and the record clearly shows that demolition waste containing asbestos remained in the ravine for nearly a year. Because of asbestos' harmful nature and because it risked contamination of air, soil, and water, the Board finds that the duration and gravity of these violations must be considered an aggravating factor in determining the amount of a civil penalty.

Section 42(h)(2): Presence or Absence of Due Diligence. The People argue that, before May 17, 2000, Blue Ridge showed "a complete absence of due diligence." Comp. Brief at 13. The People suggest that it was disingenuous for Blue Ridge to rely on assurances from the Mayor, Building Commissioner, and Clerk of the Village of Bartonville that no permits were required for the demolition of the facility. Specifically, they argue that village officials are not responsible for advising a construction company such as Blue Ridge of applicable state and federal environmental regulations. Comp. Brief at 13-14. With regard to the period after May 17, 2000, the People agree that Blue Ridge "did retain the necessary expertise and, ultimately, the site was clean in accordance with applicable requirements." Comp. Brief at 14. While they note that the reason for some delays may be placed at the door of other entities, they argue that the remediation process "took too long." *Id*.

In response, Blue Ridge argues that the record does not show that it had any prior involvement either with demolition activities or handling asbestos. Under those circumstances, they claim, it was "customary and reasonable" to rely on municipal officials for guidance on demolition permits. Resp. Brief at 8. In addition, Blue Ridge argues that the record does not indicate that its remediation process was too lengthy, does not show how long those processes generally take, and in any event does not show that it was responsible itself for causing any delay. *Id*.

The Board cannot accept Blue Ridge's claim that contact with municipal officials constitutes "due diligence . . . in attempting to comply with requirements of this Act." The record shows that Mr. Palmer, Sr., one of the owners, had viewed the facility before purchasing it and had done so carefully enough to have drawn conclusions about the length of the pipes there. While the village officials are no doubt conscientious, they simply are not charged with the responsibility of enforcing these state and federal environmental standards, and a duly diligent party would not rely solely on their advice. "The Board must again emphasize . . . that in the usual course of events, ignorance of the existence of regulations will be considered by the Board to be, at best, a self-imposed hardship." City of Ottawa v. IEPA, PCB 86-165, slip op. at

7 (Jan. 22, 1987). The Board considers the lack of due diligence in discovering the applicable demolition requirements as an aggravating factor in determining the amount of a civil penalty. Furthermore, the record is clear that Blue Ridge left a substantial volume of asbestos-containing debris in a ravine exposed to the air and soil and to an intermittent stream for a period of approximately 11 months. The Board considers this exposure as evidence of a lack of due diligence and as an aggravating factor in determining the amount of a civil penalty.

Section 42(h)(3): Economic Benefit. The People note that Blue Ridge has been repaid by the Village of Bartonville for all but $3,965.67 of its expenses for the clean-up of its facility. Pet. Breif at 15. Blue Ridge argues that the village's decision to reimburse those costs does not confer an economic benefit that is attributable to any delay on its part. Resp. Brief at 9. The People acknowledge that "[t]he record in the instant case does not define, in any precise terms, any economic benefits accrued by the Respondent because of the delay in compliance." Comp. Brief at 15 (emphasis added). Lacking any precise definition of this nature, the Board will not consider subsection (h)(3) as an aggravating or mitigating factor in determining whether to assess a civil penalty.

Section 42(h)(4): Penalty Amount Deterring Further Violations and Enhancing Voluntary Compliance. Because the Village of Bartonville has reimbursed Blue Ridge $56,000 for expenses associated with the clean-up of the facility, the People argue that Blue Ridge has shifted virtually all of the burden of its non-compliance onto the village, a party which is not responsible for dumping RACM into the ravine. As a result, the People argue, Blue Ridge has avoided virtually all of the cost of its actions. Comp. Brief at 15. The People further argue that this reimbursement violates a basic principle of the Act: that the adverse effects on the environment are borne by those causing them. Comp. Brief at 15-16; 415 ILCS 5/2(b) (2002).

In response, Blue Ridge argues that neither law nor logic supports the People's position. Resp. Brief at 9. It believes that the logical extension of the People's argument is that any insurance or collateral source of payment for clean-up would violate the policy of the Act. *Id*. The Board cannot agree. An insurer assumes the risk of paying costs associated with environmental clean-up in return for accepting premiums.

Even if, as the People propose (Pet. Brief at 15), this payment of $56,000 could be construed as reimbursement of the cost of removing debris that existed before the owners purchased the facility, that removal became much more extensive and expensive when Blue Ridge dumped a large quantity of demolition debris and RACM into the ravine. Also, the parties have stipulated that the village reimbursed an amount $3,965.67 less than the full cost to avoid paying expenses "directly related to the asbestos on the pipe." Comp. Exh. 3 at 5. There is nothing in the record to indicate that this amount is the actual cost of cleaning up asbestos-containing pipe. *See id*. It is indeed the purpose of the Act "to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (2002). Under the facts of this case, Blue Ridge has shifted costs for which it is responsible onto the Village of Bartonville and those who provide financially for its operations. The civil penalty must be at least $56,000 to be consistent with the fundamental principle of the Act.

Section 42(h)(5): Previously Adjudicated Violations. The People note that "[t]he record does not indicate there are any prior adjudicated violations against the Respondent." Comp. Brief at 10. The Board considers this as a mitigating factor in determining whether to assess a civil penalty.

Board Finding on Appropriate Amount of Civil Penalties. The People argue that a substantial penalty is necessary to deter future violations by Blue Ridge and to aid in voluntary compliance with the Act. Because the case presents a large number of violations and a failure to exercise due diligence, the People recommend a civil penalty of $72,000, which includes the amount of $56,000 reimbursed by the Village of Bartonville. Comp. Brief at 16.

Blue Ridge argues that "no decision by the Board or any court supports the imposition of such a severe penalty based on the facts of this case." Resp. Brief at 9. It proposes instead a maximum penalty of $3,000. Resp. Brief at 11. Blue Ridge notes that, in reviewing penalties in IEPA v. Berry, PCB 88-71, slip op. at 66-67 (May 10, 1990), the Board found that the average penalty imposed was long less than $10,000. *Id*. at 10. The Board notes, however, that maximum penalties under the Act have increased as much as ten-fold since Berry (*see* P.A. 86-1014 (effective July 1, 1990)), and Berry did not consider reimbursement as a penalty factor.

Blue Ridge argues that People v. Aabott Asbestos, Inc., PCB 99-189 (Apr. 5, 2001) provides suitable guidance. Resp. Brief at 10. Although Aabott was an asbestos removal contractor, it committed multiple violations and failed to appear for hearing. *Id*. The People sought a penalty of $65,000 but the Board ultimately assessed a penalty of $30,000. Blue Ridge argues that the People's proposed penalty of $72,000 is, in comparison with Aabott, "significant overreaching." *Id*. The People respond that this case involves a larger number of violations than Aabott and that Blue Ridge is responsible not only for air violations but also for open dumping and a threat of water pollution. Pet. Reply at 6. They further respond that the Aabott decision does not show that it was reimbursed to any extent for the costs of its noncompliance. *Id*. In light of those considerations, the People stress that a fine of $16,000 – plus the reimbursed $56,000 – is "quite reasonable." *Id*.

Because this case presents a large number of violations, a failure to exercise due diligence, and a need to deter similar threats to the air and water of the State, the Board finds that a substantial civil penalty is warranted in this case. The People argued that Blue Ridge's lack of prior adjudicated violations was irrelevant, but the Board consider this a mitigating factor and will accordingly reduce the amount of civil penalty sought by the People. Under the circumstances of this case and after considering all of the statutory factors, the Board will order Blue Ridge to pay a civil penalty of $66,000.[2]

CONCLUSION

In granting the People's Motion for Partial Summary Judgment on August 7, 2003, the Board found that Blue Ridge had violated Sections 9(a), 9.1(d)(1), 12(d), 21(a), (e), (p)(1), and

[2] The People did not specifically request an award of attorney fees. *See* 415 ILCS 5/42(f) (2002).

(p)(2) of the Act; Section 201.141 of the Board's regulations; and 40 C.F.R. 61.145(a) and 40 C.F.R. 61.145(b)(1). The Board incorporates by reference its August 7, 2003 order. After reviewing the record in this case and the relevant portions of the Act, the Board today finds that Blue Ridge has also violated 40 C.F.R. 145(c)(1), 40 C.F.R. 145(c)(6), 40 C.F.R. 145 (c)(8), and 40 C.F.R. 61.150(a)(1), and therefore also violated Section 9.1(d)(1) of the Act. The Board orders Blue Ridge to pay a civil penalty of $66,000 for all of these violations.

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

ORDER

1. The Board finds that Blue Ridge violated Section 9(a), 9.1(d)(1), 12(d), 21(a), (e), (p)(1), and (p)(2) of the Environmental Protection Act (415 ILCS 5/9(a), 9.1(d)(1), 12(d), 21(a), (e), (p)(1), (p)(2) (2000)); Section 201.141 of the Board's regulations (35 Ill. Adm. Code 201.141); and 40 C.F.R. 61.145(a), 40 C.F.R. 145(c)(1), 40 C.F.R. 145(c)(6), 40 C.F.R. 145 (c)(8), 40 C.F.R. 61.145(b)(1), and 40 C.F.R. 61.150(a)(1).

2. No later than Monday, December 6, 2004, which is the 60th day after the date of this order, Blue Ridge must pay $66,000 in civil penalties. Blue Ridge must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and respondent's social security number or federal employer identification number must be included on each certified check or money order.

3. Blue Ridge must send the certified check or money order to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   1021 North Grand Avenue East
   P.O. Box 19276
   Springfield, Illinois 62794-9276

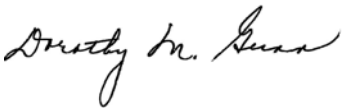
4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Act (415 ILCS 5/42(g) (2002)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2002)).

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) (2002); *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, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 7, 2004, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board