ILLINOIS POLLUTION CONTROL BOARD
May 4, 2000

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 95-170
	)	(Enforcement - Air)
ENVIRONMENTAL CONTROL AND ABATEMENT, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. McFawn):

Currently before the Board is "Complainant's Motion for Reconsideration," filed on March 27, 2000, seeking reconsideration of a finding by the Board in its order of February 17, 2000. Specifically, complainant asks the Board to reconsider its finding that an issue of material fact existed as to respondent Environmental Control and Abatement, Inc.'s (ECA) liability for violation of asbestos regulations in connection with an asbestos removal project in Urbana, Illinois.[1] ECA filed a response opposing complainant's motion on April 4, 2000. Upon reconsideration, the Board concludes that complainant is correct that each individual nonscheduled renovation operation requires a separate notification to the Illinois Environmental Protection Agency (Agency) if the renovation operation involves asbestos above the regulatory threshold amount. Accordingly, the Board modifies its order of February 17, 2000 to grant summary judgment in complainant's favor with respect to the violations of 40 C.F.R. 61.145 and 415 ILCS 5/9.1(d) alleged in connection with the Urbana project.

This case involves alleged violations of provisions of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos. The asbestos NESHAP is codified at 40 C.F.R. 61 Subpart M, which includes 40 C.F.R. 61.145. The alleged violations of this federal regulation are within the Board's jurisdiction because Section 9.1(d) of the Illinois Environmental Protection Act (Act), 415 ILCS 5/9.1(d) (1998), prohibits violation of any regulation adopted pursuant to Section 112 of the federal Clean Air Act, 42 U.S.C. 7412.

The Urbana project involved the removal of 1,900 linear feet of asbestos-containing piping insulation from a building owned by the University of Illinois. Section 61.145 requires each owner or operator of a renovation activity to provide notice of the proposed activity to the Agency if the amount of regulated asbestos-containing material (regulated ACM, or RACM) involved exceeds a certain threshold. (See Section 61.145(a)(4)(i) for threshold amounts and Section 61.145(b) for notice requirements.)

[1] The Board's February 17, 2000 order addressed alleged violations at five different project sites, but complainant's motion involves only rulings in connection with the Urbana site.

The relevant provisions of Section 61.145 provide:

(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. The requirements of paragraphs (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:

* * *

(4) In a facility being renovated, including any individual nonscheduled renovation operation, all the requirements of paragraphs (b) and (c) of this section apply if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed 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[.]

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(iii) To determine whether paragraph (a)(4) of this section applies to planned renovation operations involving individual nonscheduled operations, predict the combined additive amount of RACM to be removed or stripped during a calendar year of January 1 through December 31.

* * *

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

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

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(3) Postmark or deliver the notice as follows:

(i) At least 10 working days before asbestos stripping or removal work or any other activity begins (such as site preparation that would break up, dislodge or similarly disturb asbestos material), if the operation is described in paragraphs (a) (1) and (4) (except (a)(4)(iii) and (a)(4)(iv)) of this section. ***

(ii) At least 10 working days before the end of the calendar year preceding the year for which notice is being given for renovations described in paragraph (a)(4)(iii) of this section.

* * *

(4) Include the following in the notice:

* * *

(v) Procedure, including analytical methods, employed to detect the presence of RACM and Category I and Category II nonfriable ACM.

(vi) Estimate of the approximate amount of RACM to be removed from the facility in terms of length of pipe in linear meters (linear feet), surface area in square meters (square feet) on other facility components, or volume in cubic meters (cubic feet) if off the facility components. Also, estimate the approximate amount of Category I and Category II nonfriable ACM in the affected part of the facility that will not be removed before demolition.

These provisions require a notice to be submitted to the Agency if a renovation will involve asbestos above a certain threshold amount. The regulation provides for different types of notices to be used in different circumstances, two of which are of concern to us in this case: a standard ten-day notice of an upcoming operation (Section 61.145(b)(3)(i)) and an annual notice covering various individual nonscheduled renovation operations to be undertaken in the coming calendar year (Section 61.145(b)(3)(ii)). ECA submitted a ten-day notice for the Urbana project, but it lacked the information required under Section 61.145(b)(4)(v) and (vi). ECA argued, however, that the project had been covered by an annual notice submitted by the University. The annual notification was not submitted in connection with the parties' summary judgment motions. ECA argued that it was not required to submit an individual notice of the project—the notice it provided was submitted merely as a courtesy to the Agency—so any defects in the ten-day notice it did submit would not have been violations of the NESHAP regulations.

In its February 17, 2000 order, the Board found that an issue of material fact existed as to the existence and scope of an annual notification for the Urbana facility. The Board concluded that if such a notification was submitted, it could have covered ECA's work. In its analysis, the Board stated:

> We note the People's argument that the Urbana project was subject to the notification requirement because it involved 1900 linear feet of RACM. People's Response at 3-4. The issue here is not whether the project was subject to the notification requirement—clearly it was. The question is rather whether an annual notification submitted by the University covered this project, and if so, if ECA's work would be considered a specific nonscheduled operation within the noticed project. If a project (of whatever size) is covered by an annual notification, a separate notification is not required even though a specific operation may involve more than the threshold amount of RACM. See 40 C.F.R. 61.145(b)(3)(i), (ii), (iv). People v. Environmental Control and Abatement, Inc. (February 17, 2000), PCB 95-170, slip op. at 11.

Among the purposes of a motion for reconsideration is to bring to the tribunal's attention errors in the application of existing law. Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); see also 35 Ill. Adm. Code 101.246(d). In seeking reconsideration, complainant asserts that the Board erred in its application of Section 61.145. Based on the language of Section 61.145(a)(4), complainant argues that, notwithstanding any annual notice that may have been submitted, where the amount of RACM involved in a particular nonscheduled renovation operation exceeds the regulatory threshold, a separate notice must be provided for that nonscheduled renovation operation.

Complainant cites no authority in support of its arguments. Nevertheless, given complainant's arguments, the Board has identified an ambiguity in the terms of Section 61.145. Paragraphs (a)(4), (a)(4)(iii), (b)(3)(i) and (b)(3)(ii) can credibly be read either to require a separate notice for individual nonscheduled operations that involve more than the threshold amount of RACM (as urged by complainant) or to permit an annual notice to cover such nonscheduled operations (as the Board ruled in its February 17, 2000 order). To resolve this ambiguity, we have reviewed the comments of the United States Environmental Protection Agency in connection with the amendments to Section 61.145 that added these provisions. We note the following statement from the "Notice of Proposed Rule Revision" published at 54 Fed. Reg. 912 (January 10, 1989):

> To clarify whether planned renovations involving individual, nonscheduled operations must comply with the notification provisions of § 61.145(b), paragraph (a)(4)(i), is modified to require that the additive amount of asbestos to be removed or stripped over a calendar year of January 1 through December 31 be used instead of over the "maximum period of time a prediction can be made not to exceed 1 year." This clarifies the intent of the current regulation to cover individual, nonscheduled asbestos removal operations involving small amounts of asbestos if the total amount of asbestos that will be removed in 1 year is

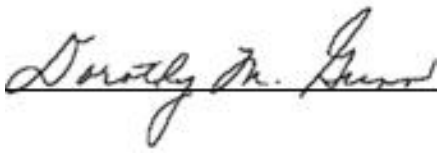
> projected to exceed the quantities of asbestos specified in § 61.145(a). When individual renovations exceed the cutoff, a separate notification is required. 54 Fed. Reg. at 917 (emphasis added).

Based on this federal comment, we conclude that complainant is correct that a separate notice was required for the Urbana project, notwithstanding that the University may have submitted an annual notice, because the project involved more than the regulatory threshold amount of RACM, *i.e.*, 1,640 linear feet over the threshold level of 260 linear feet. Neither party disputes that the notice submitted by ECA in connection with the Urbana project did not indicate the procedure and analytical methods that would be used to detect the presence of ACM, nor did it indicate the approximate amount of RACM to be removed from the site, as required by Section 61.145(b)(4)(v) and (vi). Accordingly, summary judgment should have been entered in complainant's favor with respect to the alleged violations of Section 61.145(b)(4) and Section 9.1(d) of the Act.

Therefore, that portion of the Board's February 17, 2000 order denying complainant's motion for summary judgment with respect to alleged violations of Section 61.145(b)(4)(v) and (vi) and Section 9.1(d) of the Act in connection with the Urbana project is vacated, and the Board grants complainant's motion for summary judgment on those alleged violations. The Board reserves ruling on the issue of an appropriate remedy pending a hearing on the alleged violations not resolved in this order or the Board's order of February 17, 2000.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of May 2000 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board