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STATE OF ILLINOIS
Pollution Control Board

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 9, 2004

The Honorable Dorothy Gunn
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph
Chicago, Illinois 60601

Re: ***People v. Blue Ridge Construction Corporation, an Illinois corp.***
PCB No. 02-115

Dear Clerk Gunn:

Enclosed for filing please find the original and five copies of a NOTICE OF FILING and COMPLAINANT'S REPLY BRIEF TO RESPONDENT'S POST-HEARING BRIEF in regard to the above-captioned matter. Please file the original and return a file-stamped copy of the document to our office in the enclosed self-addressed, stamped envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Delbert D. Haschemeyer".

Delbert D. Haschemeyer
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031

DDH/pp
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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APR 13 2004

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 BLUE RIDGE CONSTRUCTION CORPORATION,)
 an Illinois corporation,)
)
 Respondent.)

PCB NO. 02-115
(Enforcement)

NOTICE OF FILING

To: William R. Kohlhasse
Miller, Hall & Triggs
1125 Commerce Bank Building
416 Main Street
Peoria, IL 61602

PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S REPLY BRIEF TO RESPONDENT'S POST-HEARING BRIEF, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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:



DELBERT D. HASCHEMEYER
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: April 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that I did on April 9, 2004, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instrument entitled NOTICE OF FILING and COMPLAINANT'S REPLY BRIEF TO RESPONDENT'S POST-HEARING BRIEF

To: William R. Kohlhasse
Miller, Hall & Triggs
1125 Commerce Bank Building
416 Main Street
Peoria, IL 61602

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s)

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

A copy was also sent by First Class Mail with postage thereon fully prepaid

To: Brad Halloran
Hearing Officer
Pollution Control Board
James R. Thompson Center, Ste. 11-500
100 West Randolph
Chicago, IL 60601



Delbert D. Haschemeyer
Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

APR 13 2004

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
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 v.)
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 BLUE RIDGE CONSTRUCTION CORPORATION,)
 an Illinois corporation,)
)
 Respondent.)

PCB NO. 02-115
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**COMPLAINANT'S REPLY BRIEF TO
RESPONDENT'S POST-HEARING BRIEF**

Now comes the Complainant, PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of the State of Illinois, and provides the following Reply Brief to Respondent's Post-Hearing Brief.

I.

**REPLY TO RESPONDENT'S ARGUMENT - COMPLAINANT FAILED TO PROVE
THE THRESHOLD QUANTITIES OF RACM WERE PRESENT AT THE SITE**

Respondent in its Post-Hearing Brief argues that the evidence failed to establish by a preponderance of the evidence that the threshold amount of RACM required by 40 CFR Section 61.45(a)(1)(ii) was present at the site. Respondent demeans Complainant's Exhibit 2 (the ten-day notification form submitted by Respondent's asbestos contractor) arguing, "in view of the fact that the only evidence in the record of tests of material outside the dining hall showed there was no RACM present in the ravine, a ten-day notice containing an unexplained estimate which is consistent with all other facts cannot reasonably be said to establish by a preponderance of the evidence that the threshold quantities of RACM were present." Respondent's argument has no merit.

First, as testified to by Mr. Hancock, Plaintiff's Exhibit 2 is a legal document required to be

filed by Federal Regulations (40 CFR Subpart M-61.145). The document was prepared by Terry McIntire with Sentry, a Division of Williams Corporation, the asbestos removal contractor, a company the Agency deals with frequently; thus, an experienced asbestos removal contractor. (Trans. pp. 28 & 29). The 1,000 cubic feet of RACM indicated by Complainant's exhibit to be present is a number determined after inspection and measurement. (Trans. p. 56). Secondly, the information in Complainant's Exhibit 2 is certified to be correct by Terry McIntire. Thirdly, there are no facts in the record which are inconsistent with the information in Complainant's Exhibit 2. The amount of RACM on pipes or surface area indicated by Complainant's exhibit is 0. This is entirely consistent with Mr. Hancock's and Mr. Palmer's testimonies that it was not possible to measure the pipes because they had already been demolished or removed and, thus, impossible to determine the amount of RACM present on the pipes or on surface areas of the building. It is also consistent with the observations of Mr. Hancock of RACM being located on the ground in the building and being advised by Mr. Palmer that demolition debris had been pushed into the ravine in back (Stip. Exhs. A & B).

Consequently, the completion of the notice indicating 0 RACM for pipes and surface areas is entirely consistent with and as required by 40 CFR 61.145(a)(1). Further, an inspection of Complainant's Exhibit 2 clearly indicates it is for Respondent's facility. The exhibit, on its face, indicates it is for the old State Mental Hospital/Dining Hall at 4201 Constitution in Bartonville, Peoria County, Illinois. The exhibit further indicates that the RACM in the structure is located on its north side of outside building and that the building's size was 5,790 square feet. All of these facts are consistent with other evidence in the record. It is clear Exhibit 2 is the required ten-day notice for Respondent's facility, which is the subject of this case. It is further clear that the notice was submitted by a representative of the Respondent and, as such, is an admission by the Respondent. Further, it is clear that Plaintiff's Exhibit 2 is the only credible evidence in the record defining the

amount of RACM. Thus, there is no doubt that the record established by a preponderance of the evidence that the amount of RACM at the site exceeded the threshold amount of 1 cubic meter of RACM required by 40 CFR 61.145(a)(1)(ii) and, therefore, establishes the violations as alleged in paragraphs 11, 12 and 13 of Count II of the Complaint.

II.

**REPLY TO RESPONDENT'S ARGUMENT - THERE IS NO JUSTIFICATION
IN THE RECORD FOR THE PENALTY SOUGHT BY COMPLAINANT**

Respondent takes issue with Complainant's analysis of the Section 42(h) factor stating Complainant's analysis "is severely flawed."

42(h)(1) Duration and Gravity.

Respondent acknowledges Respondent commenced demolition on May 17, 2000, and the remediation project was completed on April 19, 2001. Although Respondent asserts that the Stipulation does not establish that any or all of its violations continued for 340 days, Respondent fails to take issue with any single violation identified in Complainant's brief as lasting 340 days. Thus, other than a broad conclusory statement, Respondent fails to identify how Complainant's analysis of violations relative to Section 42(h)(1) is flawed. As indicated, the calculations were a useful exercise as a measure and gravity of the violations. That is, the large numbers reflect the fact that the asbestos-containing debris laid exposed for a long time. In fact, the Board can take official notice that the debris in laying exposed from May 11, 2000, to April 19, 2001, was exposed during all four seasons of the year, spring, summer, fall and winter, with all the wind, rain, dust, and snow which occurs during the four seasons in Illinois. Thus, as the numbers indicate, the violations were serious and they lasted a long time.

42(h)(2) Due diligence.

Complainant notes that, as expected, Respondent raises as an argument its checking with the Village to determine if permits were necessary. As indicated in Complainant's closing brief,

such an argument should be summarily dismissed. Complainant stands on its 42(h)(2) argument presented in its closing brief.

42(h)(3) and 42(h)(4) Any economic benefit accrued by the violator because of delay in compliance with requirements.

Respondent argues that reimbursement by the Village of the cleanup expenses is not an economic benefit because of delay. There is no question that reimbursement by the Village was an economic benefit to the Respondent. Further, it appears that the amount expended and reimbursed by the City was an amount necessary to bring Respondent into compliance. Because of the conditions of the site prior to the commencement of demolition activities by Defendant, (see testimony of Mr. Palmer, Trans. pp. 61-63) and the condition of the site when first inspected by Mr. Hancock (Stip. Exhs. A & B), it is impossible to accurately determine if compliance cost would have been more or less than the \$59,965.67 expended. Consequently, it is impossible to define economic benefit in the classic sense; that is, money saved or avoided because the expenditure was delayed. What is clear is that, because of the delay in returning to compliance, capital cost necessary to dispose of all of the asbestos and asbestos-contaminated waste was \$59,965.67. Because of the reimbursement by the Village, Respondent's actual costs were minimized, and do not reflect the serious nature of the violation, which it does not dispute.

42(h)(4) The amount of monetary penalty which will serve to deter further violations by the Respondent and to otherwise aid in enhancing voluntary compliance with this Act by the Respondent and other persons similarly subject to this Act.

Should the Board determine that the reimbursement by the Village of the cost of coming into compliance does not constitute windfall economic benefit accrued by the violator resulting from lack of diligence in compliance, Complainant would urge the Board to consider the reimbursement in light of Section 42(h)(4). Section 42(h)(4) authorizes the Board to consider the amount of penalty which will serve to deter future violations by the violators and others similarly situated. It is elementary that for a penalty to operate as a deterrence, it must impose an economic penalty for

violation of the Act. A person cannot make money as a result of noncompliance. In this case, the cost of non-compliance was \$59,965.67. That is the amount to achieve compliance (Stip. para. 20, Exh. M). Respondent was reimbursed either \$56,000.00 (Stip. para. 30), or \$59,965.77 (Exh. M). Any penalty of less than \$56,000.00 and Respondent walks away making money on his noncompliance. Thus, if the penalty is to operate as a deterrence, it must be more than \$56,000.00 or \$59,965.67.

Respondent cites *IEPA v. Berry*, PCB 88-71. It should be noted that in that case, the Board calculated the maximum penalty as \$65,000.00. The Board imposed a penalty of \$10,000.00, or approximately 15% of the maximum exposure. In the instant case, 15% of the maximum exposure is approximately \$4,627,500.00. It should be noted that subsequent to the *Berry* case, the General Assembly increased the maximum penalty from \$10,000.00 to \$50,000.00 (a five-fold increase), and the continuing penalty from \$1,000.00 per day to \$10,000.00 (a ten-fold increase). Thus, if the *Berry* penalty was adjusted proportionately to the increase in potential penalty made by the General Assembly, *Berry's* penalty would have been at least in excess of \$50,000.00.

Respondent also cites *People v. Abbott Asbestos*, PCB 99-189, in which the Board imposed a penalty of \$30,000.00. A review of that case indicates that the Board found violations of Section 9(a) and 35 Ill. Adm. Code 201.141 (Counts I and II); Section 9.1(d)(1) and 40 CFR 145(c)(1), (c)(3) and (c)(6)(i) (Counts III and IV); and Section 9.1(d)(1) and 40 CFR 61.150(a)(1)(u). The Board further found the violations spanned approximately a year in time as violations were observed at one facility in March of 1998 and another facility in 1999. In the instant case, the Board has found that Respondent violated Section 9(a) of the Act and 35 Ill. Adm. Code 201.141 (Count I); 40 CFR 61.145(a) and (b)(1) (Count II); Section 21(a), (e), (p)(1) and (p)(2) of the Act (Count III); and Section 12(d) of the Act (Count IV). The evidence establishes Respondent also violated 40 C.F.R. 61.145(e)(1), 61.145(c)(6) and 61.145(c)(8) as alleged in Count II. Further, the

record establishes that the violations continued for approximately a year. Thus, the *Abbott* case and the instant case are very similar. While the *Abbott* case involves violations at two facilities, the instant case involves more violations; nine violations found by the Board in response to the Motion for Summary Judgment, plus an additional three violations supported by the hearing record. Further, the *Abbott* case involves primarily air violations, whereas the instant case not only has air violations, it also includes open dumping and a clear threat of water pollution. Further, there is no indication in the *Abbott* case that the Respondent was reimbursed for any extra cost arising as a result of its noncompliance. In short, the *Abbott* case supports this Complainant's request for a \$16,000.00 penalty (quite reasonable), plus the \$56,000.00 Respondent was reimbursed.

SUMMARY


For the foregoing reasons, Complainant respectfully requests that the Board impose a penalty of \$72,000 as requested in Complainant's closing brief.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

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

BY:


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Dated: 4/9/04

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