

ILLINOIS POLLUTION CONTROL BOARD
September 3, 1998

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 94-288
) (Enforcement - Air)
GRAYSLAKE GELATIN COMPANY, an)
Illinois corporation; BLIDCO, INC., an)
Illinois corporation; DIVERSIFIED)
ABATEMENT CONTRACTORS, INC., an)
Illinois corporation, and JOHN NORDIGIAN,))
individually and as president of)
DIVERSIFIED ABATEMENT)
CONTRACTORS, INC.,)
)
Respondents.)

INTERIM OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

Complainant, the People of the State of Illinois (People), has moved for summary judgment (motion) on its two-count complaint against respondents Diversified Abatement Contractors, Inc. (Diversified) and John Nordigian (Nordigian). The complaint alleges that respondents violated the Illinois Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996), when they removed regulated asbestos-containing materials (RACM) at a site at 40 Railroad Avenue, Grayslake, Illinois (the site).

In count I, the People allege that respondents violated Section 9.1(d) of the Act when they failed to comply with a regulation governing the removal of RACM. The regulation at issue, 40 C.F.R. 61.145(c), requires asbestos removal contractors to adequately wet all RACM when stripping RACM from facility components. In count II, the People allege that respondents also violated Section 9.1(d) of the Act by failing to comply with a regulation governing the discharge of visible emissions and disposal of asbestos-containing waste material, 40 C.F.R. 61.150(a) and (b).

In the motion, the People assert that there is no genuine issue of material fact regarding these counts and that it is entitled to judgment as a matter of law. The People also request that the Board grant the People the relief it requested in the amended complaint¹ (Comp.). In the amended complaint, the People request, on each count, that the Board (1) order the respondents to cease and desist from any further violations, (2) assess a civil penalty against

¹ The Board construes the People's references to the "Complaint" as references to the amended complaint filed on April 29, 1998.

respondents of \$50,000 for each violation, with an additional penalty of \$10,000 per day for each day of violation, (3) order respondents to pay the People's costs and attorney's fees in this matter; and (4) grant such other relief as the Board deems appropriate and just. Comp. at 12-13, 16-17.

The Board grants the motion against Diversified as described below. The Board denies the motion against Nordigian because the People have not established that he is liable for Diversified's violations.

The Board reserves ruling on the People's requested relief. Within 14 days of the date of this order, the People may request a hearing on the relief requested. If the People request a hearing, a hearing will be held. If the People do not request a hearing, the Board will rule on the People's requested relief after the parties have briefed those issues under the briefing schedule set forth in this order.

FINDINGS OF FACT

The Board finds the following facts based on the Request for Admission of Facts (Request for Admission) that the People served on Diversified on May 10, 1995. See Exhibit A to Motion. Diversified never responded to the Request for Admission and therefore is deemed to have admitted all of the statements in the Request for Admission. See 35 Ill. Adm. Code 103.162(c).

The Board notes, however, that the People did not serve the Request for Admission on Nordigian. Therefore, the Board cannot find that Nordigian admitted the statements in the Request for Admission.

Diversified is an asbestos abatement contractor based in Waukegan, Illinois. Request for Admission at 3-4. In June 1992, Grayslake Gelatin Company (Grayslake Gelatin) retained Diversified to remove asbestos thermal insulation from an evaporator and from a railroad tank car on a concrete floor at the site. Request for Admission at 4. Grayslake Gelatin also retained Diversified to remove asbestos thermal insulation from a tank on the ground outside the Grayslake Gelatin building at the site. *Id.* At that time, there was approximately 225 square feet of friable asbestos material on the tank, 84.375 square feet of friable asbestos material on one component of the evaporator, and 842 square feet of friable asbestos material in and on the railroad tank car. *Id.* On June 11, 1992, Diversified filed a notification of demolition and renovation with the Illinois Environmental Protection Agency (Agency). *Id.*

Diversified left the Grayslake Gelatin facility in July 1992. When performing the asbestos abatement work, Diversified:

1. failed to adequately wet all of the RACM when it stripped RACM from the tank, evaporator, and railroad tank car;

2. did not obtain prior written approval from the Administrator of the U.S. Environmental Protection Agency (USEPA) and the Agency to strip the RACM off of facility components without wetting;
3. discharged visible emissions to the outside air during the abatement of the tank, evaporator, and railroad tank car;
4. did not wet all of the asbestos-containing waste material that it collected from the tank, evaporator, and railroad tank car;
5. did not process all of the asbestos-containing waste material into nonfriable form;
6. did not use an alternative emission control and waste treatment method that received the prior approval of the Administrator of the USEPA or the Agency; and
7. failed to deposit all of the asbestos-containing waste material emitted during the abatement of the tank, evaporator, and railroad tank car at a waste disposal site. Request for Admission at 4-5.

DISCUSSION

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

Violations

As noted above, both of the counts in the complaint allege that respondents Nordigian and Diversified have violated Section 9.1(d) of the Act. That Section provides in pertinent part as follows:

No person shall:

1. Violate any provisions of Sections 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) (1996).

In count I, the People allege that respondents have violated Section 9.1(d) of the Act by violating a Clean Air Act regulation on asbestos, 40 C.F.R. 61.145(c), adopted pursuant to

Section 112 of the Clean Air Act, 42 U.S.C. Section 7412. The regulation applies if the combined amount of RACM to be stripped at a facility being renovated is at least 260 linear feet on pipes or at least 160 square feet on other facility components. See 40 C.F.R. 61.145(a)(4). The regulation requires operators of renovation activities to adequately wet all RACM when stripping it from facility components. The regulation relieves the operator of the renovation activity of the wetting requirement if the removal contractor obtains the USEPA Administrator's prior written approval not to wet RACM. See 40 C.F.R. 61.145(c)(3).

In count II, the People allege that respondents violated Section 9.1(d) of the Act by violating another Clean Air Act regulation on asbestos, 40 C.F.R. 61.150(a) and (b). Among the provisions of this regulation that respondents allegedly have violated are:

1. a requirement to discharge no visible emissions to the outside air during the collection, processing, packaging, or transporting of any asbestos-containing waste material, or to use one of the emission control and waste treatment methods specified in the regulation, including:
 - a. adequately wetting asbestos containing waste material;
 - b. processing asbestos-containing waste material into nonfriable forms;
or
 - c. using an alternative emission control and waste treatment method that has received prior approval by the USEPA Administrator (see 40 C.F.R. 61.150(a)); and
2. a requirement to dispose of all asbestos-containing waste material as soon as is practical at an appropriate disposal site described in the regulation (see 40 C.F.R. 61.150(b)).

The Board first considers the People's motion against Diversified. Whether Diversified violated 40 C.F.R. 61.145(c) depends first on whether the asbestos-containing material that Diversified removed from the tank, evaporator, and railroad tank car was RACM. RACM includes "friable asbestos material," and under the Request for Admission, Diversified admitted that there was friable asbestos material on the tank, evaporator, and railroad tank car. Request for Admission at 4.

As noted above, Section 61.145(c) applies only if the combined amount of RACM to be stripped at a facility being renovated is at least 260 linear feet on pipes or at least 160 square feet on other facility components. See 40 C.F.R. 61.145(a)(4). The combined amount of RACM to be stripped at the site in June and July 1992 exceeded this amount (see Request for Admission at 4), and therefore Section 61.145(c) applied to the renovation.

The Board also finds that Diversified is an "operator of a . . . renovation activity" as that term is defined in the applicable regulations. See 40 C.F.R. 61.141. "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.” *Id.* An operator of a renovation activity includes “any person who owns, leases, operates, controls, or supervises the . . . renovation operation” *Id.* Diversified performed renovations at the site by removing RACM from the tank, evaporator, and railroad tank car, which are facility components. *Id.* Therefore, Diversified was an operator of a renovation activity.

The Board further finds that Diversified violated 40 C.F.R. 61.145(c) when it failed to adequately wet the RACM that it stripped from the tank, evaporator, and railroad car tank. Request for Admission at 4-5. Diversified did not obtain the USEPA Administrator’s prior written approval not to wet this RACM, and therefore remained subject to that requirement. Request for Admission at 5. The Board therefore grants the People summary judgment against Diversified for violating 40 C.F.R. 61.145(c) and therefore Section 9.1(d) of the Act.¹

In addition, the Board finds that Diversified violated 40 C.F.R. 61.150(a) and (b).² Section 61.150(a) required Diversified not to discharge any visible emissions to the outside air during the handling of asbestos-containing waste material, or to use one of the specified emission control and waste treatment methods. The Board finds that Diversified violated Section 61.150(a) by not complying with either option. Diversified discharged visible emissions into the outside air during the handling of asbestos-containing waste material generated by the abatement of the tank, evaporator, and railroad tank car (Request for Admission at 5). It also failed to (1) wet all of the asbestos-containing waste material that it collected from the tank, evaporator, and railroad tank car (*Id.*); (2) process all of the asbestos-containing waste material into nonfriable form, or (3) use an alternative emission control and waste treatment method with the prior approval of the USEPA Administrator (*Id.*). The Board therefore grants the People’s motion against Diversified for violating 40 C.F.R. 61.150(a) and thus Section 9.1(d) of the Act.

Section 61.150(b) requires all asbestos-containing waste material to be properly disposed of “as soon as is practical by the waste generator.” 40 C.F.R. 61.150(b). For reasons set forth above, Diversified is a “waste generator,” which is defined as any “operator of a source covered by [40 C.F.R. Part 61] whose act or process produces asbestos-containing waste material.” 40 C.F.R. 61.141. The Board finds that Diversified violated Section 61.150(b) when it failed to deposit at a waste disposal site all of the asbestos-containing waste material emitted during the abatement of the tank, evaporator, and railroad tank car. Request

¹ The Board notes that the People’s first amended complaint and motion allege that respondents violated 40 C.F.R. 61.145(c) by failing to properly contain the RACM after wetting. Comp. at 12; Mot. at 3. The Request for Admission does not state that Diversified failed to properly contain RACM after wetting; therefore, the Board cannot find that Diversified committed this violation.

² These provisions apply to each “operator of any source covered under the provisions of . . . 61.145” 40 C.F.R. 61.150. As discussed, Section 61.145(c) applies to renovation activities and Diversified was an operator of a renovation activity.

for Admission at 5. The Board therefore grants the People summary judgment against Diversified for violating 40 C.F.R. 61.150(b) and therefore Section 9.1(d).

The Board cannot grant the People summary judgment on its claims against Nordigian, however. As noted earlier, Nordigian was not served with the Request for Admission, and thus cannot be deemed to have admitted the statements in the Request for Admission. Furthermore, while the People state in the motion that Nordigian can be held liable for Diversified's violations because he is the "corporate officer who ran the day to day business of Diversified" (Mot. at 3), the People have submitted no affidavit or other proof supporting this factual claim. Therefore, even if Nordigian could be held liable for Diversified's violations if he did run its day to day operations (a legal question that the Board does not now reach), the absence of proof on this issue precludes summary judgment.

Requested Relief

Penalties

In the complaint, the People request that the Board assess a civil penalty against respondents of \$50,000 for each violation, with an additional penalty of \$10,000 per day for each day of violation. The People also request a cease and desist order. In assessing a civil penalty or a cease and desist order, the Board must consider the facts and circumstances set forth in Section 33(c) of the Act. See 415 ILCS 5/33(c) (1996). In addition, Section 42(h) of the Act authorizes the Board to consider various other factors in determining the appropriate civil penalty. See 415 ILCS 5/42(h) (1996).

While the People ask for a civil penalty of \$10,000 for each day that a particular violation continued, the People provide no information on the number of days each of these respective violations continued. Accordingly, the Board will reserve ruling on the request for penalties and a cease and desist order. The People may address these issues, as well as any relevant Section 33(c) or 42(h) factors, at hearing or in pleadings, as outlined below.

Costs and Attorney's Fees

In the complaint, the People request that the Board order respondents to pay the People's costs and attorney's fees in this matter pursuant to Section 42(f) of the Act. Section 42(f) provides in pertinent part as follows:

[T]he Board . . . may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act. 415 ILCS 5/42(f) (1996).

The People have not directly addressed whether Diversified's violations were willful, knowing, or repeated. The People also have not presented information on the People's costs

and attorney's fees. The Board therefore will reserve ruling on the People's request for costs and attorney's fees; the People may address these issues through hearing or pleadings, as outlined below.

CONCLUSION

The Board grants the People's motion for summary judgment against Diversified as set forth on pages 5-6. The Board denies the People's motion for summary judgment against Nordigian.

The Board reserves ruling on the People's request for relief against Diversified. Within 14 days of the date of this order, the People may request a hearing on penalties, a cease and desist order, costs, and attorney's fees. If the People make the request, a hearing will be held. If the People do not request a hearing within 14 days, the Board will rule on the requested relief the following briefing schedule: the People may file a brief on penalties, a cease and desist order, costs, and attorney's fees within 30 days of the date of this order; Diversified may file a response brief within 20 days of the People's filing of its brief. In these pleadings, any facts asserted that are not of record must be supported by affidavit or other appropriate proof.

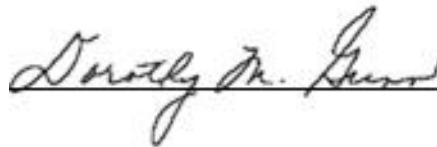
ORDER

1. The Board grants the People's motion for summary judgment against Diversified on the following matters:
 - a. The Board finds that Diversified violated 40 CFR 61.145(c) and therefore violated Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (1996); and
 - b. The Board finds that Diversified violated 40 CFR 61.150(a) and (b) and therefore violated Section 9.1(d) of the Act, 415 ILCS 5/9.1(d) (1996).
2. The Board denies the People's motion for summary judgment against Nordigian.
3. The Board reserves ruling on the People's motion for summary judgment against Diversified for penalties, a cease and desist order, costs, and attorney's fees.
 - a. Within 14 days of the date of this order, the People may file with the Board a request for a hearing on penalties, a cease and desist order, costs, and attorney's fees. If the request is made, a hearing will be held.
 - b. If the People do not request the hearing described in paragraph 3(a) within 14 days of the date of this order, the Board will rule on the People's request for relief after the following briefing schedule:

- i. Within 30 days of the date of this order, the People may file a brief on penalties, a cease and desist order, costs, and attorney's fees to be imposed on Diversified;
 - ii. Within 20 days of the People's filing under paragraph 3(b)(i), Diversified may file a response brief.
- c. Any facts asserted that are not of record must be supported by affidavit or other appropriate proof.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above interim opinion and order was adopted on the 3rd day of September 1998 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board