BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

3 KINGS ENVIRONMENTAL, INC. Appellant, v. SOUTHWEST CLEAN AIR AGENCY, Respondent.	PCHB NO. 05-014 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

3 Kings Environmental, Inc. (3 Kings) challenged a penalty of $350 issued by the Southwest Clean Air Agency (SWCAA) for alleged violations of agency regulations requiring notification prior to commencing demolition or renovation activity.

The hearing in the matter was conducted on June 21, 2005, in Lacey, Washington. Ronald King represented 3 Kings, and Robert Elliott, Executive Director of SWCAA represented the agency. Board member William H. Lynch heard the case[1] and Administrative Appeals Judge, Phyllis K. Macleod presided for the Board. Randi R. Hamilton of Gene Barker and Associates, Olympia, Washington, recorded the proceedings.

Witnesses were sworn and heard, exhibits were introduced, and the parties presented arguments to the Board. Based upon the evidence presented, the Board makes the following:

[1] Board member Lynch heard the case under the authority of RCW 43.21B.305, which allows a single Board member to hear a case involving penalties under specified amounts. At the time of the hearing, the statute allowed a single Board member to hear a case involving a penalty under $5,000. Recent legislation has increased that amount to $15,000.

FINDINGS OF FACT

1.

3 Kings Environmental, Inc. contracted with the owner, Ted Ratterman, apparently on behalf of the Rita Ratterman et al. Trust, to demolish two 12-foot by 60- foot mobile homes located at the Hidden Village Mobile Home Park. The demolition bid excluded a number of items from the work to be performed by 3 Kings, including the "Demolition permit." (Ex. R-12, King testimony).

2.

3 Kings performed the majority of the demolition work on the two mobile homes on or before October 27, 2004. SWCAA first became aware of the demolition activity when a Clark County Solid Waste employee contacted the agency on October 27, 2004, indicating a demolition project was underway at the mobile home park. Later that day, SWCAA Inspector David Joiner proceeded to the site to investigate the situation. He observed demolition work on two mobile homes that was almost complete. His review of agency records indicated SWCAA had not received a Notice of Demolition prior to the demolition work on this project. (Joiner testimony, Ex. R-2).

3.

3 Kings believed the owner was responsible for all permitting and notification necessary for the project based on the language excluding the "demolition permit" from the contract. In fact, no notification was given to the agency prior to beginning the demolition. Once this omission was brought to 3 Kings attention, the company immediately filed a Notification of

Demolition and Renovation, which was received by the Air Agency on October 27, 2004, after the inspector's site visit. (Ex. R-13).

4.

The owner, Mr. Ratterman, had obtained an asbestos survey prior to the demolition work, which indicated the mobile homes contained no asbestos. The survey may have been filed with the agency on or around October 25, 2004. (Ex. R-11). The specific statements and understandings of Mr. Ted Ratterman were not admitted into evidence because Mr. Ratterman died prior to the hearing.

5.

Based upon Mr. Joyner's investigation, SWCAA issued a Field Notice of Violation (Ex. R-1) and a Civil Penalty of $350 (Ex. R-9) based upon 3 Kings' demolition of a structure without submitting a Demolition Notification as required by SWCAA Regulation 476. 3 Kings timely appealed the penalty to the Pollution Control Hearing Board in this case, PCHB No. 05-014.

6.

Any Conclusion of Law properly deemed a Finding of Fact is hereby adopted as such.

Based upon the foregoing Findings of Fact the Board enters the following

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the persons and the subject matter of this case under RCW 43.21B.110 and RCW 70.94. The case is heard *de novo* and the regulating agency has the

burden of proof to show by a preponderance of the evidence that the penalized party, 3 Kings, committed a violation, and that the assessed penalty is reasonable.

2.

SWCAA Regulation 476 governs all demolition and renovation activities. It has broad applicability and extends to projects containing no asbestos:

> This regulation shall apply to all demolition and renovation activities, removal of asbestos containing material, storage, transport, and disposal of asbestos containing materials and other specific activities as referenced in 40 CFR 61.140 et seq. (Subpart M).

SWCAA 476-020.

3.

The notification requirements for demolition and renovation activities are contained in SWCAA 476-050, which provides in relevant part:

> (1) Applicability. No person shall cause or allow work on an asbestos project, maintenance, renovation, or demolition activity involving asbestos containing material unless the owner or operator has submitted a complete notification to the Agency on Agency approved forms, in accordance with the advance notification period requirements and fees as provided in SWCAA 476-050(2).
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> (b) Regardless of the amount of asbestos-containing material present ***(including none)***, a Notification of Demolition activity must be submitted to the Agency on Agency approved forms prior to commencing a demolition accordance with SWCAA 476-050(2). In no event shall a project or activity proceed on a date other than the date indicated on the notification.

(emphasis added). The notification period for a demolition without asbestos is ten working days prior to the start of work. SWCAA 476-050(2).

4.

The provisions of SWCAA 476-050 are applicable to this case. The situation involved demolition without asbestos, so notification ten days prior to the work was necessary under SWCAA 476-050(2).[2] The notification was not given by the owner or by 3 Kings as the company performing the demolition work. 3 Kings argued it should not be held liable in this case because the owner was responsible for obtaining the demolition permit. A contract can allocate responsibility between the owner and the operator for obtaining demolition permits and/or notifications on a demolition project, but a contract between the parties cannot excuse the regulatory requirement to give advance notice prior to commencing demolition activity. The demolition regulations are designed to protect the public from air contaminants and that purpose cannot be modified by contract. To avoid a violation, 3 Kings should have verified that the owner had, in fact, complied with all demolition permit and/or notification requirements, prior to beginning its work on the project. The company did not verify compliance and proceeded to engage in demolition of the mobile homes before proper notification. SWCAA has, therefore, established that 3 Kings violated the provisions of SWCAA 476.

[2] A waiver of the ten-day notification requirement is available in certain limited emergency circumstances under SWCAA 476-050(5). In this case, however, no evidence was presented that the owner or operator applied for or qualified for an emergency waiver.

5.

3 Kings argued at the hearing that it should not be held liable for a violation because it is unclear whether mobile homes are subject to the demolition notification provisions of SWCAA 476. The company contends mobile homes could, or should, be treated as trailers and not as buildings or structures. SWCAA 476-030(15) defines demolition as "the wrecking, dismantling, removal of any load-supporting structural member on, or burning of, any building, vessel, structure, or portion thereof." This definition of demolition is broad and properly encompasses a mobile home sited for residential occupancy in a mobile home park. Rolling stock such as motor homes or travel trailers are distinguishable from permanently sited mobile homes. The appellant has cited no authority for its contention that mobile homes should not be considered a structure under this regulation and has not established a defense to the cited violation.

6.

The Board considers three factors when it evaluates the reasonableness of a penalty. These are: (1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken by the penalized party. *Kaiser v. Ecology*, PCHB No. 99-121 & 135 (2000). The penalty in this case was assessed at $350. While the violation in this case fortunately did not directly threaten public health, failure to give notification of a demolition project is a serious violation. The notification requirements are designed to allow air agencies to assure that owners and operators do not inadvertently expose the public to asbestos or other harmful contaminants in connection with demolition activity. The violator in this case is in the industry and is charged with knowledge of the regulatory requirements for demolition and asbestos work. The penalty

assessed was not based on multiple days of violation, although it is quite possible demolition work occurred on more than one day. The company was cooperative in filing the necessary paperwork after the SWCAA inspector identified the violation, but no specific factors supporting mitigation of the penalty amount have been established. Given the totality of the circumstances the penalty of $350 is reasonable and is sustained.

7.

Any Finding of Fact deemed to be properly considered a Conclusion of Law is hereby adopted as such.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

ORDER

The SWCAA penalty 3662, in the amount of $350, assessed against 3 Kings Environmental Inc., is hereby AFFIRMED.

Dated this 12th day of August 2005.

POLLUTION CONTROL HEARINGS BOARD

WILLIAM H. LYNCH

Phyllis K. Macleod
Administrative Appeals Judge