UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Madeira City Schools,	)	Docket No. TSCA-V-C-302
	)	
Respondent	)	

1. Toxic Substances Control Act - Asbestos in Schools Rule - A school comprised of five single story buildings interconnected by covered walkways must be listed as having five associated buildings rather than as one building for purposes of records under section 763.114 (a).

2. Toxic Substances Control Act - Asbestos in Schools Rule - the written notice to school employees required by section 763.111(b) requires individual written notice to each employee and is not satisfied by wide posting in the school of EPA Form 7730-3 "Notice to School Employees."

3. Toxic Substances Control Act - Asbestos in Schools Rule - the notice to the PTA required by section 763.111(d) must be given promptly by the local education agency upon discovering the presence of asbestos material in the schools and cannot be deferred until the asbestos has been removed or encapsulated.

4. Toxic Substances Control Act - Asbestos in Schools Rule - penalty of $1200 assessed for violation of the notification and recordkeeping requirements.

Appearance for Complainant:

James M. Thunder, Esquire,
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V, 230 South Dearborn Street
Chicago, IL 60604

Appearance for Respondent:

J. Michael Fischer, Esquire
Ennis, Roberts & Fischer Co.
1000 Mercantile Library Building
Cincinnati, OH 45202

Decision on Motion for Accelerated Decision

This is a proceeding under the Toxic Substances Control Act ("TSCA"), section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violation of a rule promulgated under section 6 of the Act, 15 U.S.C. 2605. The rule establishes requirements for the identification and notification of friable asbestos-containing materials in schools ("Asbestos in Schools Rule"), 40 C.F.R. sections 763.100-763.119. 1/ The complaint issued by the EPA charges that Respondent, Madeira City Schools of Madeira, Ohio, violated certain recordkeeping and notification requirements of the rule. A penalty of $4,900 was requested. Respondent answered denying the violations charged, and its liability for a penalty.

The matter is now before me on Complainant's motion for an accelerated decision under the Rules of Practice, 40 C.F.R. section 22.20. Respondent in its response to the motion agrees that there is no dispute about the material facts, and contends that on the undisputed facts judgement should be rendered in its favor.

Complainant's motion and Respondent's response and the relevant papers of record demonstrate that there are no genuine issues of material fact in

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1/ TSCA, section 16(a) provides in pertinent part as follows: "(1) Any person who violates a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for the purposes of this subsection, constitute a separate violation of section 15."

TSCA, section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under section . . . 6."

this case. 2/ For the reasons stated below a penalty of $1200 is assessed against Respondent.

Findings of Facts

1. Respondent Madeira City Schools, Madeira, Ohio, is a local education agency as defined in 40 C.F.R. 763.103(e), and is subject to the requirements of the Asbestos in Schools Rule. 3/

2. Respondent operates three schools: an elementary school (DuMont Elementary School); a middle school (Sellman Middle School); and a high school (Madeira High School). Affidavit of William G. Williamson submitted with Respondent's response to Complainant's motion (hereafter "Williamson affidavit").

3. In 1982, the Hamilton County Board of Health inspected Respondent's schools for asbestos. This was done pursuant to a recommendation by the Ohio Department of Education that the inspection required by the EPA's regulations could be conducted by a county board of health. No areas were found where asbestos problems might be present. Williamson affidavit, pars. 2, 3, and Exh. A.

4. In 1984, on being advised that the inspection by the Hamilton County Board of Health may not be acceptable to the EPA, Respondent had the schools reinspected by PEDCo Environmental, Inc., an engineering firm specializing in asbestos related matters. Williamson affidavit, par. 4.

2/ Complainant has also filed a reply to Respondent's response. While the rules do not specifically provide for replies by the moving party, Complainant's reply will be considered because it discusses an issue raised in Respondent's response, the applicability of the exemption in 763.117(c)(2)(i), and also because it narrows the issues with respect to the high school.

3/ Respondent has never denied that it is subject to the Asbestos in Schools Rule.

5. The inspection by PEDCo as reported on July 5, 1984, disclosed that friable asbestos was present in the DuMont Elementary School and Sellman Middle School. No friable asbestos was found in the Madeira High School. Wiliamson affidavit, par. 5 and Exh. E.

6. On August 29, 1984, Maurice Horwitz of the United States Environmental Protection Agency inspected Respondent to determine its compliance with Asbestos in Schools Rule. Affidavit of Maurice Horwitz submitted with Complainant's motion for accelerated decision (hereafter "Horwitz affidavit"). In his report of the inspection, the inspector confirmed that there were no friable materials present at the high school, and that the asbestos present at the Sellman School was either encapsulated or removed. Friable areas, however, were still found at the DuMont School. Report of EPA's inspection on August 29, 1984, submitted as part of Complainant's prehearing exchange (hereafter "EPA Inspection Report").

7. The Madeira High School consists of five one story buildings connected to each other by covered cross-walks. Inspection Report at 2.

8. A file containing asbestos related documents and materials was maintained at the principal's office at the Madeira High School. Among the papers in this file were the following:

    a. Reports of the inspections made by the Hamilton County Board of Health in 1982, and by PEDCo dated July 5, 1984. Neither of these reports made reference to the Madeira High School.

    b. Two completed EPA Forms 7730-1, "Inspections for Friable Asbestos-Containing Materials", one form dated October 11,

1982, filed after the Hamilton County Board of Health inspection, and one dated July 26, 1984, filed after the PEDCo inspection. Williamson affidavit, par. 11 and Exh. I.

9. The EPA Form 7730-1 showed that three schools had been inspected for friable materials, and the July 26, 1984 form, showed that friable materials was present in two schools. The schools were not identified by name. Horwitz affidavit; Williamson affidavit, Exh. I.

10. After being notified by PEDCo that friable asbestos-containing material was found at the DuMont Elementary School and Sellman Middle School, Respondent posted EPA Form 7730-3, "Notice to School Employees," in every area of the schools where friable asbestos material was located as well as in other conspicuous places in the buildings such as the teacher's lounge and the employee's lounge. Respondent also orally notified the employees of the DuMont School of the presence of asbestos and furnished each individual with a copy of EPA Form 7730-2, "A Guide for Reducing Asbestos Exposure." Williamson affidavit, par. 8 and Exhs. F and G thereto; Horwitz affidavit, par. 11.

11. Respondent acted immediately to carry out PEDCo's recommendations for the removal or encapsulation of friable asbestos material found in the DuMont Elementary and Sellman Middle Schools. By the time of the EPA inspection on August 29, 1984, all asbestos-containing material at the Sellman School had either been encapsulated or removed. The work at the DuMont School was "substantially" completed at the time of inspection and was fully completed on August 30, 1984, or shortly thereafter. Williamson affidavit, par. 9, and Exh. K thereto; EPA Inspection Report.

12. On August 30, 1984, Respondent sent a letter to PTA leaders inviting them to an inspection tour of Respondent's schools to show them how Respondent had contained and removed all friable asbestos. This inspection tour was conducted on September 6, 1984, and an additional tour was conducted later in September for those PTA leaders and members who could not make the first one. Williamson affidavit, par. 10 and Exh. H thereto.

Discussion, Conclusions and Penalty

The EPA has proposed a penalty of $1300 for Respondent's failure to have the required records at Madeira High School and a penalty of $3600 for Respondent's failure to comply with the warning and notification requirements at the DuMont Elementary School. These penalties, it claims, are in accord with the EPA's guidelines for assessment of civil penalties under TSCA, section 16, 45 Fed. Reg. 59779 (September 10, 1980), and the EPA's revised enforcement response policy for the Asbestos in Schools Rule, dated June 22, 1984.

An argument made by Respondent which should be considered at the outset is its claim that it is exempt from the requirements of the rule by reason of the fact that its program for removing and encapsulating asbestos material was "substantially" completed on August 29, 1984, the date of the inspection, and was fully completed either the next day or in any event before September 6, 1984. 4/ The pertinent exemption is 40 C.F.R. 763.117 (c)(2)(i), which provides as follows:

4/ Respondent's response to Complainant's motion for an accelerated decision at 10-11. The Williamson affidavit is somewhat ambiguous on the actual date of the completion of the abatement program, but it seems clear from the affidavit that the work had been completed at the time of the PTA inspection on September 6, 1984. See Williamson affidavit, pars. 9 and 10.

> (2) No provision of this subpart applies to any school if:
> (i) The local education agency has conducted abatement programs that result in the elimination of all friable asbestos materials from the school either by removal or encapsulation of the materials.

Complainant, reading the exemption in conjunction with 40 C.F.R. 763.115(a), requiring compliance with the rule by June 27, 1983, contends that the exemption applies only to schools in which all the asbestos had been removed or encapsulated by that date. 5/ It is not entirely clear either from the wording of the exemption or from the legislative history that the exemption should be so construed that a school abating its asbestos material subsequent to June 27, 1983, would not thereafter be exempt from the rule. 6/ It is not necessary to consider the question further, however, since it seems clear from its wording that the exemption does not apply to either the DuMont School or the Madeira High School, the only two schools for which violations are charged. With respect to the DuMont School, Respondent says that the abatement program was "substantially completed" on that date. The exemption is for schools which

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5/ Complainant's reply to Respondent's response at 4-5.

6/ See preamble to the final rule, 47 Fed. Reg. 23367, where the Agency stated as follows:

> The Agency has also determined that in a school where previously discovered friable asbestos-containing material has been removed or satisfactorily encapsulated so that it is no longer friable, the provisions of the rule should not apply. By undertaking these corrective actions, school officials not only will have substantially complied with the identification requirements, they will also have removed the types of materials which are the focus of the recordkeeping and notification parts of this rule.

This language would not seem to place a time limit on when the school could take advantage of the exemption, so far as further compliance is required.

have eliminated all friable asbestos material. Since there was still friable asbestos material at the school that had not been encapsulated or removed, the exemption did not apply to the DuMont School, as of the date of the inspection. The Madeira High School is not covered by the exemption because it is not a school in which an abatement program for the encapsulation or removal of asbestos has been undertaken. Schools which contain friable materials apparently are not exempted at least under this particular provision simply because no asbestos materials have been found.

The Madeira High School Recordkeeping Violation

Complainant raises only the issue of whether the records for this school were deficient in that they did not list all school buildings associated with the school and indicate that each had been inspected for friable materials as required by 763.114(a)(2). It concedes, that the violation of section 763.114(a)(1), charged is de minimis and that there has been no violation of section 763.114(a)(6). 7/

According to the record, the five buildings which comprise the high school are connected with covered walkways, and Respondent states that each building houses a particular function or segment of the educational program, e.g., administrative offices, gymnasium, laboratories. 8/ The EPA's construction of the rule as requiring that the school be listed as having

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7/ See Complainant's reply at 1. The reference to section 763.114(a)(3), is obviously in error since no violation of that provision was charged in the complaint, and it is assumed therefore that what was intended was section 763.114(a)(6).

8/ Respondent's response to Complainant's motion for an accelerated decision at 1, n. 1. Respondent's description is consistent with the description of the school in the EPA's inspection report as five one story buildings connected to each other with covered crosswalks.

five buildings even though constructed as Respondent contends is in accordance with the normal use and meaning of the word "building." Respondent's contention that a "building" can also mean several buildings connected together by walkways seems a more technical construction. It is a general rule of construction that words in a statute are to be given their ordinary meaning unless it is indicated either in the statute or its legislative history that the word is to be given a technical meaning. Burns v. Alcala, 580 U.S. 575, 580-81 (1975); Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1948). Here, I find no indication that the word building is to be used in other than its ordinary sense. In assessing the penalty, however, the significance of not listing the high school as five separate buildings must also be considered. Recordkeeping under the rule serves two purposes, it provides the EPA with a means of verifying compliance and it also provides notice and warning of the presence of friable asbestos-containing materials. 9/ Practices, accordingly, which result in records that are ambiguous or vague with respect to the inspection of and presence of asbestos materials in the schools should be proscribed. It does not seem likely, however, that the failure to mention that there are five buildings associated with the high school would leave a person looking at the records and knowing that they apply to the high school in doubt as to whether all buildings were covered by the records. Possibly, the importance of listing the high school as five buildings and the potential for harm if it is not, is better assessed if asbestos-containing materials had been found in the school. On this record, however, this particular violation does appear to be minor in extent.

9/ See preamble to proposed rule, 45 Fed. Reg. 61978 (September 17, 1980).

Complainant also contends that the records did not indicate whether any of the buildings of the high school had been inspected for friable material or whether there was or was not such material present in any of the buildings. 10/ This is not totally true for there are reports in the file of a sample having been taken and analyzed from the "H.S. Boiler Room," and of a sample having been taken and analyzed from the "High School South Gym," during the inspection by PEPCo in 1984. Both reports disclosed that although friable materials were present, no asbestos was observed. 11/ Also, since the records showed that three schools were inspected and friable asbestos materials found in only two, the DuMont Elementary School and the Sellman Middle School, one carefully reading the records would undoubtedly be able to glean from them that there was no friable asbestos material at the high school. Such records, however, cannot be considered as an adequate substitute for records that on their face expressly state that the high school has been inspected and whether or not any buildings in the high school have friable materials present, which is what the rule actually requires. The risk of harm arising from this deficiency in the records, nevertheless, is also minor. In view of what the record discloses about Respondent's conscientious efforts to comply with the rule, it is safe to assume that if friable asbestos material had been found in the high school, it would have been disclosed with the same detail of information that was provided with respect to the two schools where friable asbestos was found. 12/

10/ Complainant's motion for accelerated decision at 3.

11/ Williamson affidavit, Exh. I.

12/ See letter from PEDCo dated July 5, 1984, in Exh. I to the Williamson affidavit.

Accordingly, for the reasons stated, I find that recordkeeping violation charged with respect to the Madeira High School is minor in extent and not significant as claimed by Complainant, and that the appropriate penalty is $200.

The Notification Violations at the DuMont Elementary School

Respondent contends that compliance with the requirements that persons employed at the DuMont School be given written notice of the presence of asbestos-containing materials as required by 40 C.F.R. 763.111 (b), was accomplished by Respondent posting EPA Form 7730-3 in the areas where friable asbestos material was found and also in other conspicuous places in the building such as the teacher's lounge and the employee's lounge. 13/ Contrary to what Respondent argues, the rule requires individual written notices to each employee. This is in accord with the usual construction of a requirement for giving written notice. See N.L.R.B v. Vapor Recovery Systems Co., 311 F.2d 782, 785 (9th Cir. 1962). Moreover, it is clear from a study of the rule itself and of Form 7730-3, that the posted notice and the notice to individual employees were to serve two separate but complementary purposes. Form 7730-3 alerts those who read it to the presence of friable asbestos-containing material in the school and where they may obtain more complete information about it. The notice to each employee insures that he or she will be informed of the actual location in the school of the friable asbestos-containing material. While Respondent has listed on Form 7730-3 the location by room or building area

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13/ Respondent's response at 9.

where the asbestos material is present, this is not the actual information called for on the form. 14/

Nevertheless, although written notice was not given to the individual employees, Respondent did apparently orally notify them of the location of friable asbestos material and also furnished each non-teaching employee with a copy of EPA Form 7730-2 "A Guide for Reducing Asbestos Exposure." When these actions are combined with the wide posting of Form 7730-3, the probability of persons being unwittingly exposed to asbestos once Respondent learned of its presence seems very small.

With respect to notifying the PTA leaders as required by 40 C.F.R. 763.111(d), Respondent contends that it did more than what the law requires by conducting a personal tour of the building for all PTA leaders and members shortly after the EPA had made its inspection. The violation arises, however, from the fact that Respondent did not give prompt notice but waited until it had completed its abatement program for removing or encapsulating the asbestos material. Respondent's letter of August 30, 1984, to the PTA leaders suggests that Respondent did so because it was concerned in not making the PTA overly anxious and causing them to react excessively to the fact that asbestos materials had been found in the schools. 15/ The rule, however, must be construed as requiring prompt notice in the absence of some indication to the contrary. Any question about this is resolved by an examination of the legislative history.

14/ The rooms and building areas having asbestos-containing material were noted in the space on the form in which Respondent was to give the building and room where the record of the inspection, a diagram of the locations of the asbestos-containing materials and a copy of the EPA regulations were available. Williamson's affidavit, Exhs. F1 and F2.

15/ See Williamson affidavit, Exh. 4.

In responding to comments on the proposed rule in its analysis of comments, the EPA stated as follows:

> The Agency disagrees that the schools should not send notices to parents or parent-teacher associations until after abatement work is conducted. As noted previously, EPA does not believe that all schools with an asbestos problem will require abatement work and the Agency does not want to encourage local education agencies to undertake such activity unnecessarily. Furthermore, because abatement work will be more costly and require some preparations, EPA finds that schools will act more slowly to carry out remedial programs than they will to carry out detection programs. The Agency finds that employees and parents should be notified promptly, before schools begin remedial work. 16/

It is also to be noted that in the preamble to the final rule, the EPA recommended specific wording for the notice to parents to avoid any overreaction by them, which wording could also be used, it would seem, on notices to the PTA. 17/

Taking into account, however, the fact that Respondent immediately acted to remove or encapsulate the asbestos material after learning of its presence at the school, that this work was substantially completed by the time of the EPA's inspection, and completed very shortly thereafter so as to remove all risk of exposure, and also the evidence generally indicating that Respondent even though it did not meet all the requirements of the rule did act responsibly in endeavoring to keep the school population from being exposed to asbestos, it would appear that the risk of harm created by the delay in notifying the PTA, was only a minor one.

16/ USEPA, OPTS, OTS Analysis of Comments (January 1982) at 37-38. Since this document is listed as a support document (No. 4) in the preamble to the rule, see 47 Fed. Reg. 23367 (May 27, 1982), and is frequently referred to in the preamble, there is no question of its being part of the legislative history of the rule. Although not cited by Complainant, I may take official notice of its content so long as Respondent is informed of the source. See Banks v. Schweiker, 654 F.2d 637 (9th Cir. 1981).

17/ 47 Fed. Reg. 23366.

Accordingly, I find that the appropriate penalty for the notification violations at the DuMont School is $1000. It is recognized that this is a considerably greater reduction in the penalty set by the EPA's guidelines than the 40% proposed by the EPA. Taking into account, however, Respondent's good faith efforts to comply with the rule, that while Respondent's first inspection probably did not meet the EPA's requirements, Respondent had good faith reasons for believing it did, that Respondent promptly had the school reinspected on learning that the first inspection was inadequate, that it promptly acted to remedy the situation once it learned that there was friable asbestos material in the schools, and that its efforts although falling short of full compliance did minimize the risk of exposure, it is believed that this reduction is proper.

Conclusion

It is concluded that Respondent has violated the Asbestos in Schools Rule, 40 C.F.R. 763.111(b) and (d) and 763.114(a)(2). It is further concluded that a penalty of $1200 should be assessed for these violations.

ORDER 18/

Pursuant to section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. 2615(a)(1), a civil penalty of $1200 is assessed against Respondent Madeira City Schools, for the violations of the Act found herein.

18/ This accelerated decision disposes of all issues in the case and constitutes the initial decision of the Administrative Law Judge. 40 C.F.R. 22.20(b). Unless an appeal is taken pursuant to section 22.30 of the rules of practice or the Administrator elects to review this decision on his/her own motion, the Accelerated Decision shall become the final order of the Administrator (see 40 C.F.R. 22.27(c)).

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the United States of America and mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: September 11, 1985
Washington, D.C.