UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
BCM Engineers, Inc.,	)	**Docket No. TSCA-III-694**
	)	
Respondent	)	

ORDER GRANTING MOTION TO DISMISS

The complaint in this proceeding under the Asbestos Hazard Emergency Response Act, 15 U.S.C. § 2641 et seq., ("AHERA"), which is codified as Title II of the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), filed on August 31, 1993, charged Respondent, BCM Engineers, Inc. (BCM), with violations of the Act and applicable regulations (40 CFR Part 763). Specifically, BCM was charged in eleven counts with failure to identify all homogeneous areas of friable suspected asbestos-containing building material (ACBM) and all homogeneous areas of nonfriable suspected ACBM in an identified school and school districts in the State of Delaware. For these violations, it was proposed to assess BCM a penalty totaling $504,000.

BCM answered, denying the alleged violations, contesting the appropriateness of the proposed penalties and requested a hearing.

Simultaneously with the filing of its answer, BCM filed a motion to dismiss upon the ground: (a) Complainant failed to include in the complaint a statement of the factual basis for the alleged violations and a statement explaining the reasoning

behind the proposed penalties as required by Rule 22.14 (40 CFR Part 22) and (b) Complainant lacks the authority under 15 U.S.C. §§ 2614, 2615 and 2643 to impose penalties upon BCM for the violations alleged (Motion, dated September 27, 1993).

In support of (a) above, BCM points out that Rule 22.14(a)(3) requires a concise statement of the factual basis for the violations alleged and that Complainant has failed to provide any information as to the number of homogeneous areas that BCM failed to identify; the size of such areas; the type or condition of suspected ACBM; the location of the suspected ACBM materials in the school buildings and, even, for most of the counts, the names of the school or schools in the particular school district where the alleged homogeneous areas or areas exist. BCM also points out that Rule 22.14(a)(5) requires a statement of the reasoning behind the proposed penalty and that Complainant attached a copy of the PCB Penalty Policy to the complaint rather than a copy of the Enforcement Response Policy for AHERA upon which the proposed penalty was based.[1/]

As an additional ground for its motion to dismiss, BCM asserts that EPA lacks the authority under 15 U.S.C. §§ 2614, 2615 and 2643 to assess the penalties proposed, because AHERA imposes nondelegable duties on LEAs to, inter alia, identify areas of suspected ACBM in school buildings, and not private

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[1/] Complainant provided BCM copy of the AHERA policy after the answer and motion to dismiss were filed.

parties who have contracted with an LEA to perform such functions (Motion at 4-6).

Complainant responded to the motion on October 5, 1993, alleging that the complaint "gave a completely adequate notice of its case to Respondent" (Response at 2). According to Complainant, this "completely adequate notice" was provided by reference to reinspection reports by EPA and two private contractors "BATTA Environmental Associates, Inc." and "Environmental Testing, Inc.," even though the mentioned reports were not attached to the complaint. Complainant argues that the complaint reasonably apprised BCM of the issues in controversy and that, under principles of administrative pleading, the notice was adequate. Moreover, Complainant contends that BCM has failed to demonstrate that it was in any way prejudiced by the Agency's form of pleading.

Complainant contends that it complied with the requirement of Rule 22.14(a)(5) to provide a statement of the "reasoning behind the proposed penalty" by naming each school district in which BCM allegedly failed to identify all areas of suspected ACBM and by indicating the number of school buildings at issue in each school district and the dollar amount sought for violations at each individual school (Response at 3). Additionally, Complainant argues that the motion is premature, because BCM has many mechanisms at its disposal, both formal and informal, to obtain additional information concerning the penalty calculation.

Complainant argues that it does have authority to assess the penalties sought herein, because 40 CFR § 763.85(a)(4) requires each person performing an inspection to, inter alia, "(iii) (i)dentify all homogeneous areas of friable suspected ACBM and all homogeneous areas of nonfriable ACBM." In support, Complainant has cited ALJ decisions which have expressly or by necessary implication accepted the position that non-LEA violators of AHERA may be assessed civil penalties under Title I of TSCA, e.g., Hall-Kimbrell Environmental Services, Inc., 1992 T.S.C.A. LEXIS 87*8 (October 8, 1992) and In Re William Garvin, d/b/a Garvin Engineering, TSCA-ASB-VIII-90-41 (Order Denying Motion To Dismiss and For Accelerated Decision, January 15, 1991).

For all of the above reasons, Complainant asserts that BCM has failed to show any grounds for the relief it seeks and urges that its motion to dismiss be denied.

On October 13, 1993, BCM filed a Memorandum In Support of its Motion for a Decision to Dismiss, setting forth its background[2/] and stating in greater detail arguments made in the motion. BCM points out that the introductory paragraph of the complaint states that EPA has reason to believe that BCM has violated TSCA § 207(a), which being applicable only to LEAs, could not apply to BCM. Additionally, BCM asserts that the

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[2/] The firm contracting with the State of Delaware was BCM Potomac, a wholly-owned subsidiary of BCM Engineers, Inc., which was merged into BCM in 1991.

contractor, BCM Potomac (supra note 2), never certified that all areas of suspected ACBM had been identified and, indeed, that its inspection reports to the State included disclaimers to that effect.

Regarding its contention that EPA lacks the authority to assess the penalties sought, BCM states that it does not deny that it is a "person" subject to penalties under TSCA or AHERA (Memorandum at 15-24). BCM does, however, deny that it violated a regulation which imposed any obligation on it (Id. 21). It argues that 40 CFR Part 763, Subpart E imposes obligations on LEAs not their contractors. According to BCM, it or its employees would only be liable under TSCA, if they lacked proper accreditation.[3]

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[3] The penalty provision of AHERA, § 207 (15 U.S.C. § 2647), reduces the maximum penalty to $5,000 per day and clearly applies only to LEAs. AHERA § 206(a) (15 U.S.C. § 2646(a)) provides:

(a) Contractor accreditation

A person may not--

(1) inspect for asbestos-containing material in a school building under the authority of a local educational agency or in a public or commercial building,

(2) prepare a management plan for such a school, or

(3) design or conduct response actions, other than the type of action described in sections 2643(f) and 2644(c) of this title, with respect to friable asbestos-containing material in such a school or in a public or commercial building, unless such person is accredited by a State under subsection (b) of this section or is accredited pursuant to an Administrator-

(continued...)

On October 15, 1993, Complainant filed a response to BCM's Memorandum in Support of its Motion to Dismiss, contending that the memorandum should be struck as untimely and that, in any event, the arguments made therein were without merit. In support of the contention that the memorandum be struck, Complainant pointed to the requirement of Rule 22.16(a), providing, inter alia, that motions shall "(4) be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." Complainant stated that it acted properly in responding to the motion and asserted erroneously that there was no minimum time period for responding to motions in the Rules of Practice effective as of July 1, 1992.[4/] On the merits, Complainant reiterated its position that the complaint provided adequate notice, asserted that "as a matter of courtesy" BCM had been provided copies of the inspection reports upon which the Agency relied in issuing the complaint and pointed out that BCM had not sought copies of the inspection reports or moved for a more definite statement. According to Complainant, it was not required to provide BCM the inspection reports prior to the pre-hearing exchange contemplated by Rule 22.19(b).

[3/] (...continued)
approved course under subsection (c) of this section.

[4/] The omission from Rule 22.16(b) of the ten-day period for responding to motions was corrected by a notice in the Federal Register (57 Fed. Reg. 60129, December 18, 1992).

By a letter to counsel for Complainant, dated October 19, 1993, BCM acknowledged receipt of copies of some of the inspection reports referred to in the complaint, disagreed that the reports were furnished as a "matter of courtesy" to the extent Complainant relied upon the reports for notice of the basic facts supporting the complaint, pointed out that the cover letter enclosing BCM's answer and motion stated that a brief in support of the motion would follow, noted that an ALJ had yet to be assigned,[5/] asserted that the memorandum was timely and should be considered and, argued, that it was unfair for EPA to issue a complaint, five years after the events in question, which, inter alia, gave a new dimension to the concept of "notice pleading."

By a letter to the ALJ, dated October 25, 1993, BCM enclosed a copy of the mentioned letter to Complainant's counsel, dated October 19, 1993, and a copy of a second letter to Complainant's counsel, dated October 22, 1993. The second letter acknowledged receipt of a copy of the complaint and order In Re Garvin, supra, disagreed with Complainant's contention that the complaint in Garvin was even less specific than the complaint in the instant matter and, inter alia, reiterated its contention that AHERA conferred upon the Agency authority to regulate LEAs not private entities.

[5/] The undersigned was designated presiding ALJ by an order, dated October 19, 1993.

On October 26, 1993, Complainant filed a motion to strike the referenced correspondence as outside the scope of the Rules of Practice or, in the alternative, that it be given an opportunity to respond thereto.

BCM responded to the motion to strike under date of November 2, 1993, acknowledging that its letters, dated October 19 and October 22, 1993, contained arguments in support of its motion to dismiss, and stating, inter alia, that the letter of October 19 was a response to Complainant's motion to strike the memorandum in support of BCM's motion to dismiss and that the letter of October 22 was sent one day after BCM received a copy of the unpublished order In re Garvin, supra. BCM describes the inspection reports it has received to date as "fragmentary, alleges that EPA is attempting to preclude consideration of the real issues in this proceeding and complains that the Agency is insisting on letter-perfect compliance with the Rules of Practice by BCM while Complainant has failed to follow those rules.

By a letter, dated June 10, 1994, BCM referred to its pending motion to dismiss, stated that discussions toward resolving this matter were underway and, without waiving its right to a ruling on the second basis of the motion, i.e., that EPA lacked authority to impose penalties upon BCM for the violations alleged in the complaint, requested a prompt ruling on the first basis of the motion, that is, the sufficiency of the complaint under the Consolidated Rules of Practice.

D I S C U S S I O N

Complainant's motions to strike will be denied. Although Rule 22.16(a) certainly contemplates, and the better practice is, that any legal memorandum accompany a motion, this relatively minor infraction of the rules pales in comparison to Complainant's more serious infractions. The memorandum, which Complainant seeks to strike, was filed prior to the assignment of an ALJ and, accordingly, prior to any consideration of the motion to dismiss. Refusal to consider the memorandum would not expedite resolution of the proceeding. Moreover, at least part of the problem in this increasingly fractious proceeding is Complainant's resolute refusal to recognize the deficiencies in its complaint.

BCM's letter, dated October 19, 1993, is justified as a response to the motion to strike and the letter, dated October 22, 1993, is explained, if not justified, by the fact BCM did not receive a copy of the unpublished order in Garvin, supra, until October 21, 1993. Complainant's objections could, of course, be obviated by giving it an opportunity to respond. In view of the disposition of the motion made herein, Complainant will be given an opportunity to move for leave to file an amended complaint and further arguments in this regard are unnecessary.[6]

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[6] BCM has made a powerful argument that AHERA did not confer upon EPA the authority to impose penalties upon contractors, such as BCM, who contract with a LEA to perform (continued...)

Complainant either fails to understand or has disregarded Rule 22.14 which sets forth the required content of a complaint. Rule 22.14(a) requires that the complaint contain, inter alia, "(1) [a] statement reciting the sections of the Act authorizing the issuance of the complaint" and "(3) [a] concise statement of the factual basis for alleging the violation." Although, as BCM points out, the statement in the opening paragraph of the complaint that EPA has reason to believe that Respondent has violated TSCA § 207(a) is inaccurate, the complaint elsewhere cites TSCA §§ 15 and 203 (15 U.S.C. §§ 2614 and 2643) as the basis therefor. Accordingly, the complaint complies with Rule 22.14(a)(1).

As to Rule 22.14(a)(3), the complaint merely alleges in conclusional terms that subsequent inspections of various schools and school districts revealed that Respondent failed to identify all homogeneous areas of friable suspected ACBM and all areas of nonfriable suspected ACBM. This is not a "concise statement of the factual basis for alleging the violation," because it does not, as a minimum, identify the areas in the particular school buildings where the allegedly unidentified suspected ACBM was located,[7] nor does it state any reason why

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[6](...continued)
functions required by the Act and, if the motion to dismiss were being granted on that basis, allowing Complainant an opportunity to respond would certainly be appropriate.

[7] In Counts II through XI of the complaint, Complainant contented itself with the allegation that all homogeneous areas
(continued...)

the materials were suspected ACBM. Under these circumstances, it is preposterous to contend that Rule 22.14(a)(3) has been complied with by reference to inspection reports not included with the complaint. Contrary to Complainant's contention, the rule requires more than "notice of the issues in controversy." As BCM points out, schools are well-used buildings and, for example, areas that were nonfriable at the time of the BCM inspections could easily have become friable at the time of re-inspections several years later.

The lack of a factual basis for the violations alleged is not merely a technical or trifling detail which Complainant may omit at its discretion, but is fundamental to the pleading contemplated by the Rules of Practice. This is illustrated by Rule 22.15(b), entitled "Contents of the answer," which provides, inter alia, that "(t)he answer shall clearly and directly admit, deny or explain each of the factual allegations in the complaint with regard to which respondent has knowledge." By failing to set forth the factual basis for the violations alleged, Complainant has precluded BCM from filing an answer conforming to Rule 22.15(b). While a respondent may, as Complainant apparently intends, file what is in effect a general denial and then move for a more specific statement in order to

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[7](...continued)
of friable and nonfriable suspected ACBM in listed school districts had not been identified by Respondent.

flesh out a defense, such a procedure is neither required nor contemplated by the Rules of Practice.

In Asbestos Specialists, Inc., TSCA Appeal No. 92-3 (EAB, October 6, 1993), the Board upheld dismissal of a similar TSCA/AHERA complaint which failed to provide the respondent fair notice of the charges against it and lacked an adequate rationale for the proposed penalty. The Board, held, however, that the dismissal should not have been with prejudice as dismissals with prejudice were proper only where the defects in the complaint were not curable by amendment. Here, while the complaint may, in the broadest terms, have provided BCM with general notice of the violations alleged, it did not, as we have seen, comply with the Rules of Practice. Hence, dismissal of the complaint with leave to amend is appropriate.

The complaint fares no better with respect to the requirement of Rule 22.14(a)(5) for "a statement explaining the reasoning behind the proposed penalty." Although the complaint states that the penalty was determined in accordance with the "Interim Final Enforcement Response Policy For The Asbestos Hazard Emergency Response Act" and designates "Circumstance Levels," presumably in accordance with the mentioned Policy, it, for example, provides no information or rationale for the determinations of harm or likely harm resulting from the violations alleged to support the Circumstance Levels chosen. This seemingly depends on whether the "suspected ACBM," in fact, contained asbestos and on exposure or the probability thereof.

The probability of exposure, of course, depends on the location of the suspected ACBM. Similarly, the "Extent" factor depends on the quantity of suspected ACBM.

O R D E R

Complainant's motions to strike are denied. The complaint is dismissed. Complainant may move for leave to file an amended complaint within 20 days of the date of this order.[8/]

Dated this 24th day of June 1994.

Spencer T. Nissen
Administrative Law Judge

[8/] It is noted that among BCM's affirmative defenses is the statute of limitations (28 U.S.C. § 2462) and that most of BCM's activities cited in the complaint appear to have taken place more than five years prior to the issuance of the complaint. This raises a question as to whether all or any part of the penalties sought are time-barred. See 3M Company (Minnesota Mining and Manufacturing) v. Browner, 17 F.3d 1453 (D.C. Cir. 1994).

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION TO DISMISS**, dated June 24, 1994, in re: BCM Engineers, Inc., Dkt. No. TSCA-III-694, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: June 24, 1994

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