

INITIAL DECISION

This matter arises under 15 U.S.C. §2615(a)(1), Section 16(a)(1) of the Toxic Substances Control Act, (15 U.S.C. §2601 et seq., hereafter "the Act)," which provides for the assessment of a civil penalty for violations of Section 15 of the Act, 15 U.S.C. 2614. Section 15 makes it unlawful to, among other things, "fail or refuse to comply with . . . any rule promulgated or order issued under Section 5 or 6 "(15 U.S.C. §2604-2605) of the Act. Promulgated under Section 6 of the Act on May 27, 1982, 47 Federal Register 23369, was Subpart F- Friable Asbestos - Containing Materials in Schools, known as the "asbestos in schools rule," 40 C.F.R. §763.100 et. seq. 1/ In this civil action, the United States Environmental Protection Agency, whose Director, Environmental Services Division, Region II, is the complainant herein, seeks assessment of civil penalties against the respondent pursuant to Section 16 U. S. C. §2615(a)(1) and 2(B) for alleged violations of the Act and the asbestos in schools regulations [hereafter "the Rule"].

The complaint alleges, in 89 Roman numbered "counts" which have provided a forced refresher course in Roman numerals to the parties and to the court, and in 359 Arabic numbered paragraphs, that respondent New York City Board of Education failed to comply with various record-keeping, notification, and testing requirements set forth in the asbestos in schools regulations in connection with 88 New York City schools under the respondent's control.

1/ "Friable material" is defined [40 C.F.R. §763.103(d)] as "any material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure).

Specifically, violations of 40 C.F.R. §763.111 (a) 2/ were charged in connection with 33 schools; violations of 40 C.F.R. §763.111(b) were charged in connection with five schools; 3/ violations of 40 C.F.R. §763.111(c) were charged with respect to 52 schools; 4/ a violation of 40 C.F.R. §763.111(d) was charged with respect to one school; violations of §763.114(a)(1), (2) and (3) were charged with regard to eight schools 5/; violations of 40 C.F.R. §763.114(a)(4)(i) were charged with respect to 80 schools; 6/, 7/;

2/ §763.111(a) provides that "local education agencies shall post in the primary administrative and custodial offices and in the faculty common rooms of each school under their authority a completed copy of the . . . Notice to School Employees unless no friable asbestos-containing material is present in the school. The notice shall remain posted indefinitely in any school which has friable asbestos-containing material."

3/ §763.111(b) provides that "local education agencies shall provide to all persons employed in school buildings under their authority which contain friable asbestos-containing materials a written notice of the location, by room or building area, of all friable asbestos-containing materials in the school."

4/ §763.111(c) provides that certain information on interim procedures to reduce exposures A guide for Reducing Asbestos Exposure (set out in full in the section) must be provided to all custodial or maintenance employees.

5/ §763.114(a)(1)(2)(3) (Record keeping) provide that local education agencies shall compile and maintain in the administrative office of each school under their authority a record which shall include: (1) The name and address of the school; (2) a list of all school buildings associated with the school, indicating whether each building has been inspected for friable materials in compliance with §763.105, and which buildings contain friable materials; (3) copies of the Notice to School Employees, found in §763.111(a).

6/ §763.114(a)(4)(1) provides that "local education agencies shall compile and maintain in the administrative office of each school, for each school building which contains friable materials, a blueprint, diagram, or written description of the building which identifies clearly the location(s) and approximate area(s) in square feet of each sampling area of such material(s), the locations at which samples were taken, and the identification number of each sample, and which shows or describes clearly whether each sampling area of friable material contains asbestos, including an estimate of its percent asbestos content as determined by calculating the average of the percent asbestos contents of all samples taken in that area."

violations of 40 C.F.R. §763.114(a)(4)(ii) were charged regarding 27 schools 8/, 9/; violations of 40 C.F.R. §763.114(a)(5) were alleged in connection with 49 schools 10/; violations of 40 C.F.R. §763.114(a)(6) were charged in connection with eleven schools; 11/ violations of §763.105(a) and (b) were charged in connection with two schools; 12/ and violations of 40 C.F.R. §763.107 and 109 were charged

7/ Nine of the 80 allegations were dropped when the schools in connection with which they were made were found to have been constructed after 1978 (40 C.F.R. §763.117(c)(2)(ii)).

8/ §763.114(a)(4)(ii) provides that a copy of all laboratory reports and all correspondence with laboratories concerning the analysis of samples taken in accordance with §763.107 shall be maintained in the administrative office of each school, regarding each school building which contains friable materials.

9/ Nine of the 27 allegations were dropped when the schools in connection with which they were made were found to have been constructed after 1978, 40 C.F.R. §763.117(c)(2)(ii).

10/ 40 C.F.R. §763.114(a)(5) provides that the record maintained in the administrative office of each school, if the school contains friable asbestos-containing materials, must contain copies of the Guide referred to in note 4 above, and one copy of Asbestos-Containing Materials in School Buildings: A Guidance Document, Parts 1 and 2 (EPA No. C00090), which can be obtained by calling 800-424-9065.

11/ 40 C.F.R. §763.114(a)(6) provides that "a statement that the requirements of the [asbestos in schools] rule have been satisfied signed by the person responsible for compliance with the rule and including the date and the person's name and title.

12/ 40 C.F.R. §763.105 (Inspection for Friable Material) provides that (a) Local education agencies shall inspect each school building which they lease, own, or otherwise use as a school building, to locate all friable material. (b) This inspection shall consist of looking for and touching all suspect materials, including surfaces behind suspended ceilings or other non-permanent structures which may be entered during normal building maintenance or repairs. For further information on inspection procedures, officials should consult Chapter 4 of Asbestos-Containing Materials in School Buildings: A Guidance Document, Part 1 (EPA no. C00090). Particular attention should be paid to the recommendation regarding respirators. Copies of the document can be obtained by calling 800-424-9065."

with respect to 19 schools. 13/, 14/ The penalty originally sought in the complaint for the 252 alleged infractions was \$237,900.

Subsequent to the issuance of the complaint, however, the complainant dropped the counts relating to eleven schools 15/ (19 charges).

13/ 40 C.F.R. §763.107, Sampling Friable Material, provides that: "(a) If friable materials are found in a school building, local education agencies shall identify each distinct sampling area of friable materials within the school building, take at least three samples from locations distributed throughout the sampling area, and label each sample container with a sample identification number unique to the sampling location and building. (b) Officials should consult Asbestos-Containing Materials in School Buildings: A Guidance Document, Part 1, Chapter 5, for further information on sampling procedures. The requirement that three samples be taken in each sampling area supersedes the recommendation made in the Guidance Document to take one sample per 5000 square feet of friable material. (c) Sampling locations should be randomly distributed within the sampling; the locations should not be selected simply for convenience or ease of reaching the sample, or because the sampler judges the location to be representative. Samples shall be taken using small sealable containers; samples shall penetrate the depth of the friable material to the substrata."

14/ 40 C.F.R. §763.109, analyzing friable material, provides: "local education agencies shall have all samples of friable material analyzed for asbestos using Polarized Light Microscopy (PLM), supplemented where necessary by X-ray Diffraction, in accordance with Interim Method for the Determination of Asbestiform Minerals in Bulk Insulation Samples, which is found under appendix A of this Subpart. Persons interested in analyzing bulk samples for asbestos can obtain copies of the document by calling 800-424-9065 (in Washington, D.C., call 554-14040). A list of laboratories capable of conducting analyses of friable materials can be obtained by calling 800-334-8571 Officials should consult Asbestos-Containing Materials in School Buildings: A Guidance Document, Part 1, Chapter 6, for further information on analysis of friable materials."

15/ Counts LVI, LIX, LXVIII, LXXIV, LXXV, LXXXIII, LXXXIV, LXXXV, LXXXVI, LXXXVII, and LXXXVIII.

Subsequently, also, respondent's motion to dismiss those portions of 13 counts relating to violations of 40 C.F.R. §763.107 and 109 resulted in a ruling on October 31, 1985, that where the respondent could show (a) it had complied with the testing procedures set out at 40 C.F.R. §763.117(a) (1)(i), (ii), and (iii), and (b) the friable materials tested contained no asbestos based upon at least 3 samples, the testing procedure of §763.107, 109 was not applicable. Consequently, since respondent has shown both (a) and (b), the charges based upon §763.107 and 109 are dismissed. 16/

Respondent also moved to dismiss five charges of violations of §763.114 (a)(4)(ii), wherein it is required that laboratory reports and correspondence with laboratories concerning analyses of samples taken in accordance with §763.107 must be maintained, for each building which contains friable materials, in the school's administrative office asbestos file.

Respondent points out that there are exceptions to the laboratory reports requirement of §763.114(a)(4)(ii). One exception is implicitly provided by §763.117(c)(1), which creates an exception to the sampling requirement of §763.107. Respondent is correct in observing that if a local education agency

16/ Allegations of violations of §763.107 and 109 appear in counts LXIV - LXVII, LXIX - LXXIII, and LXXVI - LXXXI (15 alleged violations, in all; the three alleged violations of §763.107 and 109 that appeared in the counts set out in not 15 above are not included, as those counts were dropped from the complaint.

is exempted by §763.117(c) from the requirement of taking samples of friable materials, it will not have any laboratory analyses of those samples (or correspondence relating to them) to keep in its asbestos files. However, in order to be exempt from taking samples in the first place, respondent must qualify for the exemption. The exemption from sampling upon which respondent relies to reach the end result of not having to maintain laboratory reports is conditioned upon the school's asbestos file containing two items:

- a. A signed statement which certifies that any friable materials in the school shall be treated for purpose of the Rule as asbestos-containing; and
- b. Information as to the location of such materials in the school buildings.

In this case, although the record adequately demonstrates that the friable materials in the schools mentioned in counts LXV, LXVII, LXXII, LXXIII, and LXXVIII were treated as asbestos containing 17/, and while the complainant stipulated that the asbestos files in these schools contained information as to the location of the materials 18/ nothing in the record discloses whether the asbestos files contained the necessary certification described in (b) above, upon which the exemption is partly based. While the maintenance of laboratory

17/ Affidavit of Mr. John Cesario, Manager of the respondent's Asbestos Task Force, which coordinates and supervises the respondent's asbestos abatement program and is responsible for compliance with the Rule (at pp. 1, 3).

18/ Stipulation of Withdrawal, page 2, ¶3

reports for a school where the friable materials were treated as asbestos containing, (i.e. there are no reports) may be viewed as internally contradictory, nonetheless true that a condition for the exemption has not been shown to have been met, and, as a consequence, the five charges cannot be dismissed. 19/

It is clear that the above information must, under the language of this section, be in the file before the sampling and analyses of friable materials may be omitted. The violations here, however, are minor at best.

19/Respondent notes that there is an explicit exemption to the sampling and analysis requirements -- and hence the maintenance of laboratory reports -- in §763.117(c)(2)(i) for schools where "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," and advances its count LXXVIII school as being exempt because its friable asbestos materials were encapsulated before the date of the complainant's inspection, Cesario affidavit at p. 2. However, this argument overlooks the fact that the encapsulated materials were discovered (and encapsulated) during the respondent's "Phase I" program that dealt only with friable materials located in areas frequented by students, teachers, and building employees. The school in question was later found (during "Phase II") to have friable materials located in boiler and pipe insulation (p. 3, Cesario affidavit). Therefore, this school falls under the §763.117(c)(1) exception discussed above which requires, as a condition of applicability, that the school's asbestos file contain certification and information as to the location of the materials. It is not necessary to reach the question of whether the abatement and encapsulation would have to have occurred before the effective date of the Rule. Respondent's program, as it affected the count LXXVIII school, occurred before the date of complainant's inspection.

It was stipulated, during the proceeding, that all of the remaining 70 charges of violations of §763.114(a)(4)(i) would be dropped 20/ 26 charges of violations of §763.114(a)(5) were dropped 21/ because the guidance documents specified by the Rule had not been furnished by the U.S. EPA, although they had been requested by the respondent. Also dropped for various reasons were one charge of violation of §763.114(a)(6), 22/ one charge of violation of §763.111(a), two charges of violations of §763.111(c), 22/ and two charges that respondent failed to include the Guide for Reducing Asbestos Exposure in the schools' asbestos files (counts XXXVII and XLIX) as required by §763.114(a)(5). 23/ One allegation (from count XLIX) that the school's asbestos file did not include a signed statement that the Rule had been complied with, as required by 40 CFR §763.114(a)(6), 24/ was dropped.

Withdrawals, dropped charges and counts, and dismissal of 13 charges relating to respondent's analysis of samples, therefore, leave 170 charges remaining in the complaint. 25/

20/ See Stipulation of Withdrawal, page 2, ¶13. 70 such charges remained after eleven whole counts were dropped.

21/ Stipulation of Withdrawal, p. 2.

22/ Stipulation of Withdrawal, pp. 3, 4, referring to counts XXXVI and XLIII.

23/ Stipulation of Withdrawal, p. 3.

24/ Stipulation of Withdrawal, p. 4.

25/ I. e. 31 charges of violations of 40 CFR §763.111(a); 5 charges of violations of 40 CFR §763.111(b); 49 charges of violations of 40 CFR §763.111(c); one charge of violation of 40 CFR §763.111(d); 18 charges of violations of 40 CFR §763.114(a)(4)(ii); eight charges each of violations of 40 CFR §763.114(a)(1)-(4); 26 charges of violations of 40 CFR §763.114(a)(5); 10 charges of violations of 40 CFR §763.114(a)(6); two charges each of violations of 40 CFR §763.105(a) and (b).

Turning to the remaining specific allegations, it is determined that, based upon this record, respondent has demonstrated that it did provide to its custodial and maintenance employees copies of the Guide for Reducing Asbestos Exposure required to be provided by 40 CFR §763.111(c), with instructions to them to distribute the Guide to their own employees. 26/ While numerous custodians' employees interviewed by U. S. E.P.A. investigators could not recall receiving it, the respondent's testimony that it instructed its employees to distribute the Guide (TR 155, 157, 158 27/) is sufficient to demonstrate that it carried out its responsibility under 40 CFR §763.111(c). Accordingly, the 49 allegations relating to failure to provide the Guide will be dismissed.

At counts XLVII and LXII, specifically at ¶190 and ¶250, the complaint charges that the respondent did not inspect for friable materials, in violation of 40 CFR §763.105(a) and (b). The evidence in support of these charges consists of inspection reports that noted the presence of friable materials on the pipe insulation in the administrative office of PS 170, in Brooklyn (¶ 190) and on pipes in the first floor gym/lunchroom in PS 158, Manhattan. In count XXIII, PS 202 in Brooklyn, ¶ 94 charges that the respondent failed to include in the posting and

26/ The respondent employees the custodians; the custodians hire their own employees, TR 155; R. Ex. 11.

27/ See also stipulations at ¶38; it is noted that the respondent also sent circulars to its custodial employees in connection with its own asbestos abatement program in 1979, before the Rule was promulgated.

warnings required by 40 CFR §763.111(a) the presence of friable asbestos insulation in "student occupied areas." The evidence supporting this charge consists of the fact that U.S. E.P.A. inspection reports revealed the presence of such materials in those areas. Regarding the alleged violations of 40 CFR §763.105(a) and (b), the evidence does not establish that the respondent failed to inspect PS 158 and PS 170. The evidence is equally consistent with the proposition that the material became friable subsequent to inspection. Regarding PS 202, likewise, the asbestos containing materials may well have become friable after the notices were posted. While it may be argued that the notices posted pursuant to 40 CFR §763.111(a) ought to be amended if and when additional friable materials are found, the Rule does not require amendments or posting of new notices. Moreover it is possible that the materials became friable subsequent to the last annual inspection performed by the respondent, in which case the presence of the material could not reasonably have been known. It is noted that the Rule does not require the annual inspections that the respondent performs.

At count LXXXIX, the complaint alleges that respondent failed to warn and notify parents and employees about friable asbestos-containing materials in the auditorium fan room plenum chambers of South Shore High School, Brooklyn. The respondent's evidence establishes that encapsulation was carried out in this school, and responds that the inspector pulled off material, thus breaking the encapsulation. In testimony, the complainant countered that the area was in fact encapsulated in 1984, after the 1983 visit that revealed the presence of friable materials. In connection with this area, it seems likely that the encap-

sulation may have failed to cover the area, resulting in its contracted for discovery during the 1983 U.S. E.P.A. inspection. It is difficult to impose the penalty sought with respect to this violation, considering the extensive steps taken by the respondent to abate asbestos at the school (R. Ex. 17, 29, 30), and considering the respondent's conviction that it had succeeded.

The respondent does not seriously dispute the remaining charges, arguing that the penalty is excessive for what it views as minor infractions. It points out that the number of schools (988 - 1000 schools) and the magnitude of its responsibilities makes it humanly impossible to carry out an asbestos program without any errors. It urges, too, that the abatement program was carried out in 1978 - 1980, has cost at least \$15,000,000 and has been successful in removing or encapsulating all of the asbestos containing friable materials found in New York City schools. The respondent's Asbestos Task Force, started in 1978, but operating informally even before then, had 25-26 full time employees working to deal with the asbestos problem.

Remaining in the complaint at this point are 31 violations of the rule that requires the posting of notices 28/, 5 violations of the rule that requires written notice to be given to school employees, 29/ one violation of the rule that requires results of inspection and analyses to be provided to the parent-teacher association 30/, 17 violations of the rule that requires laboratory reports and correspondence to be placed in the schools' asbestos file 31/; violations, with respect

28/ 40 CFR §763.111(a)

29/ 40 CFR §763.111(b)

30/ 40 CFR §763.111(d)

31/ 40 CFR §763.114(a)(4)(ii)

to eight schools, of the record keeping requirements of §763.114(a)(1) [name and address of school], §763.114(a)(2) [list of all school buildings associated with the school indicating whether each building has been inspected for friable materials]; 26 violations of the rule that requires each school's asbestos file (in schools where friable asbestos-containing material is found) to contain copies of the Guide and the Guidance Document Parts 1 and 2, 32/ and ten violations of the rule that requires the file to contain a signed statement that the Rule has been complied with. 33/ Against these violations admitted except for the violation of 40 CFR §763.111(a), (b), and (d) at count LXXXIX which the respondent strongly denies because of its abatement contracts relating to that school, must be considered any factors that could mitigate the penalty sought. For each of the violations mentioned above except for those relating to count LXXXIX and the eight counts 34/ where violations of four recordkeeping requirements are charged in connection with each of the eight schools, \$1,300.00 is sought. For each of the eight counts and count LXXXIX, \$6,000.00 is sought.

Upon consideration of the entire record, which includes much evidence of the respondent's early and significant activities, and the abatement of asbestos in its schools, it is clear that a substantial reduction of the penalty (remaining after the dropped and dismissed counts and charges are excluded) is warranted. 35/ Considering the nature and extent of respondent's successful program, and considering that parents and employees were

32/ 40 CFR §763.114(a)(5)

33/ 40 CFR §763.114(a)(6)

34/ Counts I, VII, XL, XLII, XLIII, L, LIV, and LXI; i.e. 40 CFR §763.114(a)(T), (2), (3), and (4).

35/ See generally Respondent's exhibit and testimony of Mr. Cesario, TR pages 120 - 170.

informed, on the whole, with relatively few exceptions, of the respondent's asbestos problem, it is concluded that a penalty of \$10,000 is appropriate for the remaining 117 charges.

FINDINGS OF FACT AND CONCLUSION OF LAW

Respondent is a local education agency as that term is defined at 40 CFR §763.103(e), and is subject to the Act and regulations issued thereunder at 40 CFR §763, subpart F.

Respondent violated 40 CFR §763.111(a) in the manner charged in the complaint, (excluding count XX) with respect to 31 schools, including the school referred to in count LXXXIX, ¶1358.

Respondent violated 40 CFR §763.111(b) as charged in the complaint, and respect to five schools charges.

Respondent violated 40 CFR §763.111(d), as charged in count LXXXIX of the complaint.

Respondent violated 40 CFR §763.114(a)(4)(ii) as charged in the complaint, except for the ten charges that were dropped with respect to 17 schools.

Respondent violated 40 CFR §763.114(a)(1) as alleged in the complaint, §763.114(a)(2), and §763.114(a)(3), and §763.114(a)(4), as alleged in the complaint with respect to eight schools.

Respondent violated 40 CFR §763.114(a)(5) as alleged in the complaint (not including 25 charges dropped relating to this section), with respect to 26 schools.

Respondent violated 40 CFR §763.114(a)(6) as alleged in the complaint, except for the allegation in count V, which was dropped.

Respondent did not violate 40 CFR §763.105(a) and (b) as alleged in the complaint; respondent did not violate 40 CFR §763.111(a) as alleged in the complaint at count XXIII, ¶94.

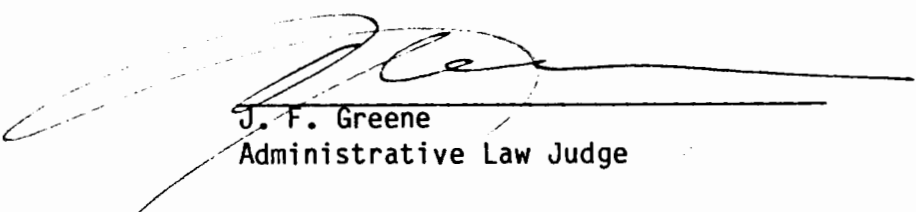
The appropriate penalty, considering all of the factors mentioned above, is \$10,000.

ORDER

Pursuant to section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. §2615(a)(1), a civil penalty of \$10,000 is hereby assessed against respondent New York City Board of Education for the violations of the Act found herein.

Payment shall be made by cashier's check or certified check, within thirty (30) days of the effective date of this Order, payable to the Treasurer, United States of America, and delivered to:

EPA - Region II
(Regional Hearing Clerk)
P. O. Box 360188M
Pittsburgh, PA 15251


J. F. Greene
Administrative Law Judge

April 25, 1986