3/19/86

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



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| IN THE MATTER OF: | |
| GARDEN CITY UNIFIED SCHOOL DISTRICT #457, RESPONDENT | TSCA Docket Number VII-84-T-273 |

TOXIC SUBSTANCES CONTROL ACT (TSCA)

1. The Toxic Substances Control Act (TSCA) and regulations promulgated pursuant thereto (40 C.F.R. Part 763, Subpart F) exist for the protection of members of the public and are thus regulatory in nature and, as such, are liberally construed and broadly interpreted to effectuate the purposes of the Act.

TOXIC SUBSTANCES CONTROL ACT (TSCA)

2. Respondent's "inspection", in 1982, which admittedly did not include the inspection of maintenance, storage or utility facilities, integral parts of "school buildings", that Respondent had a duty to inspect and which resulted in an inaccurate and negative report respecting the presence in said buildings of asbestos-containing materials, the presence of which was positively confirmed by an inspection performed by Respondent in 1984, was not an "inspection" as contemplated by the regulations and did not serve to excuse Respondent from its inspection, analysis and recordkeeping duties nor its duties to warn and notify, as provided by said regulations.

TOXIC SUBSTANCES CONTROL ACT (TSCA)

3. Respondent was authorized to contractually delegate its duties under applicable rules and regulations, but remained responsible for proper performance of such duties as provided by 40 C.F.R. 763.100.

TOXIC SUBSTANCES CONTROL ACT (TSCA)

4. Intent to violate is not an element of violations for which civil penalties are assessed; however, intent or the absence thereof may be shown as an aggravating or mitigating circumstance attendent thereto.

TOXIC SUBSTANCES CONTROL ACT (TSCA)

5. An appropriate civil penalty is properly determined if it accords with the Act, regulations and announced Agency policy. Where Respondent exceeded its duties under the rules and comprehensively, though belatedly, removed and abated all offending materials, which are the focus of rules here applicable, a substantial reduction of penalty, proposed under applicable Civil Penalty Guidelines, was compatible with the Act, regulations and announced Agency Policy and was therefore appropriate.

APPEARANCES

For Complainant:

Rupert G. Thomas
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For Respondent:

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## INITIAL DECISION

By Complaint filed December 20, 1984, Complainant, United States Environmental Protection Agency (hereinafter "EPA" or "the Agency"), Region VII, charges Respondent, Garden City Unified School District #457, a local education agency ("LEA" - hereinafter "Respondent" or "457") with violation of the Toxic Substances Control Act, (hereinafter "TSCA" or "the Act"), 15 U.S.C. 2601 et seq., and the regulations promulgated pursuant thereto, i.e., 40 C.F.R. Part 763.

Count I of said Complaint charges that 457 violated 40 C.F.R. 763.114 which requires that each LEA retain in its administrative office:
(b)(1) a list of all schools under its authority, whether each such school was inspected for friable material, and which school or schools contain friable material;

(2) a record of friable material, in such schools, which were sampled and analyzed and which materials contain asbestos, and

(3) the total area in square feet of friable asbestos-containing material (present) in each such school.

It is further alleged that such LEA is further required by Section 763.114(c) to maintain in its administrative office a completed EPA Form 7730-1 entitled "Inspections for Friable Asbestos-Containing Materials", and that Respondent, though required by Section 763.115 to comply with said regulations at an earlier date, did not so comply until July 17, 1984, for which failure a civil penalty in the sum of $1300.00 is proposed.

Count II of said Complaint charges that Respondent, at the time of subject EPA inspection on August 2, 1984, had failed to comply with applicable regulations, in that certain records were not, by 457, compiled and maintained

reflecting a timely inspection by 457 at the Alta Brown Elementary School for friable materials (Section 763.105); nor that samples of friable material found by its said inspection were, by 457, analyzed (Section 763.109), nor that warnings and notifications were issued (when) said friable material (was) determined to contain asbestos (Section 763.111). For said failure, the assessment of a civil penalty in the sum of $6,000.00 is proposed.

Count III of said Complaint charges that, at the time of the inspection by EPA on August 2, 1984, the required warnings and notifications, hereinabove described, had not been made by 457 (respecting the presence of asbestos-containing friable material at the Garden City Senior High School); that samples of said friable material at said school were, after being analyzed, reported, on July 16, 1984, as containing 80 to 85 per cent asbestos, and that the failure of 457 to timely comply with the requirements of 40 C.F.R. Sections 763.105, 763.107, 763.109, 763.111 and 763.114(a) promulgated pùr-uant to Section 6 of TSCA, 15 U.S.C. 2605(a), renders 457 in violation of the Act, for which violation a civil penalty in the amount of $6000.00 is proposed.

Respondent, in its Answer, admits that, on August 2, 1984, an EPA representative (inspector) met with "selected officials of 457", and denies any inspection beyond that limited to "responses to requests for technical assistance and advice or investigation"; that all 457 district buildings were inspected for asbestos-containing materials during a period ending on November 3, 1978; that said inspections and the results thereof were conducted with the knowledge and assistance of John C. Irvin, Chief of the Occupational Health Section of the Kansas Department of Health and Environment

("KDHE") and Jay Nordyke, EPA, Regional VII, Technical Field Advisor of the School Asbestos Program. Respondent further answers that, pursuant to 40 C.F.R. 763.115 and 763.117, its election (on June 6, 1984) to treat any friable material discovered, by its said inspections, as "asbestos-containing" exempts it from compliance with said EPA regulations. Respondent admits that, in conjunction with its regularly scheduled building inspection program, it discovered, in the two schools identified by EPA in subject Complaint, the existence of friable material, potentially asbestos-containing. Respondent states that the existence and location of such friable material was brought to the attention of the aforesaid representatives of KDHE and EPA.

Respondent further states, in its Answer, that it had not sufficient time to comply with the reporting and recordkeeping requirements of the regulations "by virtue of the proximity of the return of the testing results and by virtue of the fact that the schools were not in session and the administrative personnel and the parties to be notified were not available by the date of the alleged inspection."

On the basis of the record, including the testimony elicited at a hearing held in Kansas City, Missouri, on November 26, 1985, and the exhibits then and there received in evidence, and upon consideration of the findings proposed by the parties, I make the following

## FINDINGS OF FACT

1. Respondent, Unified School District No. 457, Finney County, Kansas, a Kansas public school district, is a "local education agency"/"school" (§763.103[e][1]). The school district is located around a city with a population of approximately 35,000, has a student enrollment nearing 6,000 and has 845 employees, of which 375 are teachers. Of 25 buildings, 16 are school

buildings within the definition of §763.103(h). (Respondent [hereinafter "R"] Exhibit [hereinafter "Ex"] 23; Transcript [hereinafter "TR"] p. 129.)

2. Dr. Jim Phifer (hereinafter "Phifer") has, since June 25, 1984, served as Superintendent of Garden City Unified School District 457, and Chief Executive Officer of the Board of Directors of said school district.

3. Mr. Jerald Cromer (hereinafter "Cromer") is Director of Plant Facilities of Garden City Unified School District 457. Cromer has been employed by Respondent since 1977, and assumed the duties of Director of Plant Facilities in 1980.

4. Dr. Kenneth Frisbie (hereinafter "Frisbie") is the Principal of Garden City Senior High School. His contract of employment provides that he be given the entire month of July for vacation (TR 142).

5. Mr. Merle Weiderstein (hereinafter "Weiderstein") is Principal of Alta Brown Elementary School. Weiderstein has been employed by Respondent for thirty-three (33) years. He has a 10-month contract and was not on duty the month preceding August 4, 1984 (TR 153).

6. Richard F. Makowski (hereinafter "Makowski") is employed by the U.S. EPA, Region VII, as an Asbestos Compliance Inspector. Makowski notified Phifer that he would be visiting Respondent's school district on August 2, 1984, to conduct an Asbestos-In-School Inspection. Phifer and Makowski agreed to the August 2, 1984 visit by Makowski (TR 137).

7. Wolfgang Brandner is employed by the U.S. EPA, Region VII, as the Regional Asbestos Coordinator.

8. Makowski met with Cromer on August 2, 1984, and conducted an inspection of Respondent's educational facilities, including Alta Brown Elementary School and Garden City Senior High School.

9. In the absence of Phifer, Cromer is next in line of command and the most knowledgeable person to deal with questions relating to asbestos in the school district (TR 137).

10. When Makowski met with Cromer on August 2, 1984, he requested any and all records in regard to asbestos (TR 6). Cromer made available to Makowski all the records he had pertaining to asbestos (TR 97).

11. Cromer possesses a master key for the buildings (TR 120). The principals of the respective schools, and head custodians, possess keys to the principals' offices and faculty lounges (TR 120).

12. During Makowski's inspection of Respondent's schools on August 2, 1984, the maintenance/custodial staff were in the building of Garden City Senior High School (TR 103).

13. Makowski was given a copy of EPA Form 7730-1, signed by Dr. Jim Phifer, and dated July 25, 1984, from the file(s) delivered to him for review by Cromer (TR. 108; R Ex-60).

14. At the time of Makowski's inspection on August 2, 1984, Respondent had not given notice of the existence of asbestos in the schools to parents or the Parent-Teacher Organization ("PTO") (TR 109-110). A taped interview with Cromer in the boiler room of Alta Brown Elementary School, subsequent to Makowski's visit, was twice shown, on August 20, 1984, on a local TV channel to apprise the community of the asbestos problem (TR 110).

15. EPA Form 7730-1, dated July 29, 1982, and executed by Cromer, was not in the files given to Makowski by Cromer during Makowski's inspection on August 2, 1984. Said form was sent to the EPA, Region VII, subsequent to the August 2, 1984 inspection of Respondent's schools by Richard Makowski (TR 122; R Ex-5).

16. The Notices of Warning, EPA Form 7730-3, were not posted in the faculty lounge and other areas in the high school until after the August 2, 1984 inspection by Makowski.

17. Friable asbestos-containing material was removed from the senior high school boiler room in August, 1984, at a time when nobody was on the premises, as it was completed before the start of school. Notices of the presence of said materials were posted during the week of August 5, 1984 (TR 149).

18. Frisbie, superintendent of the senior high school, testified that Respondent, in 1984, realized and acknowledged, for the first time, that asbestos-containing material was present in the school building. After that time, the school exerted a systematic effort to comply with all applicable regulations (TR 150), including posting of required notices and warnings (TR 144-154).

19. Wiederstein, Principal of the Alta Brown Elementary School (TR 151), testified that the friable asbestos-containing material was removed from said school prior to the start of classes in the fall of 1984 (TR 156). Upon his return to his school on August 5 or 6, 1984, he posted Form 7730-3 (Notice to Employees) and about the end of August, 1984, he notified the PTO of the presence of asbestos at the Alta Brown Elementary School (TR 154).

20. On June 6, 1984, Cromer, Director, Department of Buildings and Grounds for Respondent, certified, in accordance with 40 CFR 763.117(c), that all "friable" materials in the boiler and piping insulation in Respondent's buildings should be treated as asbestos-containing materials. On May 10, 1985, Respondent's Superintendent of Schools, Phifer, notified Complainant that such election had been revoked and no longer binding on Respondent (R Ex-24).

21. During July, 1984, Cromer prepared a memo advising "All School Employees"

that a preliminary inspection of the Alta Brown Elementary and Senior High buildings was made and that it was suspected that insulation convering the boilers and steam and hot water lines contained friable asbestos; that samples of such insulation had been taken and testing was being performed to determine if asbestos was present. Said memo cautioned all employees to wear protective breathing devices if they entered such areas (R Ex-11; TR 85).

22. In July, 1984, Cromer notified principals Weiderstein and Frisbie, by identical memos, that friable asbestos materials were found in the boiler room of the main (Alta Brown Elementary and senior high) school buildings and that such materials would be removed prior to the opening of school. He furnished each principal with a completed EPA Form 7730-3 (Notice to School Employees) and advice for completing the notification (R Ex-12 and Ex-13; TR 86-87). Said Form 7730-3 was meant to advise where records were kept concerning said friable materials; as the July, 1984, Form 7730-3 advised where the friable materials were located, a corrected form properly filled out was sent to each principal in March, 1985 (R Ex-16; R Ex-19; TR 88-89).

23. In March, 1985, the principals each prepared and forwarded to parents of their respective students a notice stating that samples of the insulation covering the boilers and piping were analyzed and found to contain asbestos materials and that said insulation was removed in summer, 1984 (R Ex 17; R Ex-19).

24. By memorandum, dated July 29, 1982, Jerald Cromer, Respondent's Director of the Department of Buildings and Grounds, notified Dr. Horace Good, then Respondent's Superintendent of Schools, that "EPA has mandated that school districts make a complete visual inspection of all district buildings to

identify asbestos-containing friable materials", and that such inspection must be completed prior to June, 1983. 1/ The memo further stated that said inspection was completed and attached a completed EPA Form 7730-1, showing all buildings of Respondent had been inspected and that no asbestos-containing friable material was found (R Ex 4; TR 69-70).

25. Said 1982 inspection, made by Respondent's Building and Grounds Director Cromer, did not include inspection of steam pipes, boilers or utility tunnels which were difficult to get to and not readily accessible (TR 71).

26. The school buildings of the Respondent were also inspected in the summer of 1984, said inspection being conducted by Gene Myers at the direction of Cromer (R Ex-7; TR 77-78).

27. As a result of the 1984 inspection, friable material was discovered in the Senior High School main building and the Alta Brown Elementary School building (R Ex-5 and Ex-7).

28. Based upon sampling and testing, after discovery of friable material in 1984, it was determined that the friable materials were asbestos-containing, and the school district had architects prepare specifications for removal of the materials, and advertised for bids for removal (R Ex-8 and R Ex-9).

29. All friable asbestos-containing materials identified as a result of the inspection, sampling and testing as aforesaid, was removed by the school district prior to commencement of the 1984-1985 school year (TR 148-149, 156).

30. The Respondent's School Service Center is a facility separate and apart from its Central Administrative Offices, the latter being the facility in which the

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1/ 47 FR 23360 was corrected by 47 FR 25145 (June 10, 1982) to show that the effective date of the Rule is June 28, 1982, and that all portions of the Rule "shall be complied with by June 28, 1983."

office of the Superintendent of Schools is located and where the official files and records of the school district are maintained (TR 95, 129-130).

31. Makowski testified that on August 2, 1984, he requested, of Cromer, to see all records in Respondent's files pertaining to the asbestos in schools TR 15-16). He examined only the compiled files on asbestos information given to him in Cromer's office (TR 17) and was not aware of or advised that any records existed which were not included in those then furnished to him by Cromer (TR 15).

32. On the occasion of subject inspection, school was not in session and, except for custodial personnel at the Abe Huber Junior High School and the Garden City Senior High School, the school buildings inspected were not occupied, and had to be unlocked for purposes of the Makowski inspection (TR 98).

33. Cromer stated that in 1982 and thereafter, inspections of all the school buildings were made; however, such inspections were not on a scheduled basis and were not documented. He emphasized to maintenance people (sometime after summer, 1983 [TR 75]) that they must start keeping the boiler rooms clean; as a result, the boilers were "washed down" with water. In the summer of 1984, it was apparent that the insulation on the boilers had deteriorated, which Cromer attributed to moisture from the boilers being "washed down." An inspection on June 6 and June 7, 1984, located such friable materials in the Alta Brown Elementary and Senior High schools (TR 77-79; R Ex-7). As a result of the 1984 inspection, Phifer executed a 7730-1 (Notice of Inspection for Friable Materials), dated July 25, 1984 (TR 80; R Ex-6). As a result of sampling and testing, it was confirmed that the boiler wrap (insulation) was asbestos-containing (TR 81-82) and, after a permit was

obtained from the KDHE, dated August 17, 1984 (R Ex-10), said asbestos-containing boiler wrap was removed from said schools (TR 83) on a week-end when school was not in session (TR 84).

34. Complainant admits that Respondent is now in compliance with the "EPA Asbestos-in-Schools Regulations", said compliance having been achieved after June 28, 1983, and after the inspection on August 2, 1984 (C's Brief, page 8).

35. While a majority of a school population may not have access to a boiler room or to tunnels underneath buildings, there is always the possibility that maintenance activities can cause the transfer of asbestos-containing materials to a place where the school population will be exposed. Examples include tracking of such materials (inadvertently or unknowingly dropped or disturbed or purposely placed in containers that do not prevent a dispersion of some amount of said materials) in areas frequented by the school population (TR 38; 47 FR 23364).

36. EPA's policy from July, 1983, until June, 1984, was to issue a Notice of Noncompliance (a letter of warning assessing no penalties), listing violations detected at the school district and affording the school district a limited time, usually thirty (30) days, to provide proof of compliance. This policy was changed in June, 1984, because, on the basis of data compiled nationwide, it did not prove to be effective in accomplishing its objective, as an increase, rather than a decrease, in violations was noted (TR 52-53; 47 FR 23362).

37. Removal of asbestos-containing material was not required by any rules pertinent to the Complaint made by EPA or the requested hearing held on November 26, 1985 (TR 54).

38. EPA operates a Technical Assistance Program (hereinafter "TAP"), available to any and all school districts, to give advice and to answer inquiries concerning compliance with "Rules for Identification and Notification of Friable Asbestos-Containing Materials in Schools." Respondent used TAP in 1979 (TR 59; 47 FR 23361).

39. Cromer testified that there were portions of subject buildings that he omitted inspecting, e.g., steam pipes, boilers and utility tunnels, which were considered "very difficult to get to", but which he considered a "vulnerable area." (TR 71).

40. Subsequent to the EPA inspection on August 2, 1984, Respondent set up a program whereby the asbestos-containing materials were removed and its buildings are regularly inspected quarterly for "friable material"; custodians have been instructed to be observant during their daily clean-up duties, and principals have been asked to make monthly inspections (TR 73).

41. Inspections on June 6 and 7, 1984, revealed friable materials in the boiler rooms at Alta Brown Elementary School and the senior high school (TR 79), which, after sampling and testing, were found to be asbestos-containing (TR 81; R Ex-8).

42. In July, 1984, Respondent employed architects to prepare specifications for bids to remove said materials from the boilers (TR 81; R Ex-9). A permit from KDHE, authorizing disposal of said material after its removal, was obtained (R Ex-10) and said materials were removed and disposed of in August, 1984 (TR 83).

43. Upon finding that said asbestos-containing materials were present in Respondent's school buildings, all school employees were notified by memo (R Ex-11; TR 85), as were the principals of Alta Brown Elementary School and the senior high school (R Ex-12 and Ex-13).

44. EPA's Penalty Policy was adopted on June 22, 1984. The alleged violation that Respondent failed to meet the 1983 deadline for compliance with the Asbestos in Schools Rule is considered a minor violation because the Respondent had made good-faith efforts to address the asbestos issue after the said deadline (TR 41). The alleged violations of failure to warn (employees by posted notices pursuant to §763.111) and notify (the PTO or parents) were each considered significant. Under the Penalty Policy Matrix, minor violations are assessed a $1,300 civil penalty; significant violations are assessed a $6,000 civil penalty (TR 40; 52).

45. Samples of the boiler pipe wrappings, removed from subject buildings of Respondent in 1984, were analyzed for asbestos type and percentage by Midwest Research Institute in Kansas City, Missouri, and were found to contain, by volume, 50% to 85% asbestos (C Ex-5).

## CONCLUSIONS OF LAW

1. The rule here applicable is that provided in 40 C.F.R. Part 763, Subpart F §763.100 et seq.) which requires local education agencies ("LEA"), including Respondent, to identify friable asbestos-containing material . . . by visually inspecting (§763.105) (their school buildings) for friable materials, sampling such materials (§763.107), having samples analyzed (§763.109) and the further requirements as are set forth in §763.100 (Scope and Purpose) providing for warning and reducing exposure of the public to such materials by issuing Notices supplying pertinent information respecting the health effects of the presence of said materials in said buildings, and to keep records of such inspections, sampling, analysis accomplished and the Notices thereof so given (§763.111, §763.114).

2. Respondent is authorized to contractually delegate its duties under said rule, but is responsible for proper performance of such duties (§763.100; TR 57).

3. Intent to violate is not an element of any violation for which civil penalties are assessed (see §16[a], TSCA, 15 USC 2615[a]; cf. 15 USC 2615[b]); however, intent or the absence thereof may be shown as an aggravating or mitigating circumstance attendant to such violation.

4. Respondent had a duty to inspect each of its school buildings, including maintenance, storage or utility facilities essential to their operation, to locate all friable material (§763.103[h][5]; §763.105]).

5. Respondent's failure to locate subject friable asbestos-containing materials and to comply with §763.105, §763.107, §763.109, §763.111 and §763.114 on or before June 28, 1983, supports the charges of violations set forth in the Complaint (47 FR 23360; 47 FR 25145; §763.115).

6. Complainant has, on this record, made a prima facie case in showing the existence, in 1984, of asbestos-containing materials in Respondent's Alta Brown Elementary School and Garden City Senior High School. Respondent has the burden of presenting and going forward with any defense to the allegations set forth in the Complaint (Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, etc., 40 CFR Part 22, §22.24).

7. Any Form 7730-1 (Report of Inspection for Friable Asbestos) prepared by Respondent and dated in 1982 (R EX-5) which evidences that no asbestos-containing materials were present in July, 1982, does not reflect that a proper and adequate inspection, as required by applicable regulations, was then made, as the substance of said Form 7730-1 is directly refuted by Form 7730-1, prepared by Respondent on July 25, 1984, which evidences, after inspection, that asbestos-containing materials were present (R Ex-6; TR 71).

8. The proper designation, by Agency regulations, of certain records to be kept necessarily implies an obligation to produce them (In the matter of Kansas City Star Co., citing in re Grand Jury Proceedings, 601 F.2d 162 [1979]).

9. An appropriate civil penalty is properly determined if it is in accord with pertinent provisions of the Toxic Substances Control Act (TSCA), regulations promulgated pursuant thereto, and Agency policy, compatible with applicable regulations, which has been consistently adhered to by the Agency (see memorandum dated November 16, 1983: "Settlement with Conditions" ["SWC"]).

DISCUSSION

I have found that, on this record, a civil penalty should be assessed against Respondent for the reasons given hereinbelow. The amount of said civil penalty has been determined pursuant to 40 C.F.R. 22.27(b) which provides that said amount must accord with the criteria provided for in the Act, and upon consideration of the Agency Guidelines.

Respondent, in its defense, stresses that it first discovered subject friable materials on June 6 and 7, 1984 (R Ex-7), and the testimony of its Director of Plant Facilities, Cromer, that the boiler wrap had not previously been in a friable condition and that he attributed its "deterioration" to the fact that custodians had "washed down" the boilers as a means of cleaning them (TR 77, cited in Respondent's Brief, page 13). Respondent's premise is that the genesis of its duties under the Act was the "discovery" of said asbestos-containing friable materials. With this, I do not agree.

To hold that said 1982 inspection report relieves Respondent of its duties to protect the public from asbestos-containing material, admittedly present at the time of the report, would completely emasculate the Act. To the contrary, regulatory provisions are liberally construed and broadly interpreted to effectuate the purposes of the Act. On that basis, I find that said 1982 "inspection", if made as contended by Respondent 2/, was not an inspection as contemplated by

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2/ Complainant objected to the consideration of Respondent's Exhibit 6 (EPA Form 7730-1 [Inspection 7/29/82]) because said document was not furnished or claimed to exist until after said EPA Inspection of August 2, 1984.

the applicable regulations. Admittedly, boiler wrap and the utility facilities were not then inspected. 40 C.F.R. 763.103(d) defines friable material as any material applied onto . . . piping, ductwork or any other part of the building structure which, when dry, may be crumbled, etc. §763.105(b)(5) includes maintenance, storage or utility facilities in the definition of "school buildings." Cromer recounted that an "inspection" was made in 1982, but that such inspection did not include steam pipes, boilers or utility tunnels (TR 71; Finding 25). It logically follows that the 1982 condition of the subject materials was not then determined by Cromer or anyone else. It was after Summer, 1983, and after Cromer attended a seminar in Chicago (TR 75), that he started to stress maintenance inspections, by discussions mainly with plumbers and electricians, generally on the need . . . to identify areas of concern (TR 76).

Cromer stated (TR 71):

> "I did not crawl tunnels. I did not look at steam pipes. The issue of steam pipes came up and we realized that that was a vulnerable area . . . There were a lot of conditions that happened . . . that we should be looking at our steam pipes and our boilers and our utility tunnels."

It is thus apparent and I here find that the "discovery" made in 1984 should have been made earlier and would, upon proper inspection, have been made prior to June 28, 1983. The procedures followed so strictly - at a time subsequent to subject EPA inspection - would have been instituted in a timely manner and thus have afforded protection to the public as contemplated by the Act and applicable regulations.

Any and all contentions of the parties presented for the record have been considered and any suggestions, requests or arguments inconsistent with the foregoing Initial Decision are hereby denied.

CIVIL PENALTY

40 C.F.R. 22.27(b) provides that I shall determine the dollar amount of the recommended civil penalty to be here assessed in accordance with any criteria set forth in the Act and that I must consider any civil penalty guidelines issued under the Act. Section 16 of the Act, 15 USCA §2615(a)(2)(B) provides that:

> ". . . in determining the amount of a civil penalty (I) shall take into account the nature, circumstances, extent and gravity of the violation or violations and with respect to the violator, ability to pay, effect on ability to continue in business, any history of prior violations, the degree of culpability, and such other matters as justice may require."

The nature and circumstances of the violations have been hereinabove described. Whereas, the friable material was discoverable, its accessability was difficult. Its asbestos-containing character made it a most hazardous material. Upon consideration of the foregoing, I conclude that the gravity of the violation was properly characterized by the Agency as being "significant." I have further considered Respondent's history of abating such hazardous material that was readily apparent, e.g., the abatement in 1979 of the "asbestos problems" at Abe Huber (gymnasium and hallways) and Alta Brown (classroom).

I have further considered and take notice that the Agency has, for settlement purposes, reduced penalties substantially on the condition that compliance with the regulations is fully achieved. 3/ This policy is altogether consistent

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3/ Settlement with Conditions (SWC), TSCA Guidance Manual and Policy Compendium, including in-house memorandum, November 16, 1983.

with the provisions of the regulations to the effect that if no asbestos-containing materials are found ("the focus of the rules"), the school is exempt from the recordkeeping and notification requirements, provided that the determination that a friable material does not contain asbestos is based on at least three samples of said friable material (§763.117[a][3]). Further, if, in the time prior to June 28, 1983, the LEA has eliminated all such materials previously discovered, e.g., by removal, Subpart F of Part 763 does not apply (§763.117[c][2]; 47 FR 23367, May 27, 1982).

Upon consideration of the provisions of the criteria set forth in the Act and upon consideration of the Agency guidelines, I find that Respondent, by its action in completely removing the offending materials and by formulation of its program to exert a systematic effort to comply with all applicable regulations by regularly making inspections for the protection of its employees, its students and the public in general, comes within the policy adhered to by the Agency. In the premises, I find that an appropriate penalty to be assessed against Respondent is 10% of that proposed by subject Complaint, or a total sum of $1,330.00.

Upon consideration of the post-hearing submissions of the parties, the conclusions reached and in accordance with the criteria set forth in the Act and the provisions contained in regulations promulgated pursuant to the Act, I recommend the adoption by the Administrator of the following:

FINAL ORDER 4/

For violation of Section 15 of the Toxic Substances Control Act (15 USC 2614) and regulations promulgated thereunder (40 C.F.R. Part 763, Subpart F), as charged by Counts I, II and III of the Complaint, a civil penalty in the total sum of $1,330.00 is assessed against Respondent Garden City Unified School District 457, in accordance with Section 16(a) of the Act (15 USC 2615[a]). Payment of the full amount of the civil penalty shall be made, within 60 days of the service of the Final Order upon Respondent, by forwarding a certified or cashier's check in the amount of $1,330.00, payable to the Treasurer of the United States, to

Mellon Bank
U.S. EPA - Region VII
Regional Hearing Clerk
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251.

It is so ORDERED.

DATED: March 19, 1986

Marvin E. Jones
Administrative Law Judge

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4/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the Final Order of the Administrator (see 40 C.F.R. 22.27[c]).

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110), EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: March 19, 1986

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

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| IN THE MATTER OF<br><br>GARDEN CITY UNIFIED SCHOOL DISTRICT #457,<br><br>RESPONDENT. | Docket No. TSCA-VII-84-T-273<br><br>CERTIFICATION OF SERVICE |

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by the Honorable Marvin E. Jones along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; that a copy was hand-delivered to Counsel for Complainant, Rupert G. Thomas, Office of Regional Counsel, Environmental Protection Agency, Region 7, 726 Minnesota Avenue, Kansas City, Kansas 66101; that a copy was served by certified mail, return receipt requested on Respondent's attorney, Ward Loyd, Esquire, Loyd & Grisell, Suite 316 Warren Building, 103 West Chestnut Street, Garden City, Kansas 67846.

If no appeals are made (within 20 days after service of this Decision), and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 20th day of March 1986.

Diana G. Reid
Regional Hearing Clerk

cc: Honorable Marvin E. Jones
Administrative Law Judge
U. S. Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101