7/31/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Henrico County Public Schools,	)	Docket No. TSCA-III-164
	)	
Respondent	)	

Toxic Substances Control Act - Asbestos-In-Schools Rule - Rules of Practice - Accelerated Decisions - Where Respondent had inspected its school facilities for the presence of friable materials and encapsulated materials determined to contain asbestos prior to the June 28, 1983, deadline for compliance with the Asbestos-In-School Rule (40 CFR Part 763, Subpart F), exemption in 40 CFR 763.117(c)(2) applied and complaint based on contention exemption was not applicable, because encapsulation was not permanent, was dismissed.

Appearance for Complainant: Henry H. Sprague, Esq.
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Appearance for Respondent: J. T. Tokarz, Esq.
Henrico County Public Schools
Highland Springs, Virginia

Accelerated Decision

This proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) was commenced on December 20, 1985, by the issuance of a complaint charging Respondent, Henrico County Public Schools, with violations of the Act[1/] and applicable regulations, 40 CFR Part 763, Subpart F. The complaint alleged, inter alia, that in an inspection of two of Respondent's schools (John Randolph Tucker (JRT) High School and Montrose Elementary School), conducted on September 19, 1985, friable asbestos-containing materials were discovered,[2/] but that records maintained at Respondent's central administrative office failed to include information required by 40 CFR 763.114(b)(3), to-wit: the square footage of friable asbestos-containing materials in each school and the number of employees who regularly

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1/ Section 15 entitled "Prohibited Acts" (15 U.S.C. 2614) provides in pertinent part:

> It shall be unlawful for any person to--
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> (1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6;
>
> * * *.

The instant rules were promulgated under § 6(a) of the Act.

2/ The inspection report, Complainant's proposed Exhibit 1, reflects that friable materials were present in auditorium ceiling and on piping and boiler at JRT High School and on boiler and piping at Montrose Elementary School. Additionally, the report states that encapsulation of friable asbestos materials was not holding in damaged spots on ceiling and rear wall in auditorium at JRT High School and that encapsulation was not holding or was incomplete on piping at Montrose Elementary School. Respondent operates 50 schools (250 school buildings) and Complainant speculates that similar conditions may prevail at other schools (Initial Brief at 10, note 3). Purchase orders attached to Respondent's answer indicate that asbestos insulation has been removed from tanks and piping in field house and gym at JRT High School and from boilers and piping at Montrose Elementary School.

work therein. The complaint further alleged that Respondent had failed to sample friable materials at JRT High School as required by § 763.107(a); had failed to have the samples analyzed for asbestos as required by § 763.109; had failed to post in the primary administrative and custodial offices and in faculty common rooms "Notice To School Employees" (EPA Form 7730-3) announcing the presence of friable asbestos-containing materials; had failed to provide to all persons employed in said school a written notice of the location, by room or building, of all friable asbestos-containing materials; had failed to provide to all custodial or maintenance employees "A Guide For Reducing Asbestos Exposure" (EPA Form 7730-2) and had failed to provide notice of the results of inspection and sampling of friable materials to the appropriate PTA or in the absence thereof, directly to the parents of pupils, all as required by § 763.111. Respondent was also charged with failure to maintain records required by § 763.114 in the administrative offices of JRT High School and Montrose Elementary School and failure to notify the PTA or absent thereof, the parents of pupils, of the results of analyses of friable materials at Montrose Elementary School. For these alleged violations, it was proposed to assess a penalty totaling $13,300.[3/]

Respondent answered, alleging that it had conducted an inspection of all buildings to determine the presence of friable materials prior to the issuance of 40 CFR Part 763, Subpart F on May 27, 1982, and that materials identified as containing friable asbestos were either removed or encapsulated prior to May 27, 1982. Respondent further alleged that it had each sample

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3/ Complainant considers that Respondent's action in removing much of the asbestos-containing materials found during the inspection entitles Respondent to a substantial reduction in the proposed penalty, because it argues on brief that the ALJ should order Respondent to pay a penalty of at least $1,330 (Initial Brief at 10).

of friable materials analyzed for the presence of asbestos utilizing Polarized Light Microscopy. Respondent admitted that it was not in compliance with the notice and recordkeeping requirements of §§ 763.111 and 114. Respondent also admitted to the presence of friable asbestos-containing materials on September 19, 1985, in areas mentioned in the complaint (note 2, supra). It was alleged that the exposure of such materials was the result of deterioration and damage to the encapsulation which had occurred since the last annual inspections on April 29, 1985 (JRT) and December 19, 1984 (Montrose). Respondent insisted, however, that because of its inspection and encapsulation activities, it was entitled to the exemption set forth in § 763.117(c)(2) and, consequently, was not in violation of the Act and regulations.

After an exchange of prehearing information ordered by the ALJ, the parties agreed that this matter could be resolved on the basis of the mentioned prehearing exchanges and the briefs of the parties.4/ In accordance with Rule 22.20 (40 CFR Part 22), this posture of the case is being treated as a motion for an accelerated decision.

Although the parties have not expressly entered into a stipulation of facts, findings proposed by Complainant and Respondent include, in addition to the fact that Respondent is a "local education agency" (LEA) as defined in 40 CFR 763.103(e), that material found to be friable in the two schools here concerned during the EPA inspection on September 19, 1985, had been inspected by Respondent, determined to contain asbestos, and

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4/ Letters from respective counsel, dated June 4 and June 10, 1986.

encapsulated prior to June 28, 1983.5/ Additionally, each parties' proposed findings state that the material was friable as a result of damage to, or deterioration of, the encapsulation.

The section of the regulation (40 CFR 763.117(c)(2)), which Respondent contends exempts it from the requirements of the rule it is charged with violating,6/ provides as follows:

> § 763.117(c): "(2) No provision of this subpart applies to any school if:
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> (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.
>
> (ii) No part of the school building was built before January 1979."7/

Respondent contends that, because it had eliminated friable asbestos materials from the schools here concerned by encapsulation, a method specifically allowed by § 763.117(c)(2)(ii), quoted above, it is entitled to the exemption therein provided and that Complainant cannot prove a violation of the rule by establishing that encapsulation completed prior to the

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5/ Initial Brief of Complainant, dated July 10, 1986, and Rebuttal Brief of Respondent, dated July 24, 1986. Proposed findings do not specifically include date of encapsulation. Respondent has, however, alleged, and Complainant has not disputed, that encapsulation at Montrose Elementary was completed in May 1982 and at JRT High School in December 1982. Although, as published, the rule required compliance with all aspects of Part 763, Subpart F by May 27, 1983 (§ 763.115), the final date for compliance was extended to June 28, 1983 (47 FR 25145, June 10, 1982).

6/ Charges relating to Respondent's alleged failure to inspect and analyze have been dropped (Complainant's Initial Brief at 1).

7/ The schools at issue here were constructed prior to January 1979 and § 763.117(c)(2)(ii) is not applicable.

required date for compliance has been damaged or deteriorated since that date (Initial Brief at 4, 5). Respondent quotes from the preamble to the regulation (47 FR at 23367), which makes it clear that materials can be rendered nonfriable by encapsulation and that once this has occurred the requirements of the rule have been satisfied.[8/] Respondent emphasizes that there is nothing in the language of the rule or the accompanying comments that conditions the exemption on the continued efficacy of the encapsulation, and that the rule does not require elimination of asbestos from school buildings, but only requires recordkeeping and notification, if friable asbestos materials were found during inspection and sampling (Id. at 6). Respondent also points out that the rule does not require continuous inspections and analysis, but one time compliance and argues that this position is supported by the Agency's "Revised Enforcement Response Policy For The

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8/ 47 FR 23367

"* * *

> 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 this 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.

* * * *"

Friable Asbestos-Containing Materials In Schools Identification and Notification Regulation" (June 22, 1984).9/

Complainant says that before promulgating use regulations such as the Asbestos-In-Schools Rule, the Administrator is required by § 6(a) of the Act to find an unreasonable risk of injury to health or the environment from exposure to the substance under consideration and quotes from the preamble to the regulation (47 FR 23361) as to the risks of asbestos exposure (Initial Brief at 3-5). Complainant also says that the purpose of the Asbestos-In-Schools Rule is to identify friable asbestos-containing materials and to notify employees and parents of students of the existence of such materials so that action may be taken to avoid or reduce the risks of asbestos exposure. It argues that the rule should be liberally construed to effectuate this purpose.

Complainant asserts that, in order to fully understand the exemption in § 763.117(c)(2)(i), it is helpful to review the other exemptions in § 763.117. Section 763.117(a) exempts schools from the provisions of §§ 763.105, 763.107 and 763.109 requiring inspection, sampling and analysis of friable materials, provided the schools have been inspected for friable materials and each type of friable material has been sampled and analyzed using Polarized Light Microscopy or Electron Microscopy, prior to the effective date of the rule. This exemption does not apply, if the determination

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9/ Language relied upon is as follows:

The cited policy document provides under "Exemptions" at 2: "Schools which satisfactorily abated (See 'Compliance Assistance Guidelines') asbestos-containing materials before June 28, 1983, are exempt from all requirements of the rule." The mentioned document also provides: "Also, the rule requires that the activities be performed only once. Therefore, there will be no repeat violations" (Id. at 10).

friable material did not contain asbestos was based on fewer than three samples and, of course, the notification and recordkeeping requirements of §§ 763.111 and 763.114 are applicable, if friable asbestos-containing materials were found. In accordance with § 763.117(a)(3), schools in which no friable asbestos-containing materials were found are also exempt from the notification and recordkeeping requirements of §§ 763.111, 763.114 and the compliance requirement of § 763.115, provided the school retains a copy of all laboratory reports and all correspondence with the laboratory concerning samples taken and maintains in the school record a signed certificate to the effect that to the best of the signer's knowledge the school did not contain friable asbestos-containing materials. An exemption is provided in § 763.117(b) for schools which can document that no friable asbestos-containing materials were used in the construction, modification or renovation and in accordance with § 763.117(c)(1), schools are exempt from the inspection, sampling and analysis requirements of §§ 763.105, 763.107 and 763.109, if the school record contains a signed statement certifying that any friable materials will be treated as asbestos containing.

Asserting that Respondent has misread § 763.117(c)(2)(i) quoted above, Complainant contends that the word "elimination" means "complete eradication." It argues that the use of the word "elimination" together with the other exemption provisions in § 763.117, summarized above, strongly imply that mere encapsulation, without a follow-up program to ensure that asbestos remains encapsulated, does not satisfy the elimination requirement (Initial Brief at 9). Complainant emphasizes that encapsulation is rarely permanent and quotes from the preamble to the regulation to the effect that where

encapsulation is undertaken, a program for periodic re-evaluation should be instituted as a check for further damage or deterioration.10/

Complainant argues that an LEA, which identifies friable asbestos containing material, and elects to encapsulate rather than remove the material, is responsible for ensuring that the encapsulation is permanent (Initial Brief at 9, 10). It argues that, if encapsulation is not permanent, the LEA is required to notify employees and parents as required by § 763.111 and keep records of the location of friable asbestos materials as required by § 763.114. According to Complainant, any other result would emasculate the rule and allow poorly encapsulated or damaged material to remain unnoticed and unrecorded, with the consequence that employees and students would be unaware of the risks to which they are being subjected.

Relying to the foregoing arguments, Respondent emphasizes that despite the findings of unreasonable risk of injury to health or the environment, EPA has not required total elimination of asbestos from schools (Rebuttal Brief at 2). Respondent states the belief that the ultimate Agency goal

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10/ The provisions cited is as follows:

"* * *

> EPA strongly recommends that, where a local education agency determines that a management program for friable asbestos-containing material is the most appropriate response, the local education agency should institute a program to advise and educate its employees of the need for caution and proper procedures. Such a management program should also include a provision for periodic reevaluation of the material to determine whether the management program has prevented further damage or deterioration.

* * * *"

(47 FR at 23360).

is elimination of health risk rather that simple notification and record-keeping requirements and that it should be obvious a higher societal benefit can be achieved through abatement activities. It argues that had Complainant's present position been known, i.e., that abatement activities undertaken to comply with the rule do not satisfy its purpose and intent because of subsequent events, such as damage or deterioration, it would have discouraged rather than encouraged, abatement activities with consequent negative effects on health.

Respondent disputes Complainant's attempt to read the word "elimination" in § 763.117(c)(2)(i) as requiring complete eradication, pointing out that "elimination" can be either by removal or encapsulation. Respondent points out that Complainant's acknowledgment "encapsulation is rarely permanent" (ante at 8) cuts against its present argument that elimination means complete eradication. Respondent also points out that the nature of the follow-up program Complainant would require in order for encapsulation to comply with the rule has not been defined either in the rule or Complainant's brief[11/] and that Complainant is attempting to remove encapsulation from the rule by administrative interpretation. Respondent further argues that Complainant's present interpretation of the § 763.117(c)(2)(i) amounts to a partial repeal of the exemption without rulemaking and adequate notice to Respondent and other LEAs (Id. at 5, 6).

In its Reply Brief, Complainant relies on guidance documents, e.g., Asbestos-Containing Materials in School Buildings, A Guidance Document

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11/ Complainant states that as a general matter, inspections performed at reasonable intervals, depending on the quality and condition of the material to be inspected, and continued maintenance or repair of damaged or deteriorating encapsulated asbestos, is all that is necessary to satisfy the elimination requirement of the exemption (Reply Brief at 6, 7).

(March 1979) and Guidance for Controlling Asbestos-Containing Materials in Buildings, EPA 560/5-85-024 (June 1985), to support the proposition that mere encapsulation, without subsequent monitoring and repair, has never been considered to be a viable abatement measure by EPA (Id. at 1-5). Complainant asserts that, because of the health benefits of the rule, exemptions should be narrowly construed and reiterates the argument that, because Respondent's encapsulation activities did not result in the complete elimination of friable asbestos-containing materials from the schools at issue, Respondent is not entitled to the exemption in § 763.117(c)(2)(i).

Discussion

The regulation will not support the interpretation Complainant attempts to place upon it. Section 763.117(c)(2)(i) provides for an exemption from the requirements of 40 CFR Part 763, Subpart F, if the LEA has conducted abatement programs that result in the elimination of all friable asbestos materials either by removal or encapsulation. Obviously, encapsulation is a permissible method of qualifying for the exemption and the word "elimination" must be read in this context. The guidance documents cited by Complainant make it clear that EPA was well aware that encapsulation is rarely permanent, but instead requires continuous inspection and maintenance. It is therefore untenable to suggest that "elimination" as used in § 763.117(c)(2)(i) means complete eradication of friable asbestos-containing materials from schools.

No issue need be or is taken with Complainant's depiction of the findings the Administrator was required to make in order to promulgate the rule at issue under § 6(a) of the Act or of the risks of asbestos exposure. The

rule perhaps could or should have required removal of all friable asbestos-containing materials from schools or stopping short of removal, and recognizing that encapsulation is merely a containment method, specifically set forth requirements for continuing inspection and maintenance of encapsulated materials. Logically, the rule could then have conditioned the exemption on continued efficacy of the encapsulation, i.e., compliance with inspection and maintenance requirements. The problem with Complainant's position is that the rule was not so written--the language of the preamble (note 10, supra) and the guidance documents cited by Complainant constituting recommendations and not requirements of the rule.12/ It is recognized that the language "satisfactorily encapsulated" in the preamble describing the § 763.117(c)(2)(i) exemption (note 8, supra) might be regarded as lending support to Complainant's contention that implicit in the rule is a requirement for continued efficacy of the encapsulation. At most, however, "satisfactorily" implies some minimum standard encapsulation was initially required to meet and inasmuch as the parties have in effect stipulated that friable asbestos materials found in the inspection were the result of damage to, or deterioration of, the encapsulation, the manner in which encapsulation was initially accomplished is not at issue.

Contrary to Complainant's position, the other exemptions in § 763.117, summarized ante at 7, 8, support the conclusion the regulations envision

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12/ Instructive here is the Introduction of the Revised Enforcement Response Policy (note 9, supra) which provides in pertinent part: "* * The inspection and notification requirements of the rule are now mandatory. Certain other activities associated with asbestos in schools, such as abatement procedures, are not requirements of the rule. However, since these activities are often logical consequences of complying with the rule, EPA will continue to offer advice to school personnel on how to control hazards from friable asbestos-containing material through the Regional Asbestos Coordinators."

one-time compliance and that despite the health concerns involved, a prime consideration of the drafters of the rule was to minimize burdens on LEAs. This is evident in the exemption from the inspection, sampling and analysis requirements of §§ 763.105, 763.107 and 763.109 provided in § 763.117(a)(1) for schools which had previously accomplished these activities. Moreover, the problem present here of subsequent damage or deterioration would seem equally likely in a school which had been inspected and found to contain no friable asbestos-containing materials, yet such a school is exempt from the notification and recordkeeping requirements (§ 763.117(a)(3)) and no provision is made for subsequent inspection, sampling and analysis.

In view of the foregoing, it follows that if the Agency is to condition the exemption in § 763.117(c)(2)(i) on continued efficacy of the encapsulation, it must do so by further rulemaking.13/ It also follows that Complainant has not shown a violation of the rule and that the complaint will be dismissed.14/

13/ See, e.g., U.S. Nameplate Company, RCRA (3008) Appeal No. 85-3 (Final Decision, March 31, 1986) (Agency could not use background documents, which were not published in Federal Register, to support contention a listed hazardous waste, F006 wastewater treatment sludges from electroplating operations, included sludges from chemical etching).

14/ Garden City Unified School District No. 457, TSCA Docket No. VII-84-T-273 (Initial Decision, March 19, 1986), cited by Complainant, is distinguishable, because in that case various steam pipes, boilers and utility tunnels had not been inspected by Respondent.

ORDER

The complaint is dismissed.[15/]

Dated this 31st day of July 1986.

Spencer T. Nissen
Administrative Law Judge

15/ In accordance with Rule 22.20(b) this decision is an initial decision, which unless appealed in accordance with Rule 22.30, or unless the Administrator elects, sua sponte, to review the same as therein provided will become the final order of the Administrator in accordance with Rule 22.27(c).