1/15/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
William Garvin, d/b/a Garvin Engineering and Montana School Board Association,	)	Docket No. TSCA-ASB-VIII-90-41
	)	
Respondents	)	

ORDER DENYING MOTION TO DISMISS AND FOR ACCELERATED DECISION

The complaint in this proceeding under section 16 of the Toxic Substances Control Act, issued on May 31, 1990, charged Respondent, Garvin Engineering (Garvin), with violations of the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2641, et seq. and applicable regulations, 40 CFR Part 763, Subpart E. Specifically, the complaint alleged, that Garvin, an "accredited asbestos contractor," performed an inspection and prepared a management plan for at least one school building in the West Yellowstone School District, West Yellowstone, Montana. The complaint further alleged that Garvin, inter alia, failed to properly inspect, sample and assess material in the school building as required by 40 CFR §§ 763.85, 763.86 and 763.88. Additionally, it was alleged that the management plan prepared by Garvin failed to include all information required by 40 CFR § 763.93. For these alleged violations, it was proposed to assess Garvin a penalty totaling $50,000.

Under date of June 20, 1990, Garvin filed an answer denying that he was the contractor who performed any inspection, prepared any management plan, or otherwise contracted with the West Yellowstone School District. It was alleged that the West Yellowstone School District contracted with the Montana School Boards Association (MSBA). Accompanying the answer was a motion to dismiss, based upon the contention Garvin was improperly named as a respondent.

Thereupon, Complainant filed a motion to amend the complaint to name MSBA as a party. Acknowledging that MSBA was the contracting party, the motion alleged that Garvin was retained due to his specific asbestos knowledge, training and experience, as required by statute and, that Garvin retained control over the work performed, such that an independent contractor relationship may have existed. The motion to amend the complaint was granted by an order, dated August 29, 1990.

On August 16, 1990, Garvin filed a "Reply Brief In Support of Motion To Dismiss, and Request for Accelerated Decision." Garvin reiterated that he did not perform any inspection, prepare any management plan, or otherwise contract with the West Yellowstone School District concerning matters alleged in the complaint. He states that the report and plan for West Yellowstone were prepared by MSBA, not Garvin.

Garvin points out that the regulations he is accused of violating, 40 CFR §§ 763.85, 763.86, 763.88 and 763.93, impose duties upon persons performing an inspection, accredited inspectors

and accredited management planners, i.e., those who do the work. He alleges that in this case, the individual who performed the work is Paul Mitchell.[1/] Garvin says that as Mr. Mitchell's employer, MSBA is perhaps legally responsible for his performance under the doctrine of respondent superior. Garvin asserts, however, that he was only another employee of MSBA as far as the West Yellowstone project was concerned. Acknowledging that he was MSBA's "Asbestos Program Director," described as "a sort of foreman," Garvin argues that Mr. Mitchell was not an agent of his, but of MSBA. Garvin contends that there is absolutely no authority under the relevant regulations or common law for fastening liability on him and that the complaint as to him should be dismissed.

In an affidavit attached to the brief, Mr. Garvin states that he does business as Garvin Engineering and that his employment agreement with MSBA, copy attached as Exhibit A, was in force during the time MSBA performed services for the West Yellowstone School District. Any responsibilities he had concerning MSBA and the West Yellowstone School District are assertedly governed by that agreement. He further states that payments received from MSBA under the agreement were subject to withholding of income and

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[1/] Exhibit B to Mr. Garvin's affidavit is an undated certification signed by Paul F. Mitchell, Montana Accreditation No. I-150, detailing activities performed in connection with an inspection of the West Yellowstone School under 40 CFR § 763.85. The certification states, inter alia, that a copy of the inspection report was submitted to the designated person under 40 CFR § 763.84. The certification does not use the pronoun "I" and no mention is made of a management plan in accordance with 40 CFR § 763.93.

social security taxes, that MSBA paid to cover him under its workmen's compensation plan and also for unemployment insurance coverage. He argues that his relationship with MSBA was that of an employer/employee rather than an independent contractor, and that the person who performed the work for the West Yellowstone School District was Paul Mitchell (supra at note 1), an EPA accredited inspector, and an employee of MSBA for that purpose. Mr. Garvin denies that Mr. Mitchell received any compensation from Garvin Engineering for work at the West Yellowstone School District.

The mentioned "Employment Contract" is dated February 19, 1988, and is between MSBA as "employer" and William H. Garvin as "employee." The contract specifies that the employee is to be designated as the employer's "Asbestos Program Director" and, as such, will supervise the employer's Asbestos Program within the guidelines of an attached "Asbestos Program Policy Statement." The contract provides that the employee shall have authority to hire and fire employer's other workers in the mentioned program and that the employee shall perform work outlined in contracts between MSBA and school districts. Such work is to include on-site inspection, collection of bulk samples for analysis, and providing school districts with comprehensive management plans acceptable to the Montana Department of Health and Environmental Sciences. The employee is to report to the employer's "Executive Director."

Regarding compensation, the contract provided that the employee would be paid an hourly rate plus a bonus of 66 percent of

"profit" calculated as specified in the contract. The bonus is to be paid plus all withholding required by law.

Responding to the motion, Complainant reiterates that an independent contractor relationship may have existed between Garvin and MSBA. Complainant alleges that those Garvin hired, fired and controlled worked at their own pace, determined their own daily schedules and brought with them their own personal tools, i.e., respiratory protective equipment, sampling containers, etc. Moreover, it is alleged that Paul Mitchell, an inspector at West Yellowstone, corresponded with the school as an employee of Garvin. The reference is to a letter on the letterhead of Garvin Engineering, dated July 12, 1988, signed by Paul F. Mitchell, Asbestos Program Administrator, to Mr. Donald Black, Superintendent, West Yellowstone School District No. 69. The letter states that the report of asbestos content of bulk samples submitted for analysis from the West Yellowstone School buildings was received on July 11, 1988, and that the analysis indicates there is asbestos in the building. The letter points out that AHERA regulations require the School District to begin a regular operation and maintenance program specifically directed toward all areas containing asbestos. The location of asbestos containing material (ACM) was pointed out and Mr. Black is informed that the response actions outlined in 40 CFR § 763.90(d)(1)(2) should be adopted. The letter recommends that the ACM be removed and states that this recommendation will appear in the management plan.

Complainant notes that AHERA requires local education agencies (LEA's) to use "accredited asbestos contractors" to inspect school buildings, prepare management plans and to design or conduct response actions. According to Complainant, the MSBA is not an LEA or an accredited asbestos contractor, but an association of LEA's. LEA's who were or are members of MSBA were offered the services of Garvin Engineering to assist them in complying with AHERA. Complainant argues that the employment agreement with Garvin indicates that he was given a great deal of authority and does not indicate MSBA controlled his activities or even reviewed them to any degree. According to counsel for Complainant, she has been unable to locate Paul Mitchell.[2/] Complainant emphasizes, however, that Mr. Mitchell clearly had access to Garvin Engineering letterhead and that the secretarial initials appearing at the base of the letter indicate that someone at Garvin Engineering assisted him in drafting and sending the letter. It is argued that, contrary to the Garvin's assertions in the motion for an accelerated decision, these facts indicate an employer/employee relationship between Garvin and Mitchell. In any event, Complainant argues that there are issues of material fact as to the relationship between Garvin, Paul Mitchell and MSBA such that a motion for an accelerated decision is inappropriate and that the motion to dismiss should be denied.

[2/] In a letter to the ALJ, dated November 30, 1990, counsel for Garvin states that he has recently located Paul Mitchell and notes that counsel for all parties may wish to interview him.

Garvin filed a reply brief in support of motion to dismiss on September 18, 1990, accompanied by an affidavit of even date by William H. Garvin. Mr. Garvin acknowledges that during the period at issue, Paul Mitchell was an employee of MSBA on some projects, an employee of Garvin on other, separate projects and that, in addition, Mitchell worked on his own for still other school districts. MSBA was allegedly Mitchell's only employer for the West Yellowstone School District project. As a sometime employee of Garvin Engineering, Mitchell was authorized to use Garvin Engineering stationery for some projects. Mr. Garvin explains that a secretary was an employee of Garvin Engineering and of MSBA and worked on projects for both employers and was paid separately for work done for that employer. He asserts that Mitchell was not authorized to use Garvin Engineering stationery for West Yellowstone, because MSBA, not Garvin, had the contract for that project.

D I S C U S S I O N

Section 15 of the Toxic Substances Control Act (15 U.S.C. § 2614) provides that "(i)t shall be unlawful for any person to--(1) fail or refuse to comply with . . . . (D) any requirement of subchapter II of this chapter or any rule promulgated or order issued under subchapter II of this chapter, . . ."

Subchapter II of this chapter in the quoted language is the Asbestos Hazard and Emergency Response Act of 1986 (15 U.S.C. § 2641, et seq.). Although the penalty provision of AHERA (15 U.S.C. § 2647) refers only to LEA's, the TSCA civil penalty provision (15

U.S.C. § 2615(a)) provides in pertinent part that "(a)ny person who violates a provision of section 2614 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." The Act does not define person. See however, the definition of person in the PCB Rule, 40 CFR § 761.3,[3/] and there can be little doubt that Respondent, William Garvin, d/b/a Garvin Engineering, is a person within the usual definition of that term. Therefore, Garvin can be liable for violations of AHERA.

In the preamble to the regulation implementing AHERA (52 Fed. Reg. 41826 et seq., October 30, 1987), the Agency at 41842-843 discussed the contention that Title II of TSCA (AHERA) did not allow EPA to assess penalties against individuals. The provision of section 15 quoted above was cited and it was concluded that violations of Title II regulations were subject to civil and criminal penalties under section 16 of Title I. It was noted, however, that this liability was qualified insofar as LEA's are concerned by section 207 (15 U.S.C. § 2647(b)), providing in effect that LEA's were not liable under Title I for violations of Title

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[3/] "Person" is defined in 40 CFR § 761.3 as follows:

> "Person" means any natural or judicial person including any individual, corporation, partnership, or association; any State or political subdivison thereof; any interstate body; and any department, agency, or instrumentality of the Federal Government.

II.[4] The Agency emphasized that section 207 did not provide any exemption from Title I provisions "for inspectors, management planners or any other person other than an LEA that has (sic) responsibility under TSCA Title II." (emphasis supplied). The Agency concluded that individuals other than LEA's that violate Title II regulations are subject to any of the penalties under Title I.

The fact that the statute applies to any "person" who fails or refuses to comply with any requirement of TSCA Title II (AHERA) or rule promulgated thereunder indicates that it is not essential that Garvin be in an independent contractor relationship with MSBA in order to be held liable for the violations alleged in the complaint. Indeed, the language "any person" could be construed to make all employees of a contractor liable for penalties for violations of AHERA regulations. This view is seemingly confirmed by the regulation preamble language (52 Fed. Reg. at 41843) providing in effect that inspectors, management planners or any other person having responsibilities under TSCA Title II [may be liable for penalties for violations thereof in accordance with Title I]. A fortiori would this apply to a supervisory employee such as Garvin.

In view of the foregoing, the motion to dismiss will be denied. It is also apparent that there are sufficient questions as

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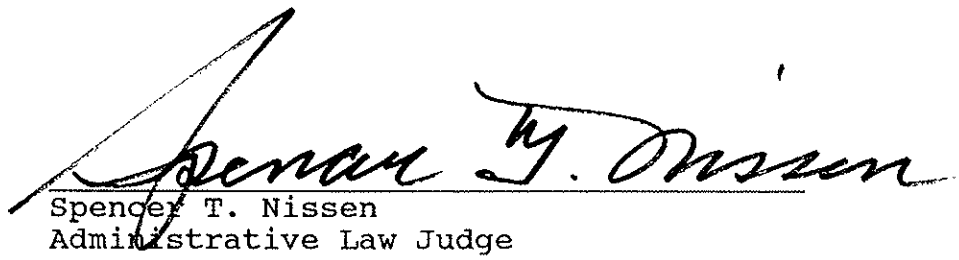
[4] Because AHERA has a penalty provision specifically applicable to LEA's (15 U.S.C. § 2647), it seems obvious that the purpose of this provision was to preclude LEA's from being assessed penalties under both Title I and Title II.

to the relationship between MSBA, Garvin and Paul Mitchell as well as the extent, if any, by which Garvin supervised Mitchell's work as to preclude granting the motion for an accelerated decision.

O R D E R

The motions to dismiss and for an accelerated decision are denied.[5/]

Dated this 15th day of January 1991.



Spencer T. Nissen
Administrative Law Judge

Enclosure
52 Fed. Reg. 41842-843

[5/] Counsel for Complainant is directed to file a report as to the status of settlement with MSBA on or before January 28, 1991.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION TO DISMISS AND FOR ACCELERATED DECISION**, dated January 15, 1991, in re: William Garvin, d/b/a Garvin Engineering and Montana School Board Association, Dkt. No. TSCA-ASB-VIII-90-41, was mailed to the Regional Hearing Clerk, Reg. VIII, and a copy was mailed to Respondents and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Secretary

DATE: January 15, 1991

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plan has not changed since the previous notification. The purpose for the annual notification is to ensure that parents and employees new to the LEA each year have an opportunity to be informed about the availability of the plan. Other commenters suggested that annual notification about the plan should include any asbestos abatement planned for that year, and that the notification requirement be expanded to inform parents whenever actions are taken under the management plans. EPA believes that these ends are achieved in a less burdensome fashion through § 763.84(c), which requires that the LEA inform workers and building occupants, or their legal guardians, at least once each school year about inspections, response actions, and post-response action activities, including periodic surveillance activities that are planned or in progress.

Regarding access to the plan, commenters suggested the plan required to be maintained at the individual school should not be the plan for the entire LEA, but only the plan for that school. The final rule has been clarified to specify that a school needs to have available only that part of the LEA's plan which pertains to that school. Another comment regarding access to the plan came from private school groups interested in limiting access to parents, students, and employees, thereby excluding the general public. EPA believes that this is contrary to Title II, section 203(i)(5), which states that the plan shall be available "for inspection by the public, including teachers, or other school personnel, and parents." Since persons involved with the school are only among those "included" in the public, EPA interprets the statute to preclude limiting access to all other members of the public.

J. State Waivers

Commenters suggested that the opportunity for a public hearing regarding a State's request for waiver should be granted upon request, rather than in response to a written request which details specific objections, as required in the proposal. EPA believes that by requiring a written statement, it is ensuring that hearings have been requested for a valid reason, thereby discouraging individuals from arbitrarily or capriciously requesting a hearing.

Comments were also received which suggested that documents submitted by States seeking waivers should be made public. State waiver requests will be made available as part of the public record required when EPA issues a notice in the Federal Register announcing receipt of the request and opportunity for public comment.

Commenters suggested that waiver requests from local governments should be permitted. Section 203(m) of Title II is clear in limiting waiver requests to States which have established and are implementing a program of asbestos inspection and management.

Commenters suggested that waivers should be granted to programs which are "substantially equivalent" to the regulation, rather than "at least as stringent." Section 203(m) of Title II clearly states that waivers are to be granted to programs "at least as stringent."

Commenters suggested that States with programs requiring only inspection of friable materials be allowed to seek waivers. The Agency believes that section 203(m) of Title II, which states that EPA "may waive some or all" of the regulatory requirements of Title II allows States which require inspection of friable materials in a manner at least as stringent as section 203 of Title II to be granted a waiver. The LEAs of that State would still be required to comply with the Title II requirements for inspection of nonfriable materials as well as all other Title II requirements for which the State did not have a program at least as stringent.

Other comments on the State waiver provisions will be considered as they are raised in proceedings affecting individual States.

K. Exclusions

Comments on the proposed exclusion criteria ranged from general support to opposing any exclusions. Some commenters indicated EPA's 1982 rule was frequently not complied with, dealt only with friable ACM, and the inspectors were not required to have accreditation. As a result, these commenters believe few if any exclusions could be granted based on the 1982 rule. Several commenters believe the term "substantial compliance" is vague and unenforceable. In addition, other commenters agreed that the requirement in the proposed rule to assess friable ACM would require inspectors to visually inspect all areas anyway. Lastly, some commenters suggested that requiring an accredited inspector to determine whether the LEA qualifies for an exclusion is too stringent and thus, unreasonable.

TCSA Title II directs the Agency to promulgate regulations which will provide for the exclusion of any area of a school building from the inspection requirements. If LEAs were required to repeat actions conducted properly in the past, the Agency would place an unnecessary burden on those LEAs and penalize LEAs which made a good faith effort to address asbestos hazards in their building. EPA believes a number of States and localities have developed inspection programs in recent years that are similar to Title II. In addition, LEAs that complied with EPA's 1982 rule could receive an exclusion from part of the final rule's requirements. For example, friable material sampled and found to contain asbestos on the ceiling of the cafeteria would not have to be re-sampled. Although friable ACBM must be assessed even if previously identified, the above example illustrates a savings to the LEA.

"Substantial compliance" allows previous sampling that was done in a random manner with sufficient samples to be adequate to determine no ACBM is present. EPA believes previous adequate inspection and sampling efforts conducted by LEAs should not prove worthless. For example, if a LEA had records that it took three random samples in a 1,500 square foot classroom to comply with EPA's 1982 rule or a State law, and all samples were analyzed negative for asbestos, an accredited inspector may determine that this is sufficient to indicate no asbestos is present even though the current rule would require five samples for the same classroom.

EPA believes only an accredited inspector has the training necessary to determine whether previous inspections and sampling were adequate. EPA has evidence to suggest that many inspections performed under the 1982 rule were conducted by persons with little or no inspection training. If these same individuals were responsible for determining the validity of previous inspections, large areas of schools may not be examined by accredited inspectors. In many respects, this would defeat the purpose of TSCA Title II.

L. Enforcement

Some commenters stated that the "Compliance and Enforcement" section of the proposed rule (§ 763.97) incorrectly describes the provisions of TSCA Title II and that the final rule should explicitly state the following points. First, LEAs that violate the regulations under Title II are not liable under any enforcement provision of Title I. Second, Title II does not allow EPA to assess penalties against individuals. Third, criminal penalties are not permitted for violation of Title II.

EPA disagrees. The provisions of the "Compliance and Enforcement" section

are in accordance with applicable law, as discussed below.

Section 3 of AHERA, "Technical and Conforming Amendments," amends section 15(1) of TSCA Title I to provide that it is unlawful for any person to fail or refuse to comply with any requirement of TSCA Title II or any rule promulgated or order issued under Title II. Therefore, violations of Title II regulations, published in this document are generally subject to the civil and criminal penalties under section 16 of Title I and to civil injunctive actions under section 17 of Title I. This liability is qualified, however, by section 207 of Title II which describes LEA civil liabilities for violation of regulations and provides that LEAs are not liable for any civil penalty under Title I. Section 207, however, does not alter the criminal liabilities of Title I or the injunctive provisions of section 17 of Title I. Nor does section 207 provide any exemption from Title I provisions for inspectors, management planners or any other person other than an LEA that has responsibilities under TSCA Title II. Finally, regardless of the provisions of TSCA, applicable case law provides that liability for actions of organizations may extend to responsible officials.

Thus the three points noted in the comments are wrong. First, LEAs that violate Title II rules are liable for criminal penalties under section 16 of Title I and are subject to injunctive relief in Federal District Courts under section 17 of Title I. Second, individuals may be liable for violating TSCA Title II regulations. Individuals other than LEAs that violate Title II regulations are subject to any of the penalties under Title I, and responsible LEA officials may be liable for any LEA violation of Title II. Third, the effect of the conforming amendments to TSCA Title I is that criminal penalties may be assessed for violation or Title II.

M. Other Issues

1. *Cost estimates for inspection.* Several commenters, ranging from school districts to independent consultants, expressed concern that the economic impact analysis of the proposed rule underestimated the cost of inspecting for ACM. Comments claimed that labor rates and time required to conduct inspections were too low.

EPA agreed with these comments. As a result the Agency's estimates for the final rule increased due to an update of unit labor costs and a small increase in the time estimated to perform several inspection activities. As a result the estimated total cost for all inspection activities increased from the proposal to the final rule from approximately $58.2 million to approximately $78.5 million. The cost for the building walkthrough and visual inspection, assessment, and mapping and reporting activities increased, while the cost estimates for bulk sampling and analysis remained the same. The total inspection costs are now estimated to be $1,144 for public primary schools, $1,627 for public secondary schools and $1,587 for private schools.

2. *Cost estimates for management plans.* A number of commenters expressed concern that the proposed rule underestimated the cost of developing management plans due to low assumptions for labor rates and time needed to prepare the plan. EPA also received comments that training and recordkeeping costs were too low. These costs are considered by EPA as part of the cost of the management plan implementation. Several commenters also expressed concern that EPA underestimated the burden associated with the state review of management plans.

EPA agrees that labor costs and time needed to prepare plans were too low in the proposal and has increased these estimates. EPA has also increased the cost for training by raising labor rate estimates and including travel expenses in the cost of training. As a result, the average costs for first year development and implementation of a management plan for a typical school is estimated to be $3,270 for a public primary school, $4,521 for a public secondary school and $4,460 for a private school. The total cost for development and implementation of management plans increased from $970.8 million in the proposed rule to $1,272 million in the final rule.

With respect to the cost to States of reviewing management plans, EPA has not substantially changed its estimates. While the proposed rule stated a range of $63 to $95 for a State to review a plan, the final rule estimates this cost at approximately $77. The plan review burden will vary with the different number of schools found in each State. For example, California, with an estimated 10,932 schools, would incur a review cost of roughly $842,000. Delaware, with an estimated 288 schools, would incur a cost of about $23,000. States will incur this burden within the 90-day review period specified in the law. The burden for each State, if it must review many plans, may be substantial. However, this burden is imposed by statute.

3. *Costs for operations and maintenance (O&M) programs.* EPA received a comment that it should not have included a cost for levels of overhead and contingency costs for school O&M programs because schools are not run like a business and would not charge themselves overhead. In addition, the comment argued that EPA's assumed rate of three minor fiber release episodes per school per year was too high. It was also argued that EPA should not have included an opportunity cost associated with O&M work, since schools would not actually spend money on many O&M activities but would redirect their employees' activities. Finally, the commenter identified a mistake in the calculations of the cost of consumable supplies used in O&M programs.

EPA agrees that schools would not incur overhead and contingency costs for O&M work. EPA used these indirect costs to calculate the expenses associated with the incremental utility, payroll, and other expenses attributable to an O&M program. EPA believes that these estimates of indirect rates are reasonable.

EPA slightly modified its assumptions with respect to fiber release episodes. However, this change did not have a significant impact on the total cost of O&M programs.

With respect to using an opportunity cost approach in the calculation of O&M costs, EPA believes that these costs are, indeed, a real cost of conducting O&M. However, the Agency acknowledges that some portion of the O&M cost may not result in actual expenditures by a school if the school chooses to give up some other activity to absorb the additional O&M activity. Regardless of how the school chooses to react, these are costs imposed by the rule. Accordingly, the Agency has included the opportunity costs analysis in the final rule estimates.

EPA acknowledges its mistake in the cost of consumables and has adjusted the O&M costs accordingly. This yields a fairly substantial drop in per school annual expenses for O&M programs. The reason for the decrease in O&M costs noted below is almost entirely due to this decrease in cost of consumables.

The final rule's costs of O&M programs per school on a yearly basis (excluding the cost of special equipment acquisition) are now estimated to be $3,800 for a public primary school, $5,100 for a public secondary school and $3,800 for a private school. The total O&M costs have decreased from $523.4 million in the proposal to $292.7 million for the final rule.

4. *Costs for removal, enclosure and encapsulation projects.* Commenters argued that cost estimates in the