



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: Enforcement Response Policy for Asbestos Abatement Projects; Worker Protection Rule
FROM: *[Signature]*
Sandra B. Stubbs
Acting Director
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Office of Compliance Monitoring
TO: Addressees

Attached is the Interim Final Enforcement Response Policy (ERP) for the Asbestos Abatement Projects; Worker Protection Rule. This document establishes the enforcement procedures and civil penalty schedules that EPA will use in response to violations of the rule by public employers subject to it. Please note that the rule applies only to those states which do not have OSHA or EPA-approved asbestos abatement regulations.

Because an effort is underway to amend the Asbestos Abatement Projects; Worker Protection Rule and because of the unique approach taken by this policy, it is an Interim Final ERP. In keeping with the Agency's increasing emphasis on risk-based approaches to enforcement, the policy is structured to encourage early voluntary disclosure.

We appreciate the comments received on the November 1988 draft of this policy, many of which have been incorporated into the attached interim final policy. Comments on the November draft were grouped by topic and have been addressed in a separate Response to Comments document which is also enclosed. Because this is an interim final policy, if the need arises during use, the Regions are welcome to submit comments to be considered when it is revised.

If you have any questions concerning the attached Asbestos Abatement Worker Protection ERP, contact your Regional Coordinator (ETS 382-7861) or Sally Sasnett (ETS 382-7832).

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INTERIM FINAL ENFORCEMENT RESPONSE POLICY
ASBESTOS ABATEMENT PROJECTS;
WORKER PROTECTION;
FINAL RULE

OFFICE OF COMPLIANCE MONITORING
OFFICE OF PESTICIDES AND TOXIC SUBSTANCES
U.S. ENVIRONMENTAL PROTECTION AGENCY

ENFORCEMENT RESPONSE POLICY
ASBESTOS ABATEMENT PROJECTS; WORKER PROTECTION; FINAL RULE

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INTRODUCTION

The Environmental Protection Agency (EPA) published the Asbestos Abatement Projects; Worker Protection; Final Rule (40 CFR Part 763, February 25, 1987) under section 6(a) of the Toxic Substances Control Act (TSCA). The purpose of the Rule is to protect public workers involved in asbestos abatement projects from exposure to asbestos. The Rule applies the provisions of the Occupational Safety and Health Administration (OSHA) Asbestos Standard for the Construction Sector (29 CFR 1926.58) to public employees in States that do not have worker protection regulations approved by OSHA, or asbestos abatement regulations which EPA has determined comparable to, or more stringent than, EPA's Worker Protection Rule.

Liability

The employer is responsible for compliance with this Rule. Consequently, the employer is subject to the remedies set forth in this Enforcement Response Policy. An employer is defined in 40 CFR 763.121 as the department, agency or entity which hires an employee. The term includes, but is not limited to any State, County, City, or other local government entity which operates or administers schools, a department of health or human services, a library, a police department, a fire department, or similar public service agencies or offices. Please refer to the Final Compliance Monitoring Strategy for Asbestos Abatement Projects, Worker Protection Rule of November 1988 for a list of States in which the Rule is applicable.

DETERMINING THE LEVEL OF ACTION

Enforcement alternatives include a notice of non-compliance, a civil complaint, injunctive action, criminal action, or some combination of these actions.

NOTICE OF NONCOMPLIANCE (NON)

The NON is appropriate for very minor violations of the Rule which did not seriously harm or endanger employees, and the violator does not have a history of violations. The NON is sent to the employer responsible for the abatement work, i.e., the department or public service agency which hired the employee committing the violation. Violations which warrant an NON are:

1. Notification is made to EPA but minor amounts of information are missing, i.e. - information which is so insignificant that it does not affect the purpose of requiring the information. For instance, it is still possible to ascertain the employer, place, and dates for an abatement project, despite the missing information.
2. Notification is made to EPA, but is up to three days late.
3. At time of inspection, records are available but minor amounts of information are missing. For instance, a records inspection is still possible despite the missing information.
4. Failure to allow employees to observe monitoring.

CIVIL ADMINISTRATIVE PENALTY

Administrative civil penalties will be imposed for violations of the Rule which are more serious in nature, and thus an NON is not appropriate. The civil complaint will describe the violation(s) and proposed penalty. Guidance for determining the amount of the penalty is contained in the section of this document entitled, "Assessing a Civil Administrative Penalty."

INJUNCTIVE ACTION

The Agency may obtain injunctive relief under TSCA section 7 in order to respond to a hazard which poses an imminent hazard. In addition, EPA is authorized under TSCA section 17 to seek an injunction to restrain any violation of TSCA, or compel the taking of any action required under TSCA.

CRIMINAL SANCTIONS

In some instances, the magnitude of a specific violation, gravity of the consequences, or number of repeat offenses will warrant the use of criminal sanctions under TSCA section 16. Criminal sanctions are limited to cases in which the violation is accompanied by evidence of intent on the part of the responsible party. TSCA authorizes criminal penalties only for violations of the Rule which are "knowingly or willfully" committed.

MULTIPLE REMEDIES

There may be unusual instances where a particular situation will present facts suggesting that more than one final action should be taken. The use of multiple remedies is not encouraged for the reasons discussed below. The purpose of this section is to outline when multiple remedies are appropriate.

Criminal Sanctions

Simultaneous civil and criminal enforcement proceedings are legally permissible, [United States v. Kordel, 397 U.S. 1, 11 (1970)], and on occasion are warranted. These cases should be the rare exceptions. When parallel proceedings are contemplated, refer to the Office of Enforcement and Compliance Monitoring (OECM) guidance on parallel proceedings (General Enforcement Policy Compendium, January 23, 1984).

Notice of Noncompliance (NON)

In general, an NON should not be used in conjunction with any other final remedy. Where a particular situation presents several violations, some of which would merit an NON while others would merit civil penalties, no NON should be sent. Instead, an administrative penalty action should be initiated, pleading all violations, with no penalties for minor infractions which would otherwise warrant an NON.

Civil Administrative Penalties and Specific Enforcement

The criteria outlined in this section anticipate that civil penalties and specific enforcement (injunctive action)

will be used sequentially. There may, however, be instances where the concurrent use of these remedies is appropriate. If the Region deems this to be appropriate in any case, OCM and DECM should be consulted before bringing either action. Refer to the Delegations Manual, Chapter 12 for guidance on authority for taking specific enforcement actions.

ASSESSING A CIVIL ADMINISTRATIVE PENALTY

SUMMARY OF THE ENFORCEMENT RESPONSE POLICY (ERP)

This ERP follows the TSCA Civil Penalty Policy (45 FR 770, September 10, 1980) to arrive at appropriate penalties for violations of the Worker Protection Rule and is constructed to deal with anticipated multiple violations by a single violator, as well as the less likely single violation scenario. Under this policy, penalties are determined in two stages:

1. Determination of the gravity based penalty (GBP) using the matrix found in the TSCA Civil Penalty Policy.
2. Adjustment of the GBP.

The GBP, as defined by the TSCA Penalty Policy, is a function of three factors involving the violation: nature, extent, and circumstances.

Nature of the Violation

The nature of the violation depends on whether the violation relates to chemical control, control associated data gathering, or hazard assessment. Chemical control regulations minimize the risk presented by a chemical substance by placing constraints on how it is handled. Control associated data gathering are the recordkeeping and reporting requirements. Hazard assessment requirements are used to gather and develop information to assess risks and benefits of a chemical substance, and to know when to impose chemical control requirements.

The following list places the violation types in their respective categories.

1. Chemical Control Violations

- o Failure to establish regulated areas, negative pressure enclosures, and to use engineering controls and workpractices as required to control exposure to asbestos during abatement work.
- o Failure to demarcate the regulated area.
- o Failure to employ respiratory protection, protective clothing, decontamination areas, change areas, and housekeeping procedures as required to control exposure to asbestos during abatement work.

2. Control Associated Data Gathering

- o Failure to create and keep records as required.
- o Failure to notify EPA prior to beginning work as required.
- o Failure to develop a training program.
- o Failure to provide required warnings.

3. Hazard Assessment

- o Failure to perform monitoring as required to determine what controls are needed, and to determine when the PEL is exceeded.
- o Failure to provide medical surveillance as required.

Extent of the Violation

Extent is based on the amount of substance involved in the violation and the nature of the violation. Determine the extent (major, significant, or minor) by referring to the instructions in this Enforcement Response Policy.

Circumstances of the Violation

The circumstances determine the potential for harm that could occur under the particular circumstances. A circumstance level is assigned each violation and is used to enter the penalty matrix which follows.

GRAVITY BASED PENALTY MATRIX

CIRCUMSTANCES	EXTENT		
	MAJOR	SIGNIFICANT	MINOR
Levels			
High Range			
1	\$25,000	\$17,000	\$5,000
2	\$20,000	\$13,000	\$3,000
Mid Range			
3	\$15,000	\$10,000	\$1,500
4	\$10,000	\$ 6,000	\$1,000
Low Range			
5	\$ 5,000	\$ 3,000	\$ 500
6	\$ 2,000	\$ 1,300	\$ 200

The steps to determine a penalty for one or more violations are:

1. Using the violation categories listed below, find the category and circumstance level (1-6) for a violation. The most serious violation in each category, i.e., the one with the lowest circumstance level, will be the violation used in determining a single penalty for all the violations in the particular violation category. Note, if two or more violations in a category have equal circumstance levels assigned, determine the extent level (step 2) for each of these violations and use the violation with the most serious extent level in computing the penalty. If extent levels are also equal, then choose the violation for that category which is the most serious. (Person preparing case uses judgment to select, if there are several violations of apparently equal magnitude.)

2. Using the extent level parameters given in this Enforcement Response Policy, determine if the violation fits the major, significant, or minor extent level.

3. After determining the circumstance level and the extent level for the one most serious violation in each violation category, use the gravity based penalty matrix to determine one penalty for each category. The total gravity based penalty (GBP) is the sum of the category penalties.

4. Make adjustments to the GBP in accordance with this Enforcement Response Policy and the TSCA Penalty Policy.

VIOLATION CATEGORIES AND CIRCUMSTANCE LEVELS

1. Monitoring

- o Failure to conduct an initial determination of airborne asbestos concentration levels (Level 1).
- o Failure to comply with the required method of measurement for analyses of airborne concentration samples (Level 3).
- o Failure to conduct daily monitoring within the regulated area as required (Level 3).
- o Failure to notify employees of monitoring results as required (Level 5).

2. Regulated Areas

- o Failure to establish regulated areas where airborne concentrations of asbestos exceed the permissible exposure limit (PEL) (Level 2).
- o Failure to establish negative pressure enclosures when feasible prior to commencing abatement work (Level 3).
- o Failure of competent person to supervise as required (Level 2).
- o Failure to have a trained, competent person on site (Level 3).

3. Work Practices

- o Failure to implement engineering controls and work practices when the permissible exposure limit (PEL) is exceeded (Level 1).
- o Incomplete or incorrect work practices and methods of compliance (Level 2).
- o Failure to comply with housekeeping provisions (Level 5).

4. Personal Protection

- o Failure to provide respiratory protection and protective clothing as required (Level 1).

- o Improper respiratory protection, but respirator is in use (Level 2).
- o Failure to provide a decontamination area as required (Level 2).
- o Failure to provide clean change areas as required (Level 4)
- o Failure to comply with laundering requirements (Level 5).
- o Failure to provide change areas with separate storage facilities for protective clothing and street clothes (Level 5).

5. Documentation/Communication of Hazards

- o Failure to provide a respiratory training program (Level 2).
- o Failure to affix warning labels on all asbestos containers as required (Level 3).
- o Failure to keep records (Level 2).
- o Failure to keep complete or accurate records (Level 4).
- o Failure to provide a training program as required (Level 4).
- o Failure to demarcate the regulated area (Level 4).

6. Notification

- o Failure to notify the Agency as required (Level 1).
- o Falsification of notification (Level 1).
- o Failure to notify EPA prior to beginning work as required (Level 2).
- o Failure to notify when emergency work is completed as required (Level 4).

7. Medical Surveillance

- o Failure to provide medical surveillance as required (Level 4).

EXTENT CATEGORY

The second step in using the matrix is to determine the extent category. The extent reflects the degree, range and scope of the violation. Therefore, in the case of the Worker Protection Rule, extent can be determined by the quantity of asbestos which underwent abatement while violating a requirement of the Rule.

For the purpose of the ERP, the extent levels are:

MAJOR - Abatement projects involving over 3,000 square feet or 1,000 linear feet.

SIGNIFICANT - Abatement projects involving over 160 square feet or 260 linear feet, but under 3,000 square feet and 1,000 linear feet.

MINOR - Abatement projects involving less than 160 square feet or 260 linear feet.

The rationale for using these values is that 3,000 square feet or 1,000 linear feet was the cutoff under the AHERA Rule until October 7, 1989; and 160 square feet or 260 linear feet is the cutoff for the NESHAP reporting requirement. Because any exposure to asbestos is unacceptable, the minor category is intended to capture even seemingly small projects.

Per-Day/One-Day Violations

Normally, each violation will be assessed on a one-day basis. In those cases where there is a history of violation(s) of this Rule, a civil complaint may be issued which calculates the penalty on a per-day basis. Per-day penalties are also appropriate where a one-day penalty assessment would not exceed the economic benefit from the violation. However, for cases which would yield substantially larger penalties than those in this ERP, Regions must consult with the appropriate Regional Coordinator for each administrative civil complaint which is calculated on a per day basis.

Determining Adjustments to the Gravity Based Penalty

To make adjustments to the gravity based penalty, follow the instructions in "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act" of September 10, 1980. The only addition to these instructions concern voluntary disclosure and economic gains from noncompliance as addressed below.

Voluntary Disclosures

Penalty reductions are appropriate for the voluntary early disclosure of Worker Protection Rule violations. The following is the maximum allowable reduction factor for this circumstance. Lower reductions may be used where appropriate.

Disclosure within 30 days of discovery.....50%
(provided good faith efforts made to reduce risk)

The reason for reducing the penalty for voluntary disclosure is because correction of the violation will usually follow, producing the benefit of limiting potential exposure to asbestos. The earlier the correction, the earlier the benefit. In some cases, without voluntary disclosure, EPA would not learn of the violation and the risk could continue. In most cases, evidence of a good faith effort would be correction of the violations which led to the risk and other reasonable actions taken to prevent further risk. This Enforcement Response Policy allows the Agency discretion in judging if the efforts were made in good faith.

Economic Benefit

In no case shall reductions be given if the reduced penalty does not exceed the economic benefit gained from non-compliance. If economic benefit is a consideration, EPA should require the employer to present information concerning economic benefits gained from the violative action. The cost of the work done, as if the requirements of the Worker Protection Rule had been followed, is then computed using information on asbestos abatement costs for that geographical area. If necessary to prevent economic gain from a violative action, the GBP may be determined for first-time violations, as well as repeat violations, on a per-day basis rather than a one-day basis.

Concurrence

Pursuant to the Delegations Manual, Regional enforcement personnel must obtain concurrence from the Office of Compliance

Monitoring of the Office of Pesticides and Toxic Substances prior to initiating an administrative civil penalty for Asbestos Abatement Projects; Worker Protection violations. A region may request the relaxation of the concurrence requirements once three civil administrative actions have been successfully issued. For these actions to be considered successful, regional cases must have been supported by adequate evidence of the violation, and the proposed penalties must conform to this enforcement response policy. In addition, for cases which would yield substantially larger penalties than those in this ERP, Regions must consult with the appropriate Regional Coordinator for each administrative civil complaint which is calculated on a per day basis. This consultation should be done prior to issuance of this type of case. (See the Per Day/One Day discussion on page 9 of this ERP).

