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

MAY 18 1990

OFFICE OF  
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: Your Request for Clarification of Conflict of Interest Issues

FROM: John J. Neylan III, Director  
Policy and Grants Division  
Office of Compliance Monitoring *Paul J. Barden, Jr.*

TO: Leo J. Alderman, Chief  
Toxics and Pesticides Branch  
Region VII

Thank you for bringing the conflict of interest issue to our attention. We agree that the rule under AHERA lacks specificity in many areas including this one; due, perhaps in part, to the multitude of possibilities it must address. We hope the following discussion clarifies the rationale for the specific conflict of interest violations described in the AHERA Enforcement Response Policy. OEMC has reviewed our response and concurs with it.

Issue: Responsibility for Conflict of Interest Provisions Concerning Air Clearance Under AHERA.

Response:

The LEA's role in the subject activity is the key factor to be considered in determining if a conflict of interest violation has occurred. As stated in the Preamble to the October 30, 1987, AHERA Rule (52 FR 41836, "LEA Responsibilities") "...Any resolution of such (conflict of interest) issues is solely at the discretion of the LEA". This is further confirmed in the Rule itself at 40 CFR 763.84(h) which states an LEA shall "...consider whether any conflict of interest may arise from the interrelationship among accredited personnel and whether that should influence the selection of accredited personnel to perform activities under this subpart." The LEA therefore, has discretion concerning potential conflicts of interest in employing abatement contractors, air monitoring firms, or laboratories. Because the rule gives the LEA complete

discretion, the LEA has not violated the conflict of interest provisions of the rule if it knows of the interrelationships and enters into contracts with related firms despite this knowledge. Therefore, the language "not ... completely independent of the abatement contractor" cited as an LEA violation in item one on page 26 of the ERP is inaccurate.

However, if information indicates that the affiliation is unknown to the LEA, or if it is documented that the LEA ordered sampling but the contractor did not comply with this directive, an action may be brought against either the abatement contractor, or the laboratory. Accredited abatement contractors are made aware of the requirements of the rule and of potential hazards inherent in allowing affiliated companies to take or analyze air samples. If an employee of an air monitoring firm affiliated with the abatement contractor collects the samples, or if a laboratory which is affiliated with either party performs the TEM analysis, and this affiliation is not disclosed to the LEA, the requirements of 40 CFR 763.90(i)(2)(i) and Appendix A.II.B.2. have been violated and a civil complaint against the abatement contractor, the sampling firm, and/or the laboratory may be warranted, as determined by the specific circumstances.

If you have further questions concerning this policy clarification, contact Sally Sasnett in the Toxics Enforcement Policy Branch at FTS 382-7832. As you know, case-specific questions should be directed to your Case Support Coordinator in the Case Development Branch of the Compliance Division.

cc: Regional Branch Chiefs  
Regional Asbestos Coordinators  
OTS/EAD