



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL 12 1993

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

Thomas B. Dominick
Deputy Attorney General
Counsel, Department of Labor and
Industrial Services
277 North Sixth, Statehouse Mail
Boise, Idaho 83720-6000

Dear Mr. Dominick:

I am writing in reply to the three questions about asbestos accreditation posed in your letter to me dated June 21, 1993.

Your first question asked whether EPA considers Idaho's safety inspectors to be subject to accreditation. As I had indicated in my earlier correspondence with Gary Barnes, based upon the role of the state inspectors which he had described to me, it appeared that they did fall within the scope of the statutory requirement (15 U.S.C. 2646). This interpretation considered the fact that your state agencies apparently rely upon the judgment of these inspectors to make an initial determination regarding the presence or absence of ACBM, or suspect ACBM, and also to determine whether or not a potential problem situation exists which warrants further action. Where these findings constitute the basis for a decision about whether or not to sample the suspect ACBM and/or inspect it further, they should be rendered by a properly trained and accredited person. We view activities such as these to be within the meaning of the phrase "inspecting for asbestos-containing material in a public or commercial building" as it is used in section 15(a) of the Asbestos School Hazard Abatement Reauthorization Act (ASHARA) (Public Law 101-637). If some or all of your state safety inspectors did not perform in this particular role, however, they might not be subject to the accreditation requirements. We would suggest that the State carefully review and evaluate the work assignment of its inspectors, and identify those who may be in need of this additional training.

The answer to your second question about what authority EPA might use to fine your agency for a hypothetical failure to comply with accreditation requirements is found in ASHARA section 15(a)(4), which amended the penalty provisions of section 207 of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2647). It provided for a civil penalty for contractors who fail to comply with TSCA accreditation requirements by inspecting, or designing or conducting, a response action in a school or public or



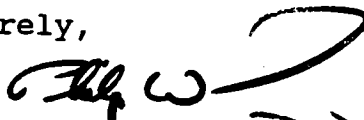
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commercial building, or employing individuals to conduct response actions in such buildings, and who fail either to obtain TSCA accreditation, or to require or provide accreditation for employees. A contractor who commits a violation is liable for a civil penalty of \$5,000 for each day of a violation, except for a contractor who is a direct employee of the Federal Government. Because your state inspectors are not exempted as direct employees of the Federal Government, and because TSCA section 202(1) generally defines "contractors" as "persons" (15 U.S.C. 2642), state agencies are potentially liable under this provision in the same manner as other employers.

Regarding your third question about whether your Department would be in violation of any statutes or rules if it chose, as a matter of policy, not to consider asbestos in its safety inspections, the answer is a qualified "no." Neither TSCA nor ASHARA required that public and commercial buildings be inspected for asbestos, the only stipulation being that if the owner/operator of such a building elected to have such an inspection performed, that it be done by an accredited person (15 U.S.C. 2646). If your Department, however, were to undertake a "demolition or renovation activity" in a regulated "facility" or "facility component," it would become subject to the EPA NESHAP regulation (40 CFR 61.145), and an inspection for the presence of asbestos would then be required. If the building to be inspected was otherwise a "public and commercial building" as defined in TSCA section 202(10) (15 U.S.C. 2642), such an inspection would have to be performed by an accredited inspector (15 U.S.C. 2646).

We appreciate your concern for these issues, and your having written to seek further clarification. I hope that my response will be helpful. If further assistance is required, please call me at (202) 260-7849, or Jayne Carlin, our Region X Asbestos Coordinator in Seattle at (206) 553-4762.

Sincerely,



Philip W. King
Field Programs Branch (TS-798)
Chemical Management Division

cc: Esther Tepper
Cindy Fournier
Jayne Carlin, Reg. X



State of Idaho

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June 21, 1993

Mr. Philip W. King
Field Programs Branch
Chemical Management Division
United States Environmental Protection Agency
Washington, D.C. 20460

Dear Mr. King:

I write in reply to your letter to Gary Barnes of this Department dated May 27, 1993. In your letter you opined that EPA considers our safety "inspectors" to be "persons who inspect for asbestos-containing material in school buildings under the authority of a local education agency or in public or commercial buildings." Accordingly, our "inspectors" need to be accredited. I am writing to request additional guidance regarding this issue.

Enclosed is a copy of Idaho Safety Code 1, Chapter EE, entitled "Asbestos." These rules place responsibility for asbestos detection and handling in the lap of a "competent person." Under the rules, this Department has no responsibility for asbestos detection or control, despite Section 3117's reference to inspections of "places of employment" by our Department "pursuant to 44-104, Idaho Code." However, the term "places of employment" referenced in Section 44-104 has been interpreted by the Idaho Supreme Court to mean places of private, not public, employment. See, Local Union 283, International Brotherhood of Electrical Workers v. Robison, 91 Idaho 445, 423 P2d 999 (1967). Since it is my understanding that EPA rules have preempted the area of asbestos regulation of places of private employment, our Department really has no asbestos inspection or control authority under Chapter EE.

Our inspectors do perform routine safety inspections pursuant to Idaho Code §72-720, et seq. If during the course of a safety inspection our inspectors notice a substance that could possibly constitute asbestos they merely point out that fact

to the appropriate authority. They do not make any initial or other determination that the substance contains or does not contain asbestos.

It is well settled that "the word 'inspection' has a broader meaning than just looking." See, Martin v. Reynolds Metals Corporation, 297 F2d 49, 57 (9th in 1961). The dictionary defines "inspect" as "to examine carefully or critically, investigate and test officially, as to inspect food' and an 'inspection' as 'especially, a critical investigation or scrutiny.'" Id. Our safety inspectors do not inspect for asbestos. They do not carefully examine substances to see if they contain asbestos. They do not test or investigate for the presence of asbestos.

In light of the foregoing I would appreciate a written response in ten (10) days to the following questions:

(1) Does EPA contend that our safety inspectors, in light of the foregoing, must become asbestos accredited? Why or why not?

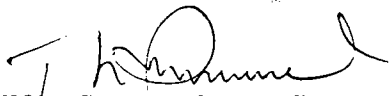
(2) Under what authority might the EPA fine this Department if our safety inspectors do not become asbestos accredited? Please provide citations for any relevant statutes or rules in your response.

(3) If this Department chooses, as a matter of policy, not to consider asbestos in its safety inspections, does the EPA contend the Department would be in violation of any statutes or rules? Please provide any relevant citations with your answer.

EPA's prompt response to this letter would be most helpful. This Department wishes to cooperate with the EPA and also avoid any possibility of fines or other punishment for noncompliance with asbestos related statutes or rules.

Thank you very much.

Very truly yours,



THOMAS B. DOMINICK
Deputy Attorney General
Counsel, Department of Labor and
Industrial Services

TBD/nl

c: Gary H. Gould, Director
Wayne Larsen, Building Division Administrator



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

MAY 27 1993

Mr. Gary Barnes
Asbestos Accreditation Specialist
Department of Labor and Industrial Services
277 North Sixth, Statehouse Mail
Boise, Idaho, 83720-6000

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

Dear Mr. Barnes:

This letter will reply to your inquiry, dated 5/17/93, regarding asbestos accreditation for inspectors under the Asbestos School Hazard Abatement Reauthorization Act (ASHARA).

As you know, ASHARA amended section 206(b)(1)(A)(i) of the Toxic Substances Control Act (TSCA) to require accreditation for "persons who inspect for asbestos-containing material in school buildings under the authority of a local education agency or in public or commercial buildings." Although requiring such "inspectors" to be accredited, neither ASHARA nor TSCA provided an explicit definition of the term "inspection."

In the absence of such a definition, EPA issued, on November 17, 1992, its "Interim Guidance on ASHARA Requirements" (see attachment). These guidelines were specifically intended to help clarify how this and other key terms found in ASHARA should be interpreted and applied until such time as the mandated revisions to the asbestos Model Accreditation Plan (MAP) regulation are promulgated. The revised MAP, when available, is expected to provide further meaning to the scope of accreditation as it will apply to the kind of situation which you have described.

The interim guidelines state that the ordinary meaning of the word "inspection" should be used to determine whenever accreditation is required for a particular asbestos-related task. By way of example, the guidelines offer that "...one meaning of the word "inspection" is a careful examination."

You have indicated that your State Safety Advisors, as a part of their safety inspections of public agencies, look for possible asbestos-containing building material (ACBM). Although they do not apparently collect samples of ACBM, or recommend its appropriate management, they do recommend, where suspect material is identified, that such suspect material be tested for asbestos and assessed by an accredited inspector. From the information you have provided, these persons seem to be responsible for making an initial determination regarding the presence or absence



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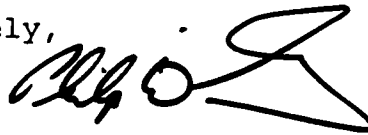
of ACBM, or suspect ACBM. You also imply that these public agencies rely upon the judgment of these safety inspectors to determine whether or not a potential problem situation exists. If the safety inspector makes an affirmative finding, this apparently then becomes the basis for deciding whether to sample the suspect ACBM and/or inspect it further.

EPA, consistent with its ASHARA Interim Guidelines, would consider safety inspectors, performing in the role that you have described, as being persons who are inspecting for ACBM, and are therefore subject to the accreditation requirements of the MAP. This is because they are looking specifically for asbestos in public or commercial buildings to identify and locate such material, and because these public agencies are relying upon their expertise and professional ability to recognize potential asbestos hazards.

Again, the MAP revisions are expected to be promulgated later this year. When this occurs, the regulations may further clarify the scope of accreditation coverage as it applies to these types of situations. Meanwhile, we would advise you to comply with the Interim Guidelines which are drawn directly from the statute.

If I can be of further assistance, please call me at (202) 260-7849.

Sincerely,



Philip W. King
Field Programs Branch (TS-798)
Chemical Management Division

Attachment

cc: Esther Tepper
Cindy Fournier
Jayne Carlin, Reg. 10

INTERIM GUIDANCE ON ASHARA REQUIREMENTS

- After November 28, 1992, AHERA § 206 requires all persons inspecting for asbestos or designing or conducting asbestos response actions in public and commercial buildings to be accredited in accordance with the MAP. Persons who violate these requirements are subject to penalties of up to \$5,000 per day, per violation.
- Until the revised MAP takes effect, persons wishing to become accredited asbestos professionals must successfully complete a course approved in accordance with the existing MAP requirements, and applicable state or local regulations.
- Until the revised MAP takes effect, training course providers and states are under no obligation to take any action with respect to the increased training requirements of ASHARA. However, they should be aware of the statutorily-extended accreditation requirements and conduct their training and licensure programs in a consistent manner. Interested parties should consult the May 13, 1992, Federal Register notice, 57 FR 20438, for information on the changes EPA is proposing to make in the MAP.
- Until the revised MAP takes effect, terms used in AHERA § 206 are to be given their statutory definitions.
- "Public and commercial buildings" are all buildings other than schools and apartment buildings of fewer than 10 units. EPA interprets this term to exclude single-family homes.
- AHERA does not define "inspection," so the ordinary meaning of the word "inspection" should be used to determine whenever accreditation is required for a particular asbestos-related task. For example, one meaning of the word "inspection" is a careful examination.
- "Response action" is defined by AHERA as methods which protect health and the environment from the hazards of asbestos-containing material, including methods described in Chapters 3 and 5 of the Purple Book. The statute does not contain an explicit exemption for small projects, although EPA is considering that, or some other type of limitation in the MAP revisions.



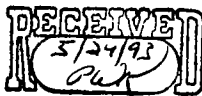
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May 17, 1993

Phil King
EPA, OPPT
Environmental Assistance Division (TS-799)
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. King:

Re: Asbestos Accreditation Under ASHARA For Inspectors

I am writing to you at this time to get an official EPA interpretation of the ASHARA requirements.

The Department of Labor and Industrial Services' Industrial Safety section use Idaho Safety Code 1, including Chapter EE, which deals with asbestos, to provide occupational safety inspections to public agencies. The safety advisors look for possible asbestos containing material as part of the safety inspection, but only to recommend that the material needs to be tested for asbestos and assessed by an accredited inspector. The safety advisors do not take samples nor do they make recommendations on how to handle the material if it is asbestos.

The Department would like to receive a written determination from EPA within 10 days from the day you receive this letter as to whether the safety advisors conform with the intent of AHERA §206 in regard to accreditation.

If you have any questions regarding this, please call me at (208) 334-3896

Sincerely,

GARY BARNES
Asbestos Accreditation Specialist

c: Wayne Larsen
Mike Poulin