



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

NOV 1 1989

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Reporting under CERCLA S. 120(h) of Hazardous
Substances Used as Building Materials

FROM: Lisa K. Friedman *LKF*
Associate General Counsel
Solid Waste and Emergency Response
Division (LE-1325)

TO: Bruce Diamond
Director
Office of Waste Programs Enforcement (OS-500)

Your staff has asked this office whether section 120(h) of CERCLA requires federal agencies to give notice, in connection with transfers of real property, that asbestos (or any other hazardous substance) has been used as a building material in that real property. We do not believe that incorporation of asbestos into a building structure would by itself trigger any notice requirement. However, the property would have to be examined on a case-by-case basis to determine whether there had been a "release" of asbestos, or "storage" or "disposal" of asbestos, within the meaning of section 120(h).

This conclusion is consistent with the Agency's draft Section 120(h) rule (40 CFR Part 373), which has recently been sent to OMB for review. However, our analysis differs from the rationale given in the draft preamble to that rule, and would require some limited changes to that preamble. We believe that the rationale presently contained in that preamble is not the better reading of CERCLA, could create enforcement problems, and is contrary to positions the Agency has taken in past litigation.

Analysis

Section 120(h)(1) of CERCLA provides that:
...[W]henver any department...of the United States enters into any contract for the sale or other transfer of real property which is



2

owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department... shall include in such contract notice of the type and quantity of such hazardous substance....

The preamble to the draft rule indicates as a "clarification" that this provision does not require reporting of asbestos (or other hazardous materials) used as structural building materials. As a basis for this conclusion, it refers to Section 104(a)(3)(B) of CERCLA. Sections 104(a)(3) and (4) provide that:

(3) ...The President shall not provide for a removal or remedial action under this section [Section 104] in response to a release or threat of release--

...
(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures;....

(4) EXCEPTION TO LIMITATIONS. Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

The preamble concludes that to require notification of such materials under section 120(h) would be inconsistent with that provision and with "existing policy."¹ The draft preamble does not specifically state that asbestos contained in buildings falls outside the scope of CERCLA generally, but it does imply that Section 104(a)(3)(B) bears on the interpretation of other portions of CERCLA, and we disagree with that implication.

Sections 104(a)(3)(B) and (4) do not by their terms apply to parts of CERCLA other than Section 104. On its face, section 104(a)(3)(B) states only that a Section 104 response (i.e. a fund-financed response) may not be undertaken to address a release of such material which is confined to the interior of a building, unless there is a public health emergency and no one else has the authority and capability to respond.

¹An internal memorandum prepared in connection with the draft rule refers more specifically to "existing EPA policy on products that contain hazardous substances." We do not know what policy is being referenced by this memorandum or by the preamble.

The principal intent of this provision, as we read it, is to protect the fund from being used to finance the nationwide asbestos cleanup. We do not read Section 104(a)(3)(B) to limit the scope of other portions of CERCLA (for example, the potential scope of enforcement actions under Section 106). We are concerned, however, that such an implication might be drawn from the language of the draft preamble. Our concern is not purely academic; one court recently held that the Section 104(a)(3)(B) prohibition was not merely a limitation on the President's authority, but was a substantive limitation on the breadth of CERCLA generally. See First United Methodist Church of Hyattsville v. U.S. Gypsum Co., _____ F. 2d _____ (4th Cir. 1989).

We feel that the issue was analyzed more appropriately by other courts which have considered whether the mere existence of asbestos in a building is a disposal or a release into the environment Knox v. AC&S, Inc., 690 F. Supp. 752, 759 (S.D.Ind. 1988); Prudential Ins. Co. of America v. U.S. Gypsum, 1989 U.S. Dist. Lexis 3791 (D.N.J. March 28, 1989). In fact, in the case of 3550 Stevens Creek Associates v. Barclays Bank of California (pending as Case No. 88-15503 in the Northern District of California), the Agency filed an amicus brief rejecting the argument that asbestos in buildings is generically outside the scope of CERCLA.²

The preamble as presently drafted could be read to support the approach followed by the Court in First United Methodist Church and rejected by the Agency in its Stevens Creek brief. Since Section 104(a)(3)(B) does not expressly govern other parts of CERCLA, we believe that a better approach in construing Section 120(h)(1) would be to refer to the specific language of that section, which requires notice only where a hazardous substance was "stored for one year or more, known to have been released, or disposed of." Whether such circumstances exist can only be determined on a case-by-case basis, and the preamble should not suggest otherwise.³

²The Justice Department has suggested filing an amicus brief in the First United Methodist case as well, if a petition for certiorari is filed.

³It might be noted, in making such a determination, that the term "release", as defined in CERCLA (and, by reference, in the proposed rule) means a release into the environment. Some courts have concluded that the term "environment" as used in CERCLA does not include the air inside a building. See, e.g., Covault v. Carey Canada Inc., 869 F. 2d 1434, 1439 (7th Cir. 1988).

4

Finally as a practical matter, it seems likely that private parties buying federal facilities would want detailed information on the presence of asbestos as a condition of the purchase in all cases, but that would be a matter for negotiation and is not required by section 120(h).

cc: Glenn Unterberger (LE-134)
Sara Nicholas (OS-510)