

June 10, 2010

Curt Spalding  
Regional Administrator  
U.S. Environmental Protection Agency  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

**RE: OVERFILE REQUEST PURSUANT TO AHERA**

Dear Mr. Spalding:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency take immediate action to ensure compliance with the federal Asbestos Hazard Emergency Response Act (AHERA) (15 USC ch. 53 subpart 2). Specifically, PEER has evidence to suggest that the compliance rate with AHERA is extremely low throughout the state, and that this noncompliance may be causing human health impacts. Therefore, we believe EPA must take action to prevent the imminent and substantial threat to public health presented by the presence of airborne asbestos and/or asbestos-containing material in the public school buildings.

**Background.** Congress enacted the federal Asbestos Hazard Emergency Response Act (AHERA) (15 USC ch. 53 subpart 2) in 1986. Among other requirements, AHERA obligates school districts to:

- Conduct a comprehensive inspection for asbestos-containing building materials in all schools;
- Based on the comprehensive inspection, develop and implement maintain an asbestos management plan for each school;
- Conduct follow-up re-inspections every three years and maintain reports of those re-inspections;
- Take appropriate action to repair, encapsulate or abate asbestos as recommended in the asbestos management plan and/or three year re-inspection reports;
- Train school personnel to conduct periodic reviews of asbestos containing material every six months and do minor asbestos abatement work;

- Maintain copies of the asbestos management plan, all three year re-inspections, six month periodic surveys and abatement records in each school's main office;
- Notify parents, teachers/staff and employee organizations annually of the existence of the management plan and re-inspection reports; and
- Notify parents, teachers/staff and employee organizations annually of any abatement activities.

The EPA enforces AHERA (40 CFR part 763.97) unless a state applies for a waiver. A waiver requires that a state demonstrate that it has the capacity to enforce AHERA at least as stringently as EPA (40 CFR part 763.98). Massachusetts applied for a waiver and EPA granted its application in 1998 (see Federal Register, June 24, 1998, pp 34348 – 34350 and Federal Register, October 27, 1998, pp 57251-57252). Since that time, the Massachusetts Division of Occupational Safety (DOS) has been responsible for enforcing AHERA. Massachusetts' 1998 waiver application makes clear that the state adopted all federal AHERA regulations except the section pertaining to penalties, 40 CFR part 763.98.

**Compliance with AHERA.** Public records and Freedom of Information Act (FOIA) responses reveal details of DOS enforcement activities from 1998 (the year Massachusetts obtained delegation of the program) to 2008. This information includes what schools DOS inspected for compliance with AHERA, and whether the audit resulted in a Notice of Noncompliance. The reports indicate that on average, 90% of DOS routine audits of AHERA compliance resulted in the issuance of a Notice of Noncompliance (NON). For the ten years for which we have reports, the percentage of total routine compliance audits that resulted in a NON ranged from 78.04% to 100%.

For years in which DOS conducted compliance audits in response to a tip or complaint, the average percentage of audits that resulted in Notices of Violation (NOV) was 75.67%. In some years, every tip resulted in a violation. The high rate of noncompliance with AHERA indicated in these documents raises questions about whether AHERA is achieving its goal of mandating inspections of school buildings for asbestos containing materials, and appropriate response actions, where asbestos-containing material has been identified (15 USC ch. 53 subch. II section 2641) and raises questions about whether AHERA is being adequately complied with or enforced.

According to the Massachusetts Department of Education, there are currently 1,831 public schools in the Commonwealth, 62 charter schools, and 31 educational collaboratives. In addition, internet research shows there are approximately 211 private schools in Massachusetts. This yields a total of roughly 2,125 schools in the Commonwealth. DOS inspected between 15 and 52 schools per fiscal year. Therefore, only 0.7% to 2.4% of Massachusetts' schools are being inspected each fiscal year. Given the high rate of noncompliance in the schools that are inspected, it is likely that there are some egregious violations going unnoticed.

In 2008 alone, DOS inspected 40 schools and found more than 300 violations. Some of the types of violations found over the years include:

- when asbestos-containing building materials (ACBM) were disturbed, records were not kept to verify that access to the area was restricted, or that the air-handling system was modified or shut down;
- failure to ensure that maintenance/custodial staff received awareness training about asbestos hazards and requirements; and
- failure to notify parents, teachers, employee organizations of the availability of the asbestos management plan, and failure to include a copy of that notification in the management plan.

**Imminent Threat to Human Health.** According to the EPA, more than 53 million children and about 6 million adults spend a substantial part of their days in schools.<sup>1</sup> EPA has recognized that many schools have environmental problems, and, in 1995, released the first edition of its *Indoor Air Quality Tools for Schools* kit to encourage school districts to address environmental problems.<sup>2</sup> The *Tools for Schools* kit has been re-issued in several editions since its inception. The EPA estimates that an average of one out of 13 school-age children has asthma, and that asthma is a leading cause of student absenteeism.<sup>3</sup> Health concerns in schools are not limited to indoor air quality. Recently, schools are identifying and remediating polychlorinated biphenyls (PCBs) found in building materials.<sup>4</sup> As public entities consider how to develop policies to respond to school-based health issues, they often consider AHERA, the Asbestos Hazard Emergency Response Act as a model for regulating health issues in schools.

Health hazards of occupational exposure to asbestos are well known.<sup>5-7</sup> These include asbestosis, asbestos-related pleural disease, lung cancer, and malignant mesothelioma. That asbestos-related diseases occur as a result of exposures among miners and millers, industrial workers manufacturing asbestos-containing products, and end-users of these products has been well-documented in medical and scientific literature dating back to the 1960s,<sup>7</sup> with case-reports decades earlier.<sup>7</sup> That occupants of buildings with asbestos-containing materials (ACM) are at risk has been less studied and was the subject of considerable controversy in the scientific community in the 1980's when the federal Asbestos Hazard Emergency Response Act (AHERA) was passed. Since then, evidence of adverse health effects of asbestos in buildings has emerged.<sup>7</sup> In 1991 an international conference on the topic was held in New York City and the results published in the *Annals of the New York Academy of Sciences*.<sup>8,9</sup> AHERA was signed into law in 1986 and requires both public and private non-profit primary and secondary schools to inspect all buildings that are leased, owned, or otherwise used as school buildings for the presence of asbestos-containing building materials. The EPA published the regulations and enforces AHERA. Subsequent to 1986, an original inspection was required. Since 1998, Massachusetts has been a "waiver state" for purposes of AHERA. EPA granted waivers to states that could demonstrate to EPA that they had an asbestos accreditation program at least as stringent as the EPA's Asbestos Model Accreditation plan under AHERA. Under Massachusetts' waiver agreement with EPA, the DOS, part of the Massachusetts Department of Labor, has the authority

to enforce AHERA in the state.

Massachusetts Cancer Registry data have been examined with regard to occurrence of malignant mesothelioma over the time period of 1982 to 2003.<sup>10</sup> There were 28 cases in school teachers and 30 in janitors and cleaners. These data provided evidence of asbestos-related disease occurring among teachers and custodians in public schools in Massachusetts. Exposure information that is available indicates that both benign and malignant disease is attributable to asbestos containing material in the school buildings. Risks for students have not been studied in epidemiologic studies.

**This Issue is a Priority for EPA.** In 2009, Region 1 of EPA issued a press release which stated:

Inspections over the past year of schools in New England by EPA underscore the need for school districts to be vigilant in protecting students' health by following asbestos management requirements....□These inspections, and subsequent penalties and Notices of Non-compliance, serve as reminders to all school districts that keeping children and school employees safe is a priority to EPA.

Moreover, EPA's website states that EPA's enforcement priorities include:

- "prevent[ing] releases of hazardous chemicals that threaten public health"
- "Assure strong and effective state enforcement of federal environmental laws"
- "Take federal action where not meeting minimum expectation"

In the case at hand, it is clear that DOS is unable to ensure AHERA compliance in Massachusetts' schools. Moreover, noncompliance with AHERA is leading to the release of asbestos and illness in school workers. Finally, EPA is not assuring the strong enforcement of AHERA, and must take action to ensure compliance with AHERA.

**EPA Overfiling Is Necessary to Protect Public Health and the Environment.** Section 404(b) of TSCA makes it unlawful for any person to violate, or fail or refuse to comply with, any requirement of an approved state program. Therefore, EPA can exercise its enforcement authority under TSCA against a violation of, or a failure or refusal to comply with, any requirement of an authorized state program. Moreover, 40 C.F.R. 763.98 allows EPA to request a conference between appropriate State and EPA officials when EPA has reason to believe that a State has failed to substantially comply with the waiver. Where EPA finds that deficiencies in the State program exist, a plan to correct the deficiencies must be negotiated between the State and EPA. Finally, if the State does not correct the deficiencies in the program, the waiver can be rescinded in part or in whole.

**Conclusion.** Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action to ensure compliance with AHERA to prevent the imminent and substantial threat to public health presented by the presence of airborne asbestos and/or asbestos-containing material in the public school buildings.

Specifically, PEER requests that EPA take immediate action to protect human health and environmental harm from the imminent and substantial threat caused by public schools' failure to take sufficient action to respond to the presence of airborne asbestos/the condition of friable asbestos-containing material within the schools, pursuant to EPA's authority under Section 208, Title 2 of the Toxic Substances Control Act, 15 U.S.C. 2648. Furthermore, we request that EPA assist DOS in inspections of schools throughout the state to ensure compliance with AHERA.

Thank you very much for your attention to this matter. Please do not hesitate to contact me to discuss these issues.

Sincerely,

Kyla Bennett, Director  
New England PEER

cc: Cynthia Giles, AA OECA

## REFERENCES

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2. EPA Tools for schools: <http://www.epa.gov/iaq/schooldesign/>
3. <http://www.epa.gov/iaq/schools/asthma.html>
4. *Protocol for Addressing Polychlorinated Biphenyls (PCBs) in Caulking Materials in School Buildings* (New York State Education Department, Facilities Planning, June 2007)
5. Becklake MR. Asbestos-related diseases of the lung and other organs: Their epidemiology and implications for clinical practice. *Am Rev Respir Dis* 1976; 114(1):187-227.
6. Selikoff IJ, Lee DHK. *Asbestos and Disease*. New York: Academic Press.
7. Oliver LC, Sprince NL, Greene R. Asbestos-related disease in public school custodians. *Am J Ind Med*. 1991; 19(3):303-16.
8. *The Third Wave of Asbestos Disease; Exposure to Asbestos in Place*, Philip J. Landrigan & Homayoun Kazemi, editors, Mount Sinai School of Medicine & Harvard Medical School, NY Academy of Sciences, New York, 1991
9. Silver KZ. Asbestos in School Buildings: Results of a Nation-Wide Survey. *Annals of the New York Academy of Sciences*. 1979;330(1); 777-786.
10. "Mesothelioma and Employment in Massachusetts: Analysis of Cancer Registry Data, 1988-2003," by G Kernan, C Roelofs, R Clapp and L Davis. Oral Presentation at the 2008 Conference for the American Public Health Association, San Diego, California.

