# INTERIM FINAL
# ENFORCEMENT RESPONSE POLICY
# FOR THE ASBESTOS HAZARD EMERGENCY RESPONSE ACT

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

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# FOR THE ASBESTOS HAZARD EMERGENCY RESPONSE ACT

## INTRODUCTION

On October 22, 1986, the President signed into law the Asbestos Hazard Emergency Response Act (AHERA) of 1986, also known as title II of the Toxic Substances Control Act (TSCA). Under AHERA, the Environmental Protection Agency (EPA) was directed to promulgate regulations which would require Local Education Agencies (LEAs) to address asbestos problems in their school buildings. In accordance with the statute, and the regulations issued on October 30, 1987 (52 FR 41826), LEAs are required to inspect school buildings for asbestos-containing building materials (ACBM), develop management plans, and implement response actions. The statute also requires persons other than LEAs to comply with the requirements of AHERA or any rule or order issued under AHERA.

This Enforcement Response Policy (ERP) for AHERA calls for the issuance of civil complaints, Notices of Noncompliance (NONs), and criminal actions to LEAs and other persons that do not comply with AHERA. This ERP also calls for the use of injunctive relief under section 208 of AHERA or under section 17 of the Toxic Substances Control Act (TSCA) to respond to hazards which pose an imminent and substantial danger to human health and the environment, or to compel an LEA or other person to comply with any requirement of AHERA. Except as otherwise indicated in this policy, NONs will not be an appropriate enforcement response for violations of AHERA by persons other than the LEA ("other persons").

### Regulated Community

### Local Education Agencies (LEAs)

Under AHERA an LEA means:

1) Any LEA as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381). Essentially, this means that an LEA is an LEA if it is defined as such under State Law.
2) The owner of any nonpublic, nonprofit elementary or secondary school building.
3) The governing authority of schools operated under the defense dependents' education system provided under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921, et seq.).

Persons Other Than the LEA ("Other Persons")

For the purposes of this ERP, "persons other than the LEA" or "other persons" means persons who:

1) Inspect LEAs for ACBM for the purpose of the LEA's AHERA inspection requirements.
2) Prepare management plans for the purpose of the LEA's AHERA management plan requirements.
3) Design and/or conduct response actions at LEAs.
4) Analyze bulk samples and/or air samples for the purpose of the LEAs AHERA requirements (i.e., laboratories).
5) Contract with the LEA to perform any other AHERA related function (i.e., to be the LEA designated person, to conduct operations and maintenance activities, etc.).

## DETERMINING THE LEVEL OF ACTION

EPA may issue civil penalties to LEAs of up to $5,000 per day per violation of AHERA as identified in AHERA section 207. The Agency may also pursue criminal sanctions against LEAs for knowing or willful violations of AHERA under TSCA title I. Under AHERA section 208, the Agency may pursue injunctive relief in order to respond to hazards that pose an imminent and substantial endangerment to human health or the environment. Finally, the Agency may use the authority of TSCA section 17 to compel LEAs to comply with any requirement of AHERA. Generally, EPA will also notify the State Governor and the public of an LEA's violation of AHERA.

Under TSCA title I, as amended by section 3(b) of AHERA, EPA may utilize all enforcement remedies provided under TSCA title I against "other persons" who violate the provisions of AHERA and its regulations (e.g., persons who design or conduct response actions that are not accredited under AHERA and laboratories that are not accredited to perform air monitoring or do not follow the protocol stipulated in Appendix A), including civil penalties of up to $25,000 per day per violation.

Administrative Civil Penalties

In general, this ERP calls for administrative civil penalties to be issued to LEAs for violations identified in AHERA section 207(a). Additionally, administrative civil penalties are the appropriate enforcement response for violations of AHERA by persons other than the LEA ("other persons"), except as otherwise specified in this policy.

Concurrence

Administrative civil penalties are to be assessed according to this policy. Pursuant to the Delegations Manual, regional enforcement personnel must obtain written concurrence from the Office of Compliance Monitoring (OCM) of the Office of Pesticides and Toxic Substances (OPTS) prior to initiating an administrative civil penalty for violations of AHERA. A region may request relaxation of the concurrence requirements for civil actions taken against LEAs once three administrative civil complaints have been successfully issued to an LEA and closed out. A region may separately request relaxation of concurrence for civil actions taken against "other persons" once three administrative civil complaints have been successfully issued to an "other person" and closed out. Regions must also obtain OCM concurrence for the first three administrative civil complaints that are successfully issued to LEA employees and successfully closed. For the civil actions to be considered successful, regional cases must have been supported by adequate evidence of the violation, and the proposed penalties and final assessments must conform to this AHERA enforcement response policy.

Finally, Regions must obtain OCM concurrence for each administrative civil complaint that is issued to an LEA or "other person" which is calculated on a per day basis, or per violation basis other than in accordance with Appendix A or B of this ERP (See the "One or Per Day Assessments" section of this ERP on page 10 and 19, and the "Multiple Violations" section of this ERP on page 18).

Notices of Noncompliance (NON)

Except as otherwise indicated in this policy (see "LEA Employees as 'Other Persons'" section of this ERP on page 20), it is not appropriate to issue NONs for violations of AHERA by persons other than the LEA ("other persons"). Such violations will usually warrant a civil complaint.

Notices of Noncompliance are to be issued to LEAs for all violations of AHERA and/or the AHERA regulations that are not responded to by other enforcement mechanisms. This includes all management plan implementation violations, or other on-going implementation violations for which an administrative civil complaint cannot be issued or injunctive relief is not obtained. Additionally, NONs are to be issued to LEAs for the LEA's first citation for any Level 6 violation or Level 3, 4, or 5 minor extent violation, regardless of the number of school buildings involved. Civil complaints are to be issued for the LEA's second citation of a Level 6 violation or a Level 3, 4, or 5 minor extent violation and are to be calculated using the Penalty Matrix for LEAs found in Table A.

Notices of Noncompliance may also be used in certain circumstances as the initial enforcement response to LEAs that have failed to conduct an asbestos inspection and submit a management plan to the State. The AHERA extension bill requires States to submit to EPA by December 31, 1988, a written statement reporting those LEAs that have submitted a management plan and those who have submitted a request to defer submission of the management plan until May 9, 1989. States must update this list and submit it to EPA by December 31, 1989. Regions may use the information obtained from these lists to issue NONs to LEAs that have not had an on-site inspection by an EPA compliance inspector, and appear on the list as not submitting a management plan by the statutory deadlines (October 12, 1988, or May 9, 1989, if the LEA has received a deferral from the State). That NON shall require LEAs to submit documentation within 60 days to the EPA Regional Office that they completed the inspection and submitted the management plan to the State. The NON shall further state that if the LEA does not submit this documentation within 60 days after receipt of the NON, the Agency will issue an administrative civil penalty to the LEA for its failure to conduct the inspection and/or submit the management plan. Local Education Agencies that did submit a management plan in response to the initial NON will not be issued a civil complaint for failing to conduct the inspection or submit the plan, as long as the LEA submits documentation of compliance within the 60 days.

The advantage to this approach is that if records incorrectly show that an LEA has not submitted a management plan, the LEA will be able to notify the Agency of the error before an unjustified and resource intensive civil complaint is issued. Further, the NON with a pending civil complaint within 60 days may provide enough incentive for an LEA to submit a management plan to the State without EPA having to invest resources issuing an administrative civil complaint.

Civil complaints which are to be issued to LEAs that do not submit documentation that an inspection was completed and a management plan was submitted to the State will not be subject to the 180-day target in the Agency's Strategic Planning and Management System (SPMS), and OCM does not expect the Regions to follow-up on all of those NONs with civil complaints at once. The number of civil complaints that will immediately follow-up NONs which are issued as the initial response for "failure to submit a management plan" will vary in each Region depending on the resources available in each Region. Therefore, Regions should prioritize the issuance of the follow-up civil complaints. Regions should consider LEAs that contain the most students (therefore the most potential exposure) and have a history of violating asbestos regulations, as having the highest priority to receive follow-up civil complaints. Regions may also consider other appropriate criteria for determining which LEAs will receive priority follow-up civil complaints.

Local Education Agencies that have not conducted the asbestos inspection and/or submitted a management plan by the statutory deadline and have had an on-site EPA compliance inspection to verify noncompliance, may be issued an administrative civil complaint as the initial enforcement response.

Notices of Noncompliance, other than NONs issued to an LEA for the first citation of a Level 6 violation or a Level 3, 4, or 5 minor extent violation, are to state that repeat violations of AHERA may be considered knowing or willful violations of TSCA, and therefore, may be subject to additional enforcement actions including criminal penalties and court injunctions. All NONs issued to an LEA should be copied to the State Governor, State AHERA Designated Agency/Person, or State Board of Education in which the LEA is located. Additionally, all NONs issued to an LEA for substantive AHERA violations are to require the LEA to submit documentation to the EPA Regional Office within 30 days that the AHERA violation has been corrected. Regions are to pursue further action (i.e., press releases, notification of the State Governor, injunctive relief, or criminal referrals) if the LEA has not corrected the violation.

## Injunctive Relief

The Agency may obtain injunctive relief under AHERA section 208(b), as well as under section 17 of TSCA title I. The decision regarding the appropriate section under which to proceed will depend on the particular facts of the case.

AHERA section 208(b) authorizes injunctive relief in cases where "the presence of airborne asbestos or the condition of friable asbestos-containing material in a school building governed by a local education agency poses an imminent and substantial endangerment to human health or the environment." As these conditions correspond roughly to the "imminent hazards" of section 7 of TSCA title I, AHERA section 208(b) should be utilized in a similar manner as that section. For example, where a situation presents a serious and immediate risk of injury such that a Temporary Restraining Order (TRO) or preliminary injunction is appropriate, the injunctive relief should be sought under AHERA section 208(b). However, until the EPA completes the delegation authority under the AHERA statute for determining "imminent hazard" and commencing imminent hazard action in an appropriate U.S. District Court, the determination that an imminent hazard exists and that injunctive relief under AHERA section 208(b) may be sought must be made on a case-by-case basis by the Administrator.

Section 17 of TSCA title I authorizes injunctive relief to restrain any violation of TSCA section 15, including violations of AHERA, or to compel the taking of any action under AHERA. This authority is very broad and can support a wide range of injunctive actions, including actions to compel compliance by LEAs where it is not possible to obtain administrative civil penalties for violations of AHERA. The Agency does not have to use "imminent hazard" as a criteria for seeking injunctive relief under TSCA section 17. However, in general, Regions should consider seeking injunctive relief in situations where LEA noncompliance with AHERA will significantly undermine the intent of AHERA. These types of violations include, but are not limited to, failure or refusal to make the management plan available to the public without cost or restriction, failure or refusal to conduct legally sufficient air monitoring following a response action, or the initiation of a response action without the use of accredited personnel. The decision to seek injunctive relief under TSCA section 17 should be made on a case-by-case basis and in accordance with the Delegations Manual for TSCA. Regions should consider seeking injunctive relief under TSCA section 17 against LEAs for the violations indicated in Appendix A. Generally, Regions should attempt other enforcement mechanisms to generate LEA compliance with AHERA, such as press releases and notification of the State, before injunctive relief under TSCA section 17 is pursued.

All cases for which injunctive relief is sought are to be referred to the Department of Justice (DOJ) in accordance with the most recent guidance from the Office of Enforcement and Compliance Monitoring (OECM).

## Criminal Penalties

Knowing or willful violations of the AHERA regulation committed by any person, including contractors, LEAs, LEA employees, can result in the issuance of criminal penalties. Criminal referrals should be considered in cases where an LEA or "other person" has been warned repeatedly by EPA that a violation is on-going and has been requested to cease or correct the violation, but have refused to do so. Criminal referrals are also appropriate against an LEA if that LEA knowingly or willfully continued a violation of AHERA for which an NON had previously been issued (see discussion of this in the NON section of this strategy). Headquarters will consider this potential enforcement response on a case-by-case basis.

## Press Releases

Regions may, at their discretion, issue a press release to notify the public of an LEA's or other person's violation of AHERA. This option serves to notify the community of an LEA's or other person's non-compliance with AHERA and also educates the public on the requirements of AHERA. EPA Headquarters recommends issuing press releases for most violations of AHERA.

## Notification of State Governors

In situations where LEA compliance is not forthcoming, Regions should contact the State Governor, State AHERA Designated Agency/Person, or State Board of Education in which a violative LEA is located, to inform those State offices of an LEA's non-compliance with AHERA or recalcitrance. This enforcement response may be particularly useful for violations where the EPA does not have civil penalty authority, and NONs and press releases are ineffective in generating compliance.

## Referrals to Headquarters

If the Regions encounter egregious situations where LEA compliance cannot be generated from the enforcement mechanisms described above, Regions may submit the cases to the Compliance Division of OCM for consideration of other enforcement responses.

## Liability

Civil penalties issued for violations of some of the provisions of AHERA could be issued to both the LEA under AHERA and other persons under TSCA title I. For instance, the use of persons not accredited under AHERA for conducting asbestos inspections may result in two separate administrative civil complaints, one against the LEA under AHERA section 207(a)(1), and another under TSCA title I against the unaccredited person who conducted the inspection. Similarly, civil penalties could be issued to the LEA and the laboratory, under AHERA and title I respectively, if the laboratory did not conduct the bulk sample analysis in accordance with the AHERA regulations.

Generally, when both the LEA and "other persons" have violated AHERA, administrative civil penalties should be issued separately to each. However, a civil complaint should not be issued to the LEA in a situation where the LEA can document that it made a reasonable effort to assure that the contracted "other person" complied with AHERA (e.g., the contractors or laboratories falsified statements about accreditation or provided false credentials). Similarly, a civil complaint should not be issued to a laboratory if the laboratory can demonstrate that they did not know, or have reason to know that the bulk sample analysis was to be used by an LEA to comply with the requirements of AHERA. In such a situation, the administrative civil complaint would be issued to the LEA.

## ASSESSING ADMINISTRATIVE CIVIL PENALTIES AGAINST AN LEA

### VIOLATIONS

Pursuant to AHERA section 207(a), administrative civil penalties may only be assessed against LEAs that: 1) fail to conduct an inspection pursuant to the regulations under AHERA section 203(b); 2) knowingly submit false information to the Governor regarding any inspection pursuant to the regulations; 3) fail to develop a management plan pursuant to the regulations under AHERA section 203(i); 4) carry out any activity prohibited by section 215 of AHERA as amended; or 5) knowingly submit false information to the Governor regarding a deferral request under section 205(d) of AHERA as amended. Therefore, LEA noncompliance with any requirement of the AHERA regulations must fall under one of these five statutory violation categories for an administrative civil complaint to be issued. Please note, the statutory violation for which the regulatory violation is derived must be cited in the administrative civil complaint. The statutory violation to which each regulatory violation corresponds is listed in Appendix A of this ERP.

#### Failure to Conduct an Inspection Pursuant to Regulations

Regulatory violations of AHERA section 207(a)(1), "failure to conduct an inspection pursuant to regulations issued under AHERA section 203(b)," include all the requirements associated with the inspection of a school building in order to identify the presence and condition of asbestos-containing building material (ACBM). These requirements include the use of personnel accredited under AHERA section 206(b) or 206(c), and laboratories accredited under AHERA section 206(d). Also included are violations of the assessment requirements and the bulk sample analysis requirements.

#### Knowingly Submits False Information Regarding an Inspection

Regulatory violations of AHERA section 207(a)(2), i.e., "knowingly submits false information to the Governor regarding any inspection pursuant to the regulations issued under AHERA section 203(i)," are limited to false information regarding the inspection that is actually submitted to the Governor as part of the LEA's management plan. This includes falsified laboratory reports and false representation of an inspector's or laboratory's accreditation.

Failure to Develop a Management Plan Pursuant to the Regulations

"Failure to develop a management plan pursuant to the regulations under AHERA section 203(i)" refers to violations of AHERA which relate to the process of preparing a complete management plan document for submission to the State Governor. An LEA's development of the management plan continues to the point where the State Governor can no longer disapprove the plan and recommend changes to that plan. Additionally, since the final result of the management plan process is the public availability of the management plan, violations of the AHERA statute and regulations relating to public availability of the management plan are considered "failure to develop a management plan." Violations of AHERA that are considered "failure to develop a management plan" are listed in Appendix A of this ERP. These violations include, but are not limited to: using an unaccredited person to prepare the plan; having a management plan that does not contain all the elements required to be in the plan that is submitted to the State Governor; not submitting the plan to the State; failing to notify the public of the management plans availability; and failing to make the plan available to the public without cost or restriction. Please note that an LEA may be liable for "failure to develop a management plan" if the plan is not complete or not developed by an accredited person, even if the LEA's management plan was not disapproved by the State.

Carries Out Any Activity Prohibited By Section 215 of AHERA as Amended

Section 215 of the AHERA extension bill amends section 205 of AHERA to state that as of October 12, 1988, renovations or removals of any building material, with the exception of emergency repairs, are prohibited in schools whose management plans have not completed the AHERA State review process, unless (1) the school is carrying out work with a grant under EPA's Asbestos School Hazard Abatement Act (ASHAA) award program, or (2) an inspection which complies with AHERA has been completed in the school and the LEA complies with paragraphs (g), (h), and (i) of 40 CFR 763.90 (response actions). In addition, all operations and maintenance (O&M) activities in the school must be conducted in accordance with the O&M and training requirements of AHERA (40 CFR 763.91 and 763.92 (a)(2)). Local Education Agencies that carry out any of the activities prohibited by section 215 of AHERA as amended, are subject to administrative civil penalties under AHERA section 207(a)(4).

Knowingly Submits False Information Regarding the Deferral Request

Local Education Agencies are subject to administrative civil penalties, under AHERA section 207(a)(5) if any of the information or statements submitted to the State with their deferral request are knowingly false. This includes the submission of a false statement that the LEA has carried out the notification of parent, teacher, and employee organizations of the LEA's intent to request the deferral, and in the case of public LEAs, that the LEA has conducted the required public meeting of the school board to discuss the deferral request with the affected groups.

## Multiple Violations

Section 207(a) of AHERA states that LEAs are liable for administrative civil penalties of not more than $5,000 per day per violation. Under AHERA, a "violation" is defined as failure to comply with the provisions of section 207(a) with respect to a single school building. Therefore, the maximum penalty that may be assessed against an LEA for any and all violations in a single school building under AHERA is $5,000 per day. Total penalties for a single school building which exceed $5,000 per day are to be reduced to $5,000 per day.

Please note, since under AHERA a violation means failure of the LEA to comply with respect to a single school building, the total civil penalty assessed against an LEA will include the total civil penalties calculated for each school building in that LEA (i.e., if an LEA has six school buildings that are in violation of AHERA, the total civil penalty assessed against that LEA could be as high as $30,000 per day).

## One Day or Per Day Assessments

Generally, violations of AHERA by an LEA will be considered as one day violations (except as specified in Appendix A). However, in those cases where an LEA violates the requirements of AHERA after a civil complaint has already been issued, it may be appropriate to amend the civil complaint or file a second complaint to seek additional civil penalties on a per day basis. Regions should also contact the State to inform them of an LEA's recalcitrance. Regions may also consider seeking injunctive relief or pursuing criminal penalties, depending on the facts of the case.

If the Regions encounter any other cases where per day penalties to an LEA are more appropriate then the one day assessments which are indicated in Appendix A, an administrative civil complaint, which is calculated on a per day basis, may be issued provided the civil compliant has been concurred on by OCM prior to its issuance.

## Calculating the Administrative Civil Penalty For the LEA

In determining the amount of a civil penalty assessed against an LEA for violations of AHERA, the Agency must consider:

A) the significance of the violation.,
B) the culpability of the violator, including any history of non-compliance;
C) the ability of the violator to pay the penalty; and
D) the ability of the violator to continue to provide educational services to the community.

Since AHERA limits the civil penalty that can be assessed against an LEA for each school building to a maximum of $5,000 per day per violation, the standard TSCA Civil Penalty matrix (45 FR 59770; September 10, 1980) cannot be used to determine the base penalty. However, section 207 of AHERA requires that any civil penalties issued under AHERA be assessed and collected in the same manner, and subject to the same provisions, as those under TSCA section 16. Therefore, a gravity based penalty (GBP) matrix shall be used for determining the initial or "base penalty," which, like the standard TSCA Civil Penalty matrix, determines the significance of the violation by addressing the nature, the circumstances, and the extent of the violation (see Table A below). Since the maximum penalty that can be assessed against an LEA for violations of AHERA is one fifth of the maximum penalty that can be assessed against persons for violations of TSCA title I, the matrix on Table A divides each cell of the Standard TSCA penalty matrix by five. As appropriate, the penalty determined from the matrix found on Table A may be further adjusted based on the culpability of the violator (including the history of non-compliance), ability of the violator to pay, and ability to continue to provide educational services.

TABLE A

Base Penalty For LEA

| | | EXTENT | | |
|---|---|---|---|---|
| CIRCUMSTANCES (Levels) | | A MAJOR | B SIGNIFICANT | C MINOR |
| High Range | 1 | $5,000 | $3,400 | $1,000 |
| | 2 | $4,000 | $2,400 | $600 |
| Mid Range | 3 | $3,000 | $2,000 | $300* |
| | 4 | $2,000 | $1,200 | $200* |
| Low Range | 5 | $1,000 | $600 | $100* |
| | 6 | $400* | $260* | $40* |

* Issue NONs for the first citation of violations that fall within these cells if that is the only violation.

Nature

A violation may be either chemical control, control-associated data gathering, or hazard assessment in nature. The AHERA regulations are essentially chemical control in nature since the goals of AHERA are aimed at placing constraints on how asbestos-containing building material (ACBM) is maintained and handled, and therefore, how to minimize the risks presented by the presence, handling, and removal of ACBM in a school building. However, the management plan and record-keeping requirements of AHERA are control-associated data gathering in nature since the goal of these requirements are to enable the Agency, and the general public, to evaluate the effectiveness of the regulations and to monitor compliance. For the purposes of this proposed AHERA ERP, a single matrix shall be used for both types of violations, and therefore, it will not be necessary to distinguish the nature of the violation.

Circumstances

The first step in selecting the base penalty is to determine which level on the circumstances axis applies to the violation.

The circumstances axis of the GBP matrix reflects the probability that harm will result from a particular violation. In the case of AHERA, the probability of harm would increase as the potential for asbestos exposure to school children and employees increases. The matrix provides the following levels for measuring circumstances (probability factors):

| | |
|---|---|
| Levels 1 and 2 (High): | The violation is likely to cause harm. |
| Levels 3 and 4 (Medium): | There is a significant chance the violation will cause harm. |
| Levels 5 and 6 (Low): | There is a small chance the violation will result in harm. |

The circumstance levels that are to be attached for each provision of AHERA of which an LEA may be in violation are listed in Appendix A of this ERP.

Extent

The second step in selecting the base penalty for a specific violation from the matrix is to determine its position on the extent axis. This axis of the GBP matrix reflects the extent of potential harm caused by a violation. In the case of AHERA, harm would be determined by the quantity of the regulated substance involved in the violation (e.g., quantity inspected, removed, enclosed, encapsulated, or repaired in violation of the regulation).

For the purposes of this proposed ERP, the extent levels are as follows:

MAJOR - violations involving more than 3,000 square feet or 1,000 linear feet of ACBM.

SIGNIFICANT - violations involving more than 160 square feet or 260 linear feet and less than or equal to 3,000 sq. ft. or 1,000 linear ft.

MINOR - violations involving less than or equal to 160 sq. ft. or 260 linear ft.

One hundred and sixty square feet or 260 linear feet is the cutoff for reporting under the National Emissions Standards for Hazardous Air Pollutants (NESHAPs), and the cutoff in 40 CFR 763.90 (i)(5) for use of phase contrast microscopy (PCM). Three thousand square feet or 1,000 linear feet is the cutoff for transmission electron microscopy (TEM) until October 7, 1989 (40 CFR 763.90(6)).

In situations where the quantity of asbestos involved in the AHERA violation cannot be readily determined, the civil penalty is to be calculated using the major extent category.

Adjustment Factors

As required by AHERA section 207, the penalty assessed against an LEA for violations of AHERA must also consider the culpability of the violator, including any history of violations; the ability to pay; and the ability of the LEA to continue to provide educational services.

Culpability of LEA

The Agency mailed copies of the AHERA regulations to all LEAs on a comprehensive list obtained from the Quality Education Data (QED) School Guide. EPA has also mailed other information and guidance documents on AHERA to each of these LEAs (e.g., the documents entitled "Asbestos-In-Schools: A Guide To New Federal Requirements For Local Education Agencies," and "100 Commonly Asked Questions About the New AHERA Asbestos-In-Schools Rule"). Therefore, OCM does not anticipate situations in which a reasonably prudent and responsible LEA would not know of their responsibilities for AHERA compliance. However, in those rare situations where it can be shown that the LEA did not know about its responsibilities under AHERA, Regions may, at their discretion, adjust the penalty downward as much as 25%.

The culpability of the LEA may also be taken into consideration, and penalties reduced by 25%, when the LEA does not have control over the violation charged. Further, the civil action may be eliminated completely in situations where the LEA can document that they made a reasonable effort to assure compliance. For example, if the LEA took reasonable steps to determine if an asbestos inspector was accredited, and further specified in the job contract that persons who conduct inspections for ACBM must be accredited under AHERA for that activity, then generally the Agency will not take a civil action against that LEA for that violation. The Agency will, however, issue a civil complaint against the unaccredited inspector.

History of Previous Violations

The gravity based penalty (GBP) matrix provided in Table A is designed to apply to "first offenders" (or second offenders for the asterisked matrix cells, i.e., a Level 6 violation or Level 3, 4, or 5 minor extent violation). Where an LEA has demonstrated a history of violations under TSCA title II, the penalty is to be adjusted upward in accordance with the TSCA Penalty Policy.

The Agency will disregard the LEA's prior history of violations in calculating the penalty for a voluntarily disclosed violation. However, for violations discovered by the Agency, the Agency will address history of prior violations as indicated in the TSCA Penalty Policy, even if the prior history results from a violation which was voluntarily disclosed.

Ability of LEA to Pay/Ability of LEA to Continue to Provide Educational Services

Under section 207 of AHERA, all civil penalties will go back to the LEA for purposes of complying with the requirements of AHERA. Any portion of the civil penalty remaining unspent after compliance by the LEA is to be deposited into the Asbestos Trust Fund. Regardless of this provision, LEAs may raise the ability to pay as an issue. If this issue is raised by the LEA, the determination of what the LEA can be expected to pay will be made on a case-by-case basis by the Regions after the civil complaint has been issued.

Other Factors As Justice May Require

Since AHERA section 207(a) states that civil penalties issued to LEAs must be assessed in the same manner as those under TSCA section 16, EPA may also consider "other factors as justice may require," such as "voluntary disclosure" and "attitude of the violator," when assessing civil penalties against LEAs.

## Voluntary Disclosure

Civil penalty amounts for an LEA's violation of AHERA will be reduced if the violations are voluntarily disclosed by the LEA. The penalty reductions for voluntarily disclosure are as follows:

| | |
|---|---|
| Voluntary disclosure ..... | 25% |
| Immediate disclosure within 30 days of discovery..... | 25% |
| TOTAL | 50% |

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the civil complaint. The civil complaint and Consent Agreement and Final Order (CAFO) should state the original penalty and the reduced penalty and the reason for the reduction.

The Agency will not consider voluntary disclosure reductions if the LEA has been notified of a scheduled EPA compliance inspection or if the EPA compliance inspection has already begun.

## Attitude

The existing adjustment provision for Attitude of the Violator in the TSCA Civil Penalty Policy (September 10, 1980) may also be applied to adjust the penalty by up to 15%. Please note that this adjustment may decrease or increase the penalty by 15%. This adjustment applies equally to LEAs that voluntarily disclosed violations and those that did not. An LEA would generally qualify for a downward adjustment if it immediately halts the violative activity and takes immediate steps to rectify the situation, and there is no finding of culpability. However, such a reduction is at the discretion of EPA.

## How Civil Penalties Will Be Collected

As stated previously, AHERA section 207(a) states that any civil penalty collected from an LEA must be used by that LEA for purposes of complying with AHERA. Any portion of that civil penalty remaining unspent after compliance by the LEA will be deposited into the Asbestos Trust Fund by the Department of the Treasury.

In order to implement the intent of this provision, Regions are to defer payment of the LEA's administrative civil penalty in accordance with the November 15, 1983 TSCA Settlement With Conditions Policy. LEAs are to be placed on a compliance schedule in which they must correct the violation for which they have been cited and any other AHERA compliance activities within a specified period of time agreed on by the Region and the LEA. By the end of the compliance schedule, or the point of completion of the required activity, the LEA must present the Region with a strict accounting of the cost of compliance. This may take the form of notarized receipts, an independent accounting, or equivalent proof. If the cost of compliance equalled or exceeded the amount of the civil penalty, the LEA will not be required to pay any money. If the cost of compliance was less than the amount of the civil penalty, the LEA is to pay the difference. The penalty check should be made out to the order of "The Treasurer of the United States of America", as with any civil penalty. In addition, the LEA should be directed in the Consent Agreement to state on the reverse side of the check, "For Deposit Into the Asbestos Trust Fund, 20 U.S.C. §4022." The check should then be mailed to: U.S. EPA, Headquarters Accounting Operations Branch, Attention: Asbestos Trust Fund, P.O. Box 360277M, Pittsburgh, PA 15251.

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## ASSESSING ADMINISTRATIVE CIVIL PENALTIES AGAINST PERSONS OTHER THAN THE LEA

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AHERA section 3(b), Technical and Conforming Amendments, amends TSCA title I to add section 15(1)(d), which states that it shall be unlawful for <u>any</u> person to fail or refuse to comply with any requirement of title II or any rule promulgated or order issued under title II. This provision subjects persons other than LEAs ("other persons") to civil penalties under TSCA section 16 of up to $25,000 per day for each violation of AHERA. Generally, total civil penalties calculated which exceed $25,000 per day for violations in a single school building are to be reduced to $25,000 per day.

Generally, penalties assessed against "other persons" are to be issued to the company if there is one. Civil penalties collected from persons other than LEAs for violations of AHERA do <u>not</u> go into the Asbestos Trust Fund or back to the LEA for AHERA compliance. All administrative civil penalties assessed against "other persons" are to be sent to the standard EPA Regional civil penalty lockboxes.

## Calculating the Administrative Civil Penalty for "Other Persons"

Administrative civil penalties assessed against persons other than the LEA are issued under TSCA title I. Therefore, this part of the policy has been developed in accordance with the TSCA Civil Penalty Policy (45 FR 59770, September 10, 1980).

The TSCA Civil Penalty Policy establishes a system for determining penalties in administrative actions brought pursuant to TSCA section 16. Under that system, penalties are determined in two stages: (1) determination of a "gravity based penalty" (GBP) using the matrix found in Table B, and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- The "nature" of the violation.
- The "extent" of environmental harm that could result from a given violation.
- The "circumstances" of the violation.

TABLE B

Base Penalty For Persons Other Than LEAs

| CIRCUMSTANCES | Levels | EXTENT A MAJOR | EXTENT B SIGNIFICANT | EXTENT C MINOR |
|---|---|---|---|---|
| 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 |

Nature

Violations of AHERA by persons other than an LEA are to be considered chemical control in nature.

Circumstances

The first step in selecting the base penalty is to determine which level on the circumstances axis applies to the violation.

The circumstances axis of the GBP matrix reflects the probability that harm will result from a particular violation. The circumstance levels that are to be attached for each provision of AHERA that a person other than an LEA may be in violation are listed in Appendix B of this ERP.

Extent

The second step in selecting the base penalty for a specific violation from the matrix is to determine its position on the extent axis.

As with the penalties assessed against LEAs for violations of AHERA, harm would be determined by the quantity of asbestos-containing building material (ACBM) inspected, removed, enclosed, encapsulated, or repaired in violation of the regulation (See Extent Level used for LEAs on page 13).

Multiple Violations

Since administrative civil complaints issued to "other persons" for violations of AHERA are issued under TSCA title I, the maximum civil penalty that may be assessed against "other persons" is $25,000 per day per violation. Consistent with administrative civil penalties issued to LEAs for violations of AHERA, a violation of AHERA will generally mean failure to comply with respect to a single school building. Therefore, the maximum penalty that will generally be assessed against an "other person" for all violations in a single school building is $25,000 per day. Total administrative civil penalties which exceed $25,000 per day will generally be reduced to $25,000 per day.

EPA may assess administrative civil penalties to "other persons" in excess of $25,000 per school building (i.e., per TSCA violation) in those situations where the violation is egregious. An administrative civil complaint which is issued to an "other person" which is calculated per TSCA violation rather than per school building must be concurred on by OCM before it is issued.

## One Day or Per Day Assessments

Please refer to the list of violations in Appendix B to see if a civil penalty for a violation is to be assessed as a one day or per day penalty. For those administrative civil complaints which were calculated as a one day assessment and the "other person" continues to violate AHERA after the complaint was issued, it may be appropriate to amend the civil complaint or file a second complaint to seek additional civil penalties on a per day basis. Regions may also consider seeking injunctive relief or pursuing criminal penalties, depending on the facts of the case.

If the Regions encounter any cases where per day penalties for an "other person" are more appropriate than the one day assessments which are recommended in Appendix B, an administrative civil complaint which is calculated on a per day basis may be issued provided the civil complaint has been concurred on by OCM prior to its issuance.

## Adjustment Factors

Once the gravity based penalty has been determined, upward or downward adjustments to the penalty amount are made in consideration of the following factors in accordance with the TSCA Civil Penalty Policy:

- Culpability;
- History of such violations;
- Ability to pay;
- Ability to continue in business; and
- Such other matters as justice may require (including voluntary disclosure and attitude of the violator).

## Settlement With Conditions

Regions may choose to remit some or all of first-time civil penalties assessed against "other persons," in accordance with the November 15, 1983 TSCA Settlement With Conditions Policy, if the violative "other person" agrees to correct the violation for which they are responsible, correct the violation in other schools in which they may have also violated AHERA, or the "other person" agrees to mandatory AHERA training in order to reduce the chance of a reoccurrence of the AHERA violation in other schools (i.e., 16 hour O&M training, AHERA accreditation, or other training as the Region sees appropriate to reduce the possibility of a repeat violation).

Generally, remitting some or all of a civil penalty in exchange for mandatory AHERA training is only appropriate in situations where an "other person" is not typically involved with asbestos, and will likely cause subsequent environmental harm because of their ignorance of asbestos work practices and AHERA. An example of this is a painter who was not informed by the LEA of the presence of asbestos, and releases asbestos fibers in the air when he scrapes the old paint off a school wall containing friable asbestos. That painter has conducted a response action without being accredited. While this painter could be issued a civil penalty of up to $25,000, the Region may choose to remit the entire penalty in exchange for the painter correcting the violation and/or taking AHERA training.

LEA Employees as "Other Persons"

Most enforcement actions should be taken against "other persons" (i.e., contractors) or the LEA. However, LEA employees, such as the janitor, superintendent, and the LEA designated person, are also considered "other persons," and therefore, subject to civil penalties under TSCA title I of up to $25,000 per day per violation of AHERA. Further, LEA employees are subject to criminal action for knowing or willful violations of AHERA under TSCA title I.

Generally, EPA will issue an NON to an LEA employee that has violated the less serious requirements of the AHERA statute or its regulations for the first-time. EPA will only assess administrative civil penalties against LEA employees that are responsible for an egregious and/or knowing or willful violation, or have violated AHERA or its regulations a second-time. EPA may also pursue criminal action against LEA employees responsible for an egregious and/or knowing or willful violation. All administrative civil penalties issued to an LEA employee should be issued in accordance with the section of this ERP entitled "Assessing Administrative Civil Penalties Against Persons Other Than the LEA." Please note that the first three administrative civil complaints that are assessed against an LEA employee must be concurred on by the Office of Compliance Monitoring before they are issued.

## ASSESSING ADMINISTRATIVE CIVIL PENALTIES AGAINST PRIVATE NON-PROFIT SCHOOLS

Under AHERA section 202(7), the **owner** of the **building** that contains a private non-profit elementary or secondary school is considered the LEA. Therefore, if a private non-profit school does not own its own building, then that private non-profit school is considered an "other person" and **not** an LEA. In this situation, a private non-profit school could be subject to administrative civil penalties under TSCA title I of up to $25,000 per day per violation of AHERA. However, in the event that a private non-profit school violates AHERA, Regions are to treat the private non-profit school as an LEA and assess administrative civil penalties in accordance with the "Assessing Administrative Civil Penalties Against LEAs" section of this ERP. That is, private non-profit elementary and secondary schools are to be liable for administrative civil penalties of up to $5,000 per day per AHERA violation, and civil penalties are to go back to the private, non-profit school for the purposes of complying with AHERA.

According to the AHERA statute, the owner of the private non-profit school building is an LEA, and therefore, must be assessed administrative civil penalties in the same manner as other LEAs.

# APPENDIX A*

## CIRCUMSTANCE LEVELS FOR LEA AHERA VIOLATIONS

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA failed to conduct an inspection pursuant to 40 CFR 763.85(a) of each school building they lease, own, or otherwise use as a school building to identify all locations of friable and nonfriable ACBM by October 12, 1988, or by May 9, 1989 if a deferral has been granted by the State (§763.85 (a)(1)). | 1† | one day | 207(a)(1) |
| LEA failed to conduct an inspection pursuant to 40 CFR 763.85(a) for a building leased or otherwise acquired on or after October 12, 1988, or by May 9, 1989 if a deferral has been granted, prior to its use as a school building, or within 30 days after commencement of its use as a school building if such use was the result of an emergency (§763.85 (a)(2)). | 1† | one day | 207(a)(1) |
| LEA failed to use an accredited inspector to conduct inspections (§763.85(a)). | 1 | one day | 207(a)(1) |
| LEA failed to conduct a reinspection of all friable and nonfriable known or assumed ACBM in each school building that they lease, own, or otherwise use as a school building, at least once every three years after a management plan is in effect (§763.85(b)). | NON (notify State Governor (Gov.) or injunction) | | |

* The order of violations listed in Appendix A tracks the order of the requirements as they appear in the AHERA statute and regulation at 40 CFR 763 Subpart E.

† See proposal on page 4 for NON.

| VIOLATION | LEVEL | PER DAY/ ONE DAY | VIOLATION |
|---|---|---|---|
| Bulk samples were not collected in accordance with §763.86 during the inspection for suspected material that was not assumed to be ACBM (please note the exception specified in §§763.86(b)(4) and 763.99) (§763.86)). | 1 | one day | 207(a)(1) |
| If bulk samples were collected during the reinspection, they were not collected, and submitted for analysis in accordance with §§763.86 and 763.87. | NON | | |
| LEA failed to have the bulk samples collected from the initial asbestos inspection submitted for analysis in accordance with 40 CFR 763.87. | 1 | one day | 207(a)(1) |
| LEA used an unaccredited laboratory for PLM analysis of bulk samples - LEA failed to take steps to assure that the bulk samples were analyzed by a laboratory which has current interim accreditation for polarized light microscopy (PLM) analysis under the EPA Interim Asbestos Bulk Sample Analysis Quality Assurance Program until the National Institute of Standards Technology (NIST) PLM program is operational (§763.87(a)). | 2 | one day | 207(a)(1) |
| LEA used an unaccredited laboratory for PLM analysis of bulk samples - LEA failed to take steps to assure that the bulk samples were analyzed by a laboratory currently accredited by the NIST laboratory accreditation program for PLM once that program becomes operational (§763.87(a)). | 2 | one day | 207(a)(1) |
| LEA failed to have an accredited inspector provide a written assessment, pursuant to §763.88, of all friable known or assumed ACBM in the school building for each inspection conducted under §763.85 and previous inspections specified under §763.99 - Exclusions (§763.88)). | 3 | one day | 207(a)(1) |
| The inspection exclusion claimed by the LEA did not meet requirements of §763.99. | 3 | one day | 207(a)(1) |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA that received an inspection exclusion, and subsequently discovered ACBM in a homogeneous or sampling area, did not comply with the applicable sections of Subpart E within 180 days following the date of the identification of ACBM (§763.99(c)). | 1 | one day | 207(a)(1) |
| LEA knowingly submits false information concerning any aspect of an inspection (§763.85)). | 1 | one day | 207(a)(2) |
| LEA knowingly misrepresented an inspector as properly accredited under Section 206 of title II of the Act (§763.85(a)(3)). | 1 | one day | 207(a)(2) |
| LEA knowingly submits false information regarding the inspection exclusions permitted under 40 CFR 763.99. | 1 | one day | 207(a)(2) |
| LEA failed to provide short-term workers (e.g. , repairman, exterminators, etc.) who may come into contact with asbestos in the school information regarding the locations of ACBM and suspected ACBM assumed to be ACM (§763.84(d)). | NON (notify Gov. or injunction) | | |
| LEA has not designated a person to ensure that the requirements of the AHERA regulations are properly implemented. | NON | | |
| Designated person has not received adequate training to perform his duties, including, as necessary, knowledge of:<br>a. Health effects of asbestos.<br>b. Detection, identification, and assessment of ACM.<br>c. Options for controlling ACBM.<br>d. Asbestos management programs.<br>e. Other relevant Federal and State regulations concerning asbestos. | NON | | |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA failed to conduct response actions in a timely manner. However, there is no evidence of imminent or substantial endangerment to human health or the environment (i.e., not conducted within the time-frames stipulated in the management plan [§763.93(e)(6)] or by §763.90) (§§763.90 and 763.93(e)). | NON | | |
| LEA failed to implement response actions within the timeframe specified in the management plan and/or the response action conducted was not sufficient to protect human health or the environment (possibily imminent and substantial endangerment) (§§763.90 and 763.93(e)). | NON (Notify Gov. or Injunction) | | |
| Response actions selected and time frames specified in the management plan were not sufficient to protect human health and the environment (Generally, this violation should only be cited if the LEA has drastically altered the time frames or response action selections that were recommended by the accredited management planner under §763.93(e)(5) or there is evidence of imminent hazard)(§763.90(a)). | NON (Notify Gov. or Injunction) | | |
| Response action selected and implemented were not consistent with the assessment conducted under §763.88 (§763.90(a)). | NON | | |
| Response action, other than a small-scale, short duration repair, was not designed and/or conducted by accredited persons (§763.90(g)). | NON (Injunction) | | |
| Visual inspection and/or air monitoring was not conducted in accordance with §763.90(i) to determine if response action has been properly completed (§763.90(i)). | NON (Injunction) | | |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| When TEM was used to clear response action, the air sampling operation was not performed by qualified individuals completely independent of the abatement contractor (763.90(i), see Appendix A section II. B. 2. of Subpart E). | NON | | |
| LEA failed to develop an operations and maintenance (O&M) plan whenever any friable ACBM is present or assumed to be present in a building that the LEA leases, owns, or otherwise uses as a school building (§763.91(a)). | 2 | one day | 207(a)(3) |
| LEA failed to implement an operations and maintenance (O&M) program whenever any friable ACBM is present or assumed to be present in a building that the LEA leases, owns, or otherwise uses as a school building (§763.91(a)). | NON (Notify Gov. or Injunction) | | |
| LEA failed to meet the requirements of the EPA' s Worker Protection Rule 40 CFR 763.121 during O&M activities conducted by LEA employees (Note, this requirement only applies if the LEA's custodial and maintenance staff is not already covered by the OSHA regulations)(§763.91(b)). | NON (Notify Gov. or Injunction) | | |
| LEA failed to clean all areas of a school building where friable ACBM, damaged or significantly damaged thermal system insulation ACM, or friable suspected ACBM assumed to be ACM are present at least once after the completion of the inspection required by 763.85(a) and before the initiation of any response action, other than O&M activities or repair according to the procedures outlined in §763.91(c). | NON | | |
| LEA failed to follow the procedures outlined in 763.91(d) when conducting operations and maintenance activities disturbing friable ACBM (§763.91(d)). | NON (Notify Gov. or Injunction) | | |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA failed to follow the procedures outlined in §763.91(f)(1) subsequent to a minor fiber release episode (i.e., the falling or dislodging of 3 square or linear feet or less of friable ACBM) (§763.91(f)(1)). | NON | | |
| In the event of a major fiber release episode (i e., the falling or dislodging of more than 3 square or linear feet of friable ACBM), the LEA failed to restrict entry into the area and post signs to prevent entry into the area by persons other than those necessary to perform the response action (§763.91(f)(2)(i)). | NON (Injunction) | | |
| In the event of a major fiber release episode, the LEA failed to shut off or temporarily modify the air handling system to prevent the distribution of fibers to other areas in the building (§763.91(f)(2)(ii)). | NON (Injunction) | | |
| LEA failed to ensure that all members of its maintenance and custodial staff receive the 2 hours of asbestos awareness training required by 40 CFR 763.92(a)(1). | NON (Notify Gov.) | | |
| LEA failed to ensure that all members of its maintenance and custodial staff who conduct activities that will result in the disturbance of ACBM received the 14 hours of additional training required by 40 CFR 763.92(a)(2). | NON (Notify Gov. or Injunction) | | |
| LEA failed to conduct a periodic surveillance, pursuant to 40 CFR 763.92, in each building that it leases, owns, or otherwise uses as a school building that contains ACBM or is assumed to contain ACBM at least once every six months after a mangement plan is in effect (§763.92(b)(1)). | NON (Notify Gov.) | | |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA failed to submit a management plan to the State Agency designated by the Governor on or before October 12, 1988, or by May 9, 1989, if that LEA received a deferral from the State, for each building that the LEA leases, owns, or otherwise uses as a school building (§763.93(a)(1)). | 2† | one day | 207(a)(3) |
| LEA failed to include in the management plan, prior to its use as a school building, a new building that is to be used as part of a school that the LEA leases or otherwise acquires after October 12, 1988, or by May 9, 1989 if that LEA has received a deferral from the State, and failed to submit the revised portions of the plan to the Agency designated by the Governor (§763.93(a)(2)). | 2† | one day | 207(a)(3) |
| LEA failed to submit a management plan to the Agency designated by the Governor for a building the LEA began to use as a school building after October 12, 1988, or May 9, 1989 if the LEA was granted a deferral, prior to the use as a school (§763.93(a)(3)). | 2† | one day | 207(a)(3) |
| LEA failed to begin implementation of the management plan on or before July 9, 1989 (§763.93(c)). | NON (Notify Gov. or Injunction) | | |

† See proposal on page 4 for NON.

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA failed to update its management plan to keep it current with on-going operations and maintenance, periodic surveillance, inspection, reinspection, and response action activities (§763.93(d)). | NON (Notify Gov.) | | |
| LEA failed to include all the items required to be in its management plan by 40 CFR 763.93(e) and other applicable sections of the AHERA regulations (§763.93(e)). | 3 | one day | 207(a)(3) |
| LEA failed to maintain in its administrative office a complete, updated copy of a management plan for each school under its administrative control or direction, and/or failed to make the plan available without cost or restriction (§763.93(g)(1) and (2)). | 2 | one day | 207(a)(3) |
| A school under the LEA authority failed to maintain in its administrative office a complete, updated copy of the management plan for that school, and/or failed to make the plan available without cost or restriction (§763.93(g)(3)). | 3 | one day | 207(a)(3) |
| LEA failed to notify in writing parent, teacher, and employee organizations of the availablity of the management plans (§763.93(g)(4) and §763.84(f)). | 2 | one day | 207(a)(3) |
| LEA failed to update its management plan by not keeping the records required under §763.94. | NON (Notify Gov.) | | |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA failed to maintain the records required by §763.94 in a centralized location in the administrative office of both the school and the LEA as part of the management plan (§763.94(a)). | NON (Notify Gov.) | | |
| LEA failed to attach warning labels immediately adjacent to any friable and nonfriable ACBM located in routine maintenance areas in accordance with §763.95. | NON | | |
| Warning label that was attached immediately adjacent to ACBM in routine maintenance areas did not contain the language required by 40 CFR 763.95(c). | NON | | |
| LEA that claimed an inspection exclusion did not include in their management plan all the information required by §763.99. | 2 | one day | 207(a)(3) |
| LEA failed to include in its management plans a copy of the deferral request and/or the statements required to accompany the request. | 4 | one day | 207(a)(3) |
| LEA that was granted a deferral performed, or directed an employee to perform renovations or removal of <u>any building material</u> other than in accordance with section 215(a)(1) of AHERA as amended. | 1 | one day | 207(a)(4) |
| LEA that was granted a deferral performed, or directed an employee to perform operations and maintenance activities in the school without complying with 40 CFR 763.91 (operations and maintenance), including Appendix B to subpart E of part 763, and paragraph (a)(2) of section 763.92 (training and periodic surveillance). | 2 | one day (per day) | 207(a)(4) |

| VIOLATION | LEVEL | PER DAY/ ONE DAY | STATUTORY VIOLATION |
|---|---|---|---|
| LEA directed a school employee to perform emergency repairs without that employee being provided proper training to safely conduct such work in order to prevent potential exposure to asbestos, and/or without providing that employee with the proper equipment and work practices necessary to safely conduct such work in order to prevent potential exposure to asbestos. | 1 | one day | 207(a)(4) |
| LEA knowingly falsified its deferral request and/or the statements required to accompany this request. | 1 | one day | 207(a)(5) |
| LEA failed to notify affected parent, teacher, and employee organizations of the LEA's intent to file the "request for deferral" before filing the deferral request, and the LEA claimed it did this in its request for deferral. | 3 | one day | 207(a)(5) |
| In the case of public LEAs, the LEA failed to discuss the request for deferral at a public meeting of the school board before the request for deferral was filed, and/or the LEA failed to notify the affected parent, teacher, and employee organizations of the time and place of this meeting in advance of the meeting, and the LEA claimed it did this in its request for deferral. | 3 | one day | 207(a)(5) |

# APPENDIX B*

## CIRCUMSTANCE LEVELS FOR OTHER PERSONS VIOLATIONS OF AHERA

| VIOLATIONS | LEVEL | PER DAY/ ONE DAY |
|---|---|---|
| Person conducted an inspection or reinspection of a school building for ACBM for the purposes of an LEA's compliance with AHERA without that person ever being accredited for this activity under AHERA section 206 or that persons accreditation has expired for more than one year (§763.85(a)(3) and 763.85(b)(2)). | 1 | one day |
| Person conducted an inspection or reinspection of a school building for ACBM for the purposes of an LEA's compliance with AHERA and their accreditation for this activity has expired within the past year of the activity (§§763.85(a)(3) and 763.85(b)(2)). | 3 | one day |
| Person who conducted the inspection for ACBM failed to visually inspect all areas of the school building to identify the locations of all suspected ACBM, and/or failed to touch all suspected ACBM to determine whether they are friable, and/or failed to identify homogeneous areas of friable suspected ACBM and all homogeneous areas of nonfriable suspected ACBM (§763.85(a)(4)(i), (ii), and (iii)). | 2 | one day |
| Person who conducted the inspection for ACBM failed to collect and/or submit for analysis bulk samples, in accordance with §§763.86 and/or 763.87, for each homogeneous area for all suspected ACM that was not assumed to be ACM (§§763.85(a)(4)(iv) and 763.86 and 763.87) (please note the exception specified in §763.86(b)(4)). | 2 | one day |

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* The order of the violations listed in Appendix B tracks the order of the requirements as they appear in the AHERA statute and regulations at 40 CFR 763 Subpart E.

| VIOLATION | LEVEL | PER DAY/ ONE DAY |
|---|---|---|
| Person who conducted the inspection for ACBM failed to assess, or failed to complete the assessment, pursuant to the requirements of §763.88, friable material in areas where samples were collected, friable material in areas that were assummed to be ACBM, thermal system insulation, and friable ACBM identified during previous inspections (§§763.85(a)(4)(v) and 763.88). | 4 | one day |
| Person who conducted the inspection or reinspection, and who provided the LEA the assessment, and/or reassessent of all friable ACBM and friable suspected ACBM assumed to be ACM, failed to provide a written justification for the assessment category selected (§§763.85(a)(4)(v), 763.85(b)(3)(i), 763.85(b)(3)(v) and (vi), and §763.88(b)). | 5 | one day |
| Person who conducted the inspection for ACBM failed to submit the records required by §763.85(a)(4)(vi) to the LEA designated person within 30 days of the inspection but did submit prior to 60 days (§763.85(a)(4)(vi)). | NON | |
| Person who conducted the inspection for ACBM submitted the records required by §763.85(a)(4)(vi) to the LEA designated person more than 60 days after the inspection (§763.85(a)(4)(vi)). | 6 | per day for each day over 60 days |
| Person who conducted the reinspection failed to reinspect and/or reassess, under §763.88, the condition of all friable known or assumed ACBM and thermal system insulation (§§763.85(b)(3)(i) and (vi) and 763.88). | 4 | one day |
| Person who conducted the reinspection failed to visually inspect material that was previously considered nonfriable ACBM and touch the material to determine whether it has become friable since the last inspection or reinspection (§763.85(b)(3)(ii)). | 2 | one day |

| VIOLATION | LEVEL | PER DAY/ ONE DAY |
|---|---|---|
| Person who conducted the reinspection failed to identify any homogeneous areas with material that has become friable since the last inspection or reinspection (§763.85(b)(3)(iii)). | 2 | one day |
| If person who conducted the reinspection collected bulk samples of newly friable material that was previously assumed to be ACBM, those bulk samples were not collected and submitted for analysis in accordance with §§763.86 and/or 763.87 (§763.85(b)(3)(iv)). | 2 | one day |
| Person who conducted the reinspection failed to assess, under §763.88, the condition of the newly friable material in areas where samples were collected, and newly friable materials in areas that are assumed to be ACBM (§763.85 (b)(3)(v)). | 4 | one day |
| Person who conducted the reinspection failed to submit the records required by §763.85(b)(3)(vii)(A) through (C) to the LEA designated person within 30 days after the reinspection but did submit prior to 60 days (763.85(b)(3)(vii)). | NON | |
| Person who conducted the reinspection submitted the records required by §763.85(b)(3)(vii)(A) through (C) to the LEA designated person more than 60 days after the reinspection (§763.85(b)(3)(vii)). | 6 | per day for each day over 60 days |
| Laboratory conducted polarized light microscopy (PLM) analysis of bulk samples of suspect ACBM for the purposes of an LEA's compliance with AHERA and was not interimly accredited at the time of the analysis to conduct PLM analysis under the EPA Interim Asbestos Bulk Sample Analysis Quality Assurance Program (until the National Institute of Standards Technology (NIST) Program is operational)(§763.87(a)). | 2 | one day |

| VIOLATION | LEVEL | PER DAY/ ONE DAY |
|---|---|---|
| Laboratory conducted PLM analysis of bulk samples of suspect ACBM for the purposes of an LEA's compliance with AHERA and was not accredited at the time of the analysis to conduct PLM analysis by the NIST laboratory accreditation program for PLM once that program became operational (§763.87(a)). | 2 | one day |
| Laboratory conducting PLM analysis was properly accredited but failed to conduct the analysis in accordance with AHERA (§763.87)). | 3 | one day |
| Laboratory that conducted the bulk sample analysis failed to provide the information required by §763.87(d) to the LEA designated person within 30 days of the analysis (§763.87(d)). | NON | |
| Laboratory that conducted the bulk sample analysis failed to provide the information required by §763.87(d) to the LEA designated person within 60 days of the analysis (§763.87(d)). | 6 | per day for each day over 60 days |
| Person designed or supervised a response action and was not accredited for that activity under section 206 of AHERA (§763.90(g)). | 2 | one day |
| The worker(s) conducting the response action were not accredited under AHERA section 206, and the response action was not designed and/or supervised by persons accredited under AHERA (§763.90(g)). | 2 | per worker per day |
| The worker(s) conducting the response action were not accredited under AHERA section 206, but were working on a response action which was designed and supervised by persons accredited under AHERA (§763.90(g)). | 3 | per worker per day |
| At the conclusion of a response action, the person designated by the LEA did not visually inspect each functional space where the response action was conducted to determine whether the action was properly completed (§763.90(i)(1)). | 3 | one day |

| VIOLATION | LEVEL | PER DAY/ ONE DAY |
|---|---|---|
| Person designated by the LEA did not collect air samples using aggressive sampling as described in Appendix A to clear response actions (§763.90(i)(2)(i)). | 2 | one day |
| Person who collected air samples to clear a response action was not qualified (§763.90(i), see Appendix A section II B.2). | 3 | one day |
| Person who collected air samples for TEM analysis to clear a response action was not completely independent of the abatement contractor (§763.90(i), see Appendix A section II.B.2.). | 4 | one day |
| Laboratory conducted TEM analyses of air samples from a school building, for purposes of an LEA's compliance with AHERA, without being accredited at the time of the analysis by the National Institute of Standards Technology (NIST) TEM laboratory accreditation program once that program became operational, or without following the protocol described in Appendix A of Subpart E until the NIST program becomes operational (§763.90(i)(2)(ii) and (iii)). | 2 | one day |
| Laboratory conducted PCM analyses of air samples from a school building, for purposes of an LEA's compliance with AHERA, without being enrolled at the time of the analysis in the American Industrial Hygiene Association Proficiency Analytical Testing Program (§763.90(i)(2(ii)). | 2 | one day |
| A laboratory enrolled in the American Industrial Hygiene Association Proficiency Testing Program conducted PCM analysis of air samples from a school building, for purposes of an LEA's compliance with AHERA, without following the method specified in §763.90(i)(5) - (7). | 2 | one day |

| VIOLATION | LEVEL | PER DAY/ ONE DAY |
|---|---|---|
| An abatement contractor completed the response action without having cleared the response action using the required air monitoring, and/or the average asbestos concentration in the air samples exceeded the levels specified in §763.90(i) (§763.90(i)). | 1 | one day |
| Person who developed the LEA's management plan, which was submitted to the State Governor for purposes of the LEA's compliance with AHERA, was not accredited under AHERA section 206 for management plan development (§763.93(e)). | 1 | one day |
| Person who developed the LEA's management plan did not provide the LEA with a management plan which contained all the information required by §763.93(e) and elsewhere in the regulations. | 2 | one day |
| The accredited management planner that signed a statement that the management plan was in compliance with AHERA, as allowed by §763.93(f), was also involved with implementation of the Management plan (please note that this statement is not mandatory, and no violation exists if the statement is not in the management plan) (§763.93(f)). | 5 | one day |
| An accredited inspector, architect, or project engineer provided an LEA an inspection exclusion statement other than in accordance with the conditions provided in §763.99 (§763.99). | 1 | one day |