



ASBESTOS REGULATORY CLARIFICATIONS

Environmental and Consumer Safety Section
Regulatory Services Division
ARC – 013
November 2001

Subject: The Impact of Sovereign Immunity and the Relationship of State to Federal Regulations

BACKGROUND

The issue of sovereign immunity and its impact on the enforcement of state and federal asbestos regulations has repeatedly come into question by the regulated community. For example, clarification is often requested regarding which provisions of the Texas Asbestos Health Protection Rules (TAHPR) apply to federally owned facilities, and whether the Texas Department of State Health Services (DSHS) has the authority to enforce the National Emission Standards for Hazardous Air Pollutants (NESHAP) against the federal government. In addition, the TAHPR, Model Accreditation Plan (MAP), and NESHAP are each unique in their applicability, and clarification is often requested regarding which provisions of each rule apply to different types of facilities and demolition/renovation projects.

RESPONSE

The provisions of the TAHPR that pertain to *public buildings*, as defined by the TAHPR, do not apply to federal facilities. The sections of the TAHPR that apply to *commercial buildings*, as defined by the TAHPR, do apply to federally owned buildings and industrial facilities. The NESHAP applicability overlaps with the TAHPR, but also includes *installations* as defined by the NESHAP. The DSHS enforces the NESHAP on behalf of the federal government against the owner/operators of demolition and/or renovation projects involving *facilities*, which include public buildings, commercial buildings, and installations.

Sovereign immunity protects the federal government against legal action unless it decides to allow enforcement action to be pursued against it. The DSHS may take enforcement action against the federal government if: 1) it is alleged that the federal government violates a rule the DSHS is authorized to enforce, and 2) sovereign immunity is waived by the governmental entity that is alleged to have committed the violation. Examples of such federal government entities are military

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bases, federal agencies, the United States Postal Service, the Internal Revenue Service, or any other federal government service or operation.

DISCUSSION

The applicability of the TAHPR, MAP, and NESHAP, and the effect sovereign immunity has on enforcement of the rules are discussed below. First, the TAHPR and MAP are discussed, independently of the NESHAP, to clarify the interrelationships of the rules. Second, the federal NESHAP and DSHS authority to enforce this rule are discussed. Finally, the issue of sovereign immunity is discussed with respect to its impact on DSHS enforcement authority.

The TAHPR and MAP

The DSHS promulgated the TAHPR, which applies to **public buildings**. The TAHPR defines **public building**, in 25 TAC §295.32(73), to exclude federally owned buildings and industrial facilities. The Environmental Protection Agency (EPA) promulgated the federal MAP, a rule that prescribes a system of training and accreditation requirements for individuals who do asbestos-related work in commercial buildings. The TAHPR was amended in 1998 to adopt the federal MAP, which extended the authority of the TAHPR to federally owned buildings and industrial facilities for the purpose of enforcing federal accreditation and training requirements.

The definition of **commercial building** in the TAHPR is consistent with the MAP, which includes federally owned buildings and industrial facilities. With the 1998 amendment to adopt the MAP, the jurisdiction of the TAHPR is expanded to authorize enforcement activities in commercial buildings in addition to **public buildings**. Examples of **commercial buildings** that are not **public buildings** under TAHPR include, federal facilities, industrial and manufacturing plants, and restricted access warehouses. The incorporation of the MAP into the TAHPR is described in the following section:

25 TAC §295.31(c)(3)--For the purposes of enforcing the Environmental Protection Agency (EPA) Asbestos Model Accreditation Plan (MAP) in commercial buildings, §§295.31, 295.32, 295.33, 295.34 (c), (e) and (g), 295.57, 295.64 (except (f)-(h)), 295.66, 295.67, 295.68, 295.70 apply. For buildings which are not otherwise subject to this title as public buildings, the department will apply and enforce these sections in a manner consistent with the MAP.



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The NESHAP

The federal government promulgated the NESHAP, which overlaps in applicability with the TAHPR, but the NESHAP also applies to industrial facilities, federally owned facilities, and installations. The federal government defers enforcement of the NESHAP to the DSHS. Given this authority, the DSHS enforces both the TAHPR, on behalf of the state government, and the NESHAP on behalf of the federal government.

The DSHS asserts its authority to enforce the NESHAP in the following two sections of the TAHPR:

25 TAC §295.31(c)(2)-- For the purposes of Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) enforcement only: §§295.32; 295.34(a), (b)(1)-(3), (c), and (f); 295.61; 295.67-68; 295.70; and 295.71 of this title (relating to Texas Asbestos Health Protection) apply to all facilities. These sections apply to the extent necessary to allow the department to adopt and enforce the federal NESHAP. For facilities not otherwise subject to this title as public buildings, the department will apply and enforce these sections in a manner consistent with the NESHAP.

25 TAC §295.71(e)-- Enforcement. The department will enforce the provisions of the NESHAP in accordance with §295.70 of this title (relating to Compliance: Administrative Penalty).

Sovereign Immunity

Sovereign immunity is a legal doctrine that precludes the institution of a suit against a sovereign government without its consent. Under the doctrine, a state government as well as an individual or corporation may not sue the federal government. In accordance with 205 U.S. 349, 353, *the sovereign is exempt from suit [on the] practical ground that there can be no legal right against the authority that makes the law on which the right depends*. However, under 11 U.S.C.S 106, *Waiver of Sovereign Immunity*, a governmental entity may waive sovereign immunity with respect to a claim. Based on these federal laws, any enforcement action against the federal government would be subject to the concurrence of the governmental body that the action is initiated against.

In summary, facilities owned or operated by the federal government, such as military bases or post offices, are subject to the NESHAP and the MAP (as it is incorporated into the TAHPR). While the DSHS has the authority to enforce these rules, the federal government reserves the right to disallow

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the enforcement action by exercising sovereign immunity. Similarly, the federal government may waive sovereign immunity, thereby allowing the enforcement action to proceed. Historically, the federal government has not demonstrated any general trends towards exercising or waiving sovereign immunity with regard to asbestos enforcement action.

The ability of the federal government to exercise sovereign immunity with respect to NESHAP and MAP enforcement by the DSHS should not be construed to mean that all NESHAP facilities are similarly immune. Industrial facilities that are not federally owned are subject to the NESHAP, and the state may take the appropriate action when NESHAP violations occur in accordance with 25 TAC §295.71(e), without consideration of sovereign immunity.

This Regulatory Clarification preempts any previous clarification/guidance/policy letters on this subject and remains in effect until superseded in writing by Texas Department of State Health Services. Attributed use or reproduction of this information is freely granted.