UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
GENERAL COUNSEL

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MEMORANDUM

SUBJECT: Federal Agency Compliance with the Asbestos School Hazard Abatement Reauthorization Act (ASHARA)

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TO: Phil King (TS-798)
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You have asked whether it is appropriate to interpret section 206(a) of the Toxic Substances Control Act (TSCA) (the asbestos contractor accreditation requirement) as applying to federal facilities and federal employees. We think that a fairly compelling argument can be made for reading TSCA §206(a) as applying to federal facilities and federal employees.

More specifically, §206(a) can be interpreted as requiring any person (including federal employees) conducting asbestos inspections or response actions in schools, or public or commercial buildings (including federal facilities), to be accredited. The provisions of the Asbestos Hazard Emergency Response Act (AHERA), and the Asbestos School Hazard Abatement Reauthorization Act of 1989 (ASHARA), as well as the legislative history of ASHARA, support a conclusion that federal facilities are public and commercial buildings, so that any inspection or response action in federal facilities must be done by accredited persons. Secondly, §206(a) by its plain language states that any person conducting asbestos inspection or response actions must be accredited. Thus, if a federal employee is doing this activity,

the federal employee must be accredited. Other provisions of ASHARA as well as the legislative histories of AHERA and ASHARA support applying the accreditation requirement in §206(a) to federal employees.

TSCA §206(a) could be alternatively interpreted as excluding coverage of federal employees. The arguments supporting this interpretation are discussed in Section II. While we have included this discussion to cover the range of possible options, we believe the better reading of the statute is that the contractor accreditation requirement applies to federal employees.

Finally, regardless of the interpretation of TSCA §206(a), federal agencies would be covered pursuant to an Executive Order. Executive Order 12088 requires federal agencies to comply with pollution control standards such as the contractor accreditation requirement in TSCA §206(a).

DISCUSSION

I. TSCA §206(a) applies to federal facilities and federal employees

Nothing in TSCA, Title II of TSCA--AHERA, or ASHARA, which amended AHERA, indicates a Congressional intent to exclude regulation of federal facilities and federal employees. Rather, specific provisions of ASHARA and AHERA support a conclusion that Congress intended the requirement for accreditation in §206(a) to apply to federal facilities and federal employees.

A. Section 206(a), by its terms and legislative history, applies to federal facilities.

TSCA §206(a), 15 U.S.C. §2646(a), requires a person inspecting asbestos-containing material or conducting response actions in schools to be accredited. In 1990, §206(a) was amended by ASHARA to extend the requirement for accreditation to persons conducting inspections or response actions in public and commercial buildings.

Section 206(a) "Contractor accreditation," as amended in 1990, provides:

> A person may not--
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> (1) inspect for asbestos-containing material in a school building under the authority of a local education authority or in public or commercial buildings,
>
> (2) * * *

(3) design or conduct response actions, . . ., with respect to friable asbestos-containing material in such a school or public or commercial buildings,

unless such person is accredited by a State under subsection (b) of this section or is accredited pursuant to an Administrator-approved course under subsection (c) of this section.

TSCA §202, 15 U.S.C. §2642, defines "public and commercial building" as "any building which is not a school building, except that the term does not include any residential apartment building of fewer than 10 units." Any building that is not a school building clearly encompasses federal facilities. Congress could have easily excluded federal facilities from the definition of public and commercial buildings along with the specific exemption it provided for small apartment buildings, but Congress did not.

Moreover, there is strong evidence to indicate that Congress intended the term public and commercial buildings to include federal facilities. The legislative history shows that Congress extended §206(a) to public and commercial buildings based, in part, on information provided by EPA on asbestos in federal facilities. TSCA §213, 15 U.S.C. §2653, required EPA to conduct and submit to Congress a study that, among other things, assessed the extent to which asbestos-containing materials are present in public and commercial buildings, the condition of such material, and the likelihood that persons occupying such buildings are or may be exposed to asbestos fibers. EPA submitted the report on "Asbestos-Containing Material in Public Buildings," to Congress in 1988 ("EPA's Study"). In the study, EPA's conclusions focused on 738,000 public and commercial buildings with asbestos-contaminated material, 14,000 of which were federal facilities. EPA's Study, p.8. Congress specifically relied on this information when it amended TSCA §206. Senator Metzenbaum, one of the sponsors of ASHARA, referred to EPA's Study, stating "we all know that the problem of asbestos-contaminated buildings is not confined to our schools. Indeed, the Environmental Protection Agency estimates that there are over 700,000 public and commercial buildings in the United States that contain asbestos-contaminated materials. These buildings pose a health risk to occupants and to the public at large." Cong. Rec. S15308, (Oct. 15, 1990).[1]

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[1] An argument put forth by some federal agencies is that work done at federal facilities is not subject to the accreditation requirement because federal activity cannot be subject to state regulation unless there is an express Congressional waiver of sovereign immunity. This argument is based on a line of Supreme Court cases which held that a federal facility was not required to obtain a state permit under the

B. AHERA and ASHARA, and their legislative histories, support a conclusion that any individual conducting asbestos inspection or response actions, including a federal employee, must be accredited under §206(a).

Section 206(a), by its plain language, states that a person conducting asbestos inspection or response actions must be accredited. Any person carrying out these asbestos activities is covered. Clearly, §206(a), even though entitled the "contractor accreditation" provision, applies to employees conducting asbestos inspections or response actions as well as to the contractor employer. Such employees are asbestos contractors themselves under AHERA and ASHARA, even though they are not contractors in the usual sense. The AHERA legislative history for §206(a) shows this to be the Congressional understanding of an asbestos contractor. Congress explained:

> It is important to recognize that the term "asbestos contractor" is defined very broadly. It includes persons who inspect for asbestos, develop asbestos management plans, including operation and maintenance plans, write specifications for asbestos work and perform asbestos abatement activities. Thus, this term would include, for example, salaried employees who perform these functions even though they are not contractors in the usual sense. The purpose of this broad definition and the accreditation requirement is to assure that all persons who must make technical decisions regarding asbestos and who work around asbestos are properly trained.

Footnote 1 continued:

Clean Air Act or the Clean Water Act absent a clear Congressional mandate that makes this authorization of state regulation clear and unambiguous. Hancock v. Train, 426 U.S. 167 (1976); EPA v. California State Water Resources Board, 426 U.S. 198 (1976). We do not believe that this line of reasoning applies here. The requirement for accreditation is a federal requirement, not a state requirement. TSCA §206(a) does not require federal agencies to be subject to state regulation (i.e., to use only state-accredited contractors); instead, the contractor could be accredited by an EPA-approved course. However, EPA may need to consider renewing its program for approving asbestos training courses at least for training federal employees.

Senate Report 99-427 on AHERA, page 6 (Sept. 3, 1986).[2] EPA's rules implementing AHERA and the §206(a) accreditation requirement at 40 CFR Part 763 set out the training requirements for asbestos abatement workers as well as for the contractors and supervisors.

Additional support for the conclusion that §206(a) applies to employees doing asbestos abatement work comes from §207(g) which provides:

> Any contractor who--
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> (1) Inspects for asbestos-containing material in a school, public or commercial building; or
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> (2) designs or conducts response actions with respect to friable asbestos-containing material in a school, public or commercial building; or
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> (3) employs individuals to conduct response actions with respect to friable asbestos-containing material in a school, public or commercial building;
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> and who fails to obtain accreditation under section 206 of this Act, or in the case of employees to require or provide for the accreditation required, is liable for a civil penalty of not more than $5,000 for each day during which the violation continues unless such contractor is a direct employee of the Federal Government. (Emphasis added.)

As the underlined portion makes clear, employees doing the asbestos work are required to be accredited, and contractors who use employees that are not accredited will be liable for penalties under §207(g).

The question is whether federal employees who conduct inspection or removal actions are subject to the accreditation requirement. As discussed above, §206(a) defines who is subject to the accreditation requirement by describing the activity. If federal employees are conducting asbestos inspection or response actions, a reasonable conclusion is that they must be accredited. The legislative history quoted above supports this conclusion. Given Congress' understanding that the term asbestos contractor covers anyone conducting asbestos inspection or

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[2] Although the House Bill was enacted in lieu of the Senate Bill, the definition of "accredited asbestos contractor" in TSCA §202 came from the Senate Bill and the Senate Report above was addressing the accreditation requirement that was finally adopted as §206.

response actions and the concern expressed above that persons doing inspection or response work be properly trained, it would not be reasonable to exclude one class of workers, absent an express intent to do so. When it enacted AHERA, Congress made no express statements about federal activities other than addressing schools operated by the Department of Defense; however, one can assume that Congress was aware that the Bureau of Indian Affairs (BIA) and the Department of Labor (DOL) operated schools that would be subject to AHERA.

When Congress enacted ASHARA, extending the accreditation requirement to asbestos work done in public and commercial buildings, there was no indication that Congress' understanding of asbestos contractor was changed. Indeed, the same Congressional concern for asbestos workers being properly trained was expressed in the legislative history of ASHARA. Congress extended the contractor accreditation requirement to public and commercial buildings, in part, out of concern that unqualified workers could expose occupants of these buildings to a greater asbestos risk after asbestos work had been done, than had existed beforehand. See Cong. Rec. S15304-15309 (Oct. 15, 1990). It would frustrate Congressional intent for the accreditation requirement to apply only to some workers and not others (federal employees), because federal employees as asbestos contractors could present the same potential hazard to occupants of buildings as other asbestos contractors.[3]

Finally, §207(g), which sets out penalties for asbestos contractors that fail to comply with the accreditation requirement, exempts "a direct employee of the Federal Government," from these penalties. It can be argued that §207(g) would not exempt federal employees unless such employees were required to obtain accreditation under §206(a).[4]

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[3] Note that ASHARA's amendment of §206(a) extended the accreditation requirment to persons inspecting, or designing or conducting asbestos response actions in public and commercial buildings, but not to those persons preparing management plans.

[4] Though federal employees are immune from civil penalties, federal agencies that fail to use accredited employees may not be immune from citizens suits under TSCA §20, under the doctrine of respondeat superior. Case law provides that responsibility for actions of employees, acting in the scope of their employment, may extend to their employers.

II. An alternative argument can be made that TSCA §206(a) does not apply to federal employees.

To make a case for interpreting TSCA §206(a) as not applying to federal employees, the first step would be to argue that TSCA §206(a), as amended by ASHARA in 1990, is ambiguous concerning applicability to federal employees. Section 206(a) states that a person cannot conduct inspections or response actions in public and commercial buildings unless such person is accredited, but does not specify who is covered as a "person." Section 206(a) is silent on the question of whether Congress intended federal employees to be included as a person who must be accredited under §206(a). When a statutory provision is ambiguous with respect to a specific issue, a court should defer to an agency interpretation if it's reasonable and consistent with the statutory purpose. Chevron v. NRDC, 467 U.S. 837 (1984). Section I of this memorandum sets out a reasonable interpretation (and what we believe to be the best reading) of TSCA §206(a) that any individual conducting asbestos inspection or response actions, including federal employees, must be accredited; however, this section examines whether EPA could adopt an alternative interpretation of TSCA §206(a) to exclude federal employees from the contractor accreditation requirement.

Section 206(a) could arguably be interpreted as not applying to federal employees because such employees are not "contractors." It would be contrary to the normal understanding of the term "contractor," to consider federal employees "contractors." Federal agencies hire employees and utilize contractors; different laws govern the terms of employment and liability depending on whether the person is a federal employee or a contractor used by the agency. Congress knows the difference between contractors and federal employees, and it could be argued that Congress would have expressly included federal employees in §206(a) and §207(g) or made clear that "contractors" included federal employees, if that was what was intended. Thus, one could argue that Congress did not express an intention to include federal employees as asbestos contractors under §§206(a) and 207(g).[5]

There is legislative history for ASHARA which shows that Congress was focusing almost entirely on the problems caused by

[5] The last sentence of §207(g), which exempts a contractor that is a "direct employee of the federal government" from civil penalties, does not call for a different conclusion. This statement could be read as referring to contractors hired by the federal government. It is logical that such contractors would be excluded from penalties, otherwise, the cost of the penalties might be built into the contract, resulting in the federal government paying penalties to itself.

contractors and asbestos removal workers when it decided to extend the accreditation requirement to persons who conduct asbestos inspection or removal actions in public and commercial buildings. Senator Reid stated:

> This amendment will go far toward deterring the "rip and skip" contractors who subject their workers to major health risks. Further, through the use of unacceptable asbestos abatement techniques, unqualified contractors may expose building occupants to a greater asbestos risk after they leave than was present when they began their work." Con. Rec. S15302 (Oct. 15, 1990).

Senator Metzenbaum, author of the legislation, added:

> [T]he problem is that not all contractors and workers in the asbestos removal business know what they are doing. Many are untrained or otherwise unprepared to undertake the complex and hazardous job of asbestos removal. Con. Rec. S15308 (Oct. 15, 1990).

Congress extended the accreditation requirement to public and commercial buildings to correct the problems caused by "rip and skip" contractors and the untrained workers in the asbestos removal business. Congress clearly was not thinking about federal employees doing asbestos inspections and response actions--there is no federal agency in the asbestos removal business. Congress may have anticipated that the asbestos work in public and commercial buildings, even in federal facilities, would be done by private asbestos contractors.

Despite the foregoing discussion, there are some problems with interpreting §206(a) as not applying to federal employees. First, if EPA were to take the position that federal employees are not covered under §206(a) as an asbestos contractor, that could open the door to arguments by other employers, like public and commercial building owners, that §206(a) only applies to independent contractors in the asbestos removal business and their employees. Secondly, such an interpretation would mean that even though Congress intended that asbestos work done in federal facilities be covered under §206(a), federal agencies could frustrate this intent by using their own employees to do the work.

III. Executive Order 12088 requires federal agencies to comply with the provisions of TSCA, including the contractor accreditation requirement.

Regardless of TSCA's applicability to federal agencies, Executive Order (E.O.) 12088 requires federal agencies to comply with TSCA's contractor accreditation requirement. E.O. 12088,

reprinted at 42 U.S.C. §4321, provides that the "head of each Executive agency is responsible for compliance with applicable pollution control standards, including those established pursuant to, but not limited to, the following:

(a) Toxic Substances Control Act (15 U.S.C. 2601 et seq.) . . ."

"Applicable pollution control standards" is broadly defined as "the same substantive, procedural, and other requirements that would apply to a private person."

In signing E.O. 12088, President Carter stated:

> I am pleased to sign this Executive order, which will ensure that Federal facilities and federal activities live up to the spirit and the letter of the Nation's environmental protection laws. . . . The Federal Government itself should be the leader in that effort, and this order will help establish that leadership. . . . From now on, all Federal facilities must comply with the same Federal, State, and local environmental standards, procedural requirements, and schedules for cleanup that apply to individual citizens and corporations. I personally will review requests for exemptions, and I will grant them only in cases where I find that national security or the paramount interest of the Nation is at stake. 43 Fed. Reg. 47707 (Oct. 13, 1978).[6]

The requirement in TSCA §206(a) that a person be accredited by a State or EPA-approved program to conduct inspection or response actions certainly fits within the definition of an applicable "pollution control standard" under E.O.12088. The accreditation requirement is a substantive requirement that applies to private persons. Section 206(a) requires any person involved in conducting response actions for friable asbestos-containing material to meet the standards for accreditation. The accreditation requirement assures that persons conducting the response actions have the knowledge and expertise to carry out such actions so as not to endanger the health or safety of persons working in or occupying buildings subject to the response action. See, Sierra Club v. Peterson, 705 F2d 1475 (9th Cir. 1983) (a permit requirement for aerial spraying of the pesticide 2,4-D is a pollution control standard under E.O. 12088). However, if a federal agency was required to comply with §206(a) solely because of the executive order, then noncompliance with §206(a) would be governed by the dispute resolution procedures in

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[6] E. O. 12088 has not been revoked by a subsequent President (See 42 U.S.C. §4321 1993 Supplement) and remains in effect.

E.O.12088, rather than TSCA §15, and the federal agency would not be subject to citizen suits under §20.

Therefore, regardless of whether TSCA §206(a) is read to apply to federal facilities and federal employees, E.O. 12088 directs federal agencies to comply with the accreditation requirement.