Knowing the laws that apply to asbestos abatement is crucial, as penalties for non-compliance can be severe. Last month, ASBESTOS ISSUES '89 presented Part I of "It's the Law," in which EPA and OSHA regulations were discussed. This month, DOT requirements are covered, plus the future of asbestos regulations.

The Department of Transportation (DOT) regulates asbestos transportation activities in accordance with the provisions of the Hazardous Materials Transportation Act of 1975, 49 U.S.C. § 1801 *et seq.* (HMTA), which established a comprehensive framework for the regulation of hazardous materials transportation activities. The HMTA regulatory program is applicable to all people who transport, or cause to be transported or shipped, hazardous materials and all who manufacture, fabricate, re-condition, repair, test or mark

IT'S THE LAW

Understanding the maze of regulations governing the handling, removal and disposal of ACM.

PART II

By Daniel M. Steinway

packages or containers for use in the transportation of hazardous materials 49 U.S.C. § 1804(a).

Pursuant to its authority under HMTA, the DOT has designated asbestos as a hazardous material for purposes of transportation, and it has prescribed requirements for shipping papers, packaging, marking, labeling and transport vehicle placarding applicable to the shipment and transportation of asbestos materials, see 49 C.F.R. § 172.101. In accordance with these requirements, commercial asbestos must be transported in: 1. rigid, leak-tight packagings; 2. bags or other non-rigid packagings in closed freight containers, motor vehicles or rail cars that are loaded by, and for, the exclusive use of the consignor and unloaded by the consignee; or 3. bags or other non-rigid packagings that are dust and sift-proof in strong outside fiberboard or wooden boxes, see 49 C.F.R. § 173.1090.

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Specific regulations have been created for the transport of asbestos materials by highway. Under these regulations, asbestos must be loaded, handled and unloaded, and any asbestos contamination of transport vehicles removed, in a manner that minimizes occupational exposure to airborne asbestos particles released incidental to transportation, see 49 C.F.R. § 177.844. Additional motor carrier safety regulations apply to common, contract and private carriers of property by motor vehicle as defined under these regulations, see 49 C.F.R. Parts 390-397.

"Asbestos must be loaded, handled and unloaded in a manner that minimizes occupational exposure to airborne asbestos particles released incidental to transportation."

FUTURE ISSUES

There have been several recent actions taken by the EPA, OSHA and various state legislatures effecting or relating to the regulation of asbestos in buildings and facilities. In addition, several federal legislative initiatives are being considered by Congress pertaining to ACM.

1. *OSHA Worker Right-to-Know Regulations Now Apply to All Employers.* OSHA has promulgated a revised federal hazard communication standard (HCS) that covers all employers with employees who are exposed to hazardous chemicals in their workplace, see 52 Fed. Reg. 31,852, Aug. 24, 1987. These regulations require that non-manufacturing employers establish hazard communication programs that provide information about the hazardous chemicals to which their employees are exposed. This information must be conveyed by labels (or other forms of warning) on containers, the preparation and distribution of material safety data sheets and the development and implementation of employee training programs, see 40 C.F.R. § 1910.1200(a), as revised. This standard had originally been stayed in federal court. The stay has been lifted and the regulations are currently in effect.

The HCS standard will have a significant impact on the duties of non-manufacturing employers under other federal environmental laws. Because of the expanded federal HCS standard, non-manufacturing employers must now comply with the information reporting requirements under sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA). These sections require employers to submit a material safety data sheet for all hazardous chemicals at their facilities (or, as an alternative, a list of the designated hazardous chemicals) and emergency and hazardous chemical inventory forms to the appropriate state and local emergency planning committees and local fire departments according to statutorily specified schedules.

As a result, those employers holding hazardous chemicals in amounts greater than the specified threshold quantities will be required to provide certain chemical hazard information to their respective state and local committees and local fire departments, see 52 Fed. Reg. 31,859.

As of Sept. 23, 1987, chemical manufacturers, importers and distributors must ensure that material safety data sheets are provided with shipments of hazardous chemicals to non-manufacturing employers or distributors. All employers were required to be in compliance with the standard by May 23, 1988, see 40 C.F.R. § 1910.1200(j), as revised. However, court challenges have been filed by construction industry organizations against this new standard, contending that the construction industry should be subject to a separate standard due to its particular industry characteristics.

2. *OSHA Asbestos Standard.* In the 1988 case *AFL-CIO vs. Secretary of Labor* (C.A. No. 86-1360), the U.S. Court of Appeals for the District of Columbia Circuit has upheld the PEL of 0.2 f/cc established in OSHA asbestos regulations. In this case, which was brought by the Asbestos Information Association/North America and other petitioners that represented industrial organizations as well as various labor organizations, the court held that the new permissible exposure limit of 0.2 f/cc was technologically feasible. It also directed OSHA to re-examine certain other requirements under the new OSHA asbestos regulations. Specifically, the court held that OSHA must reconsider "the issue of disaggregating the general industry standard to afford workers the benefits of more stringent standards in areas where they are feasible."

This order was issued by the court to determine whether a 0.1 f/cc PEL was feasible for the automotive brake and repair industry. The court also directed OSHA to review its asbestos respiratory policy and to re-examine more "vigorous measures" to reduce smoking-related asbestos risks. In addition, OSHA must consider the promulgation of a new short-term exposure limit standard within 60 days. In this case, however, the court struck down OSHA's ban on the spraying of asbestos products.

Finally, in response to labor union claims, the court directed OSHA to address other areas under the new asbestos regulations. First, OSHA is required to clarify the regulations that a construction industry employer must resume air monitoring when a change in workplace conditions could result in exposures above the action level. This requirement is presently unclear under the current regulations.

OSHA must also consider whether to use bilingual warnings or universal symbols for warning signs and labels, and whether to expand the competent person requirement. Furthermore, in accordance with the court's opinion, OSHA must clarify the small-scale, short-duration exemption under the present regulations and decide whether to require all construction industry employers to file reports prior to undertaking an asbestos abatement project or whether to impose other reporting requirements.

It will no doubt take OSHA several months to respond to the court's decision. OSHA has already issued a new short-term excursion limit of 1 f/cc

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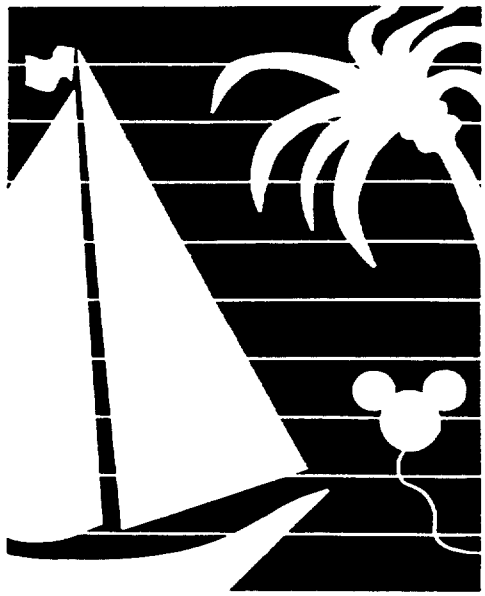

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average over a sample period pf 30 minutes for asbestos exposure. OSHA will probably issue other proposed changes through their normal rule-making process.

3. *New EPA Enforcement Strategy.* Over the past few years, the EPA has stated that strict enforcement of the asbestos NESHAP regulations is one of the agency's highest priorities. Consistent with this philosophy, the EPA has issued its revised strategy for the implementation and enforcement of asbestos demolition and renovation requirements. According to the March 1988 guidance, the EPA plans to focus more of its efforts on contractor compliance with asbestos NESHAP requirements and states that "inspection efforts focused on contractors should result in a more resource-effective enforcement action." This new strategy is expected to result in an increased number of judicial actions brought against contractors who violate the asbestos NESHAP requirements.

In order to implement this strategy, the EPA has established a computer tracking system to monitor contractor compliance with EPA asbestos regulations. This tracking system includes information on the total number of past NESHAP violations committed by an asbestos abatement contractor. The EPA expects to make this information available to any building owner/operator who wishes to obtain additional information on the qualifications of a contractor.

EPA NESHAP guidance indicates that contractor listing is a useful enforcement option that has significant deterrent effects, particularly on contractors involved in the asbestos-in-schools programs. As an example, the agency has proposed placing a large New York City demolition contractor on the EPA contractor debarment list because of recurring asbestos NESHAP violations. The EPA's proposal is the first discretionary listing action brought against a contractor for asbestos violations. If listed, this contractor will be banned from receiving any contract for removal work where federal funds are involved.

The EPA's plans to step up its asbestos enforcement program will have dramatic repercussions for asbestos abatement contractors, making it imperative that contractors carefully review and comment on any new asbestos NESHAP regulations that the agency may promulgate.

"In contrast to the federal requirements under AHERA, which only apply to school buildings, state laws generally pertain to all types of buildings."

REGULATIONS AT A GLANCE

REGULATIONS MANDATED BY DOT

- *Hazardous Materials Transportation Act of 1975 (HMTA).* Established a comprehensive program that governs the regulatory action of the transportation industry. The HMTA, under the authority of the DOT, established that asbestos is a hazardous material subject to the regulations regarding transportation of hazardous materials.

RECENT ACTIONS TAKEN BY EPA AND OSHA

- *OSHA Worker Right-to-Know Regulations Now Apply to All Employers.* A revised federal hazard communication standard (HCS) that covers all employers who have employees that are exposed to hazardous chemicals. This action requires that employers implement hazard communication programs that will provide employees with information about the chemicals to which they are exposed.

- *OSHA Asbestos Standard.* OSHA is required under court order to ensure that the permissible exposure limit (PEL) of 0.2 f/cc be technologically feasible. OSHA must also take measures to reduce smoking-related asbestos risks.

- *EPA Enforcement Strategy.* The EPA will take increased steps to ensure that enforcement actions against contractors are being taken seriously. The result—a computer tracking system to monitor contractor compliance with EPA NESHAP regulations.

STATE DEVELOPMENTS

Forty states have now enacted some form of asbestos legislation. Of these states, 32 have adopted asbestos contractor licensing or certification programs. Some states appear to be taking the lead by extending asbestos regulation to buildings other than schools.

- *Safe Drinking Water and Toxics Enforcement Act (Proposition 65).* California voters enacted Prop. 65 to protect drinking water supplies from exposure to toxic chemicals. Many states have considered similar legislation, however, these states have halted legislation and are now taking a wait-and-see attitude. State legislators are reviewing the law and considering what implications exist for business owners, as well as for the state as a entity within itself.

4. *Federal Legislation and Regulations.* Several federal legislative initiatives relating to ACM are presently being considered by Congress. In response to a number of concerns, legislation extending AHERA deadlines to perform inspections and prepare management plans were enacted into law.

In addition to AHERA activity, there has been a great deal of attention focused on S. 981, the Federal Building Asbestos Hazard Abatement Act of 1987. This legislation, sponsored by Sen. Stafford, is substantially identical to S. 2300, which was introduced in the 100th Congress. The legislation received some consideration, but no action was taken.

Similar legislation (S. 1809) would require the EPA to set standards for the identification and abatement of hazardous asbestos materials in federal buildings. This legislation directs the EPA to promulgate regulations relating to inspection, response actions, operations and maintenance, periodic surveillance, transportation and disposal of asbestos materials in federal buildings. Owners of "covered" buildings would be directed to develop and implement asbestos management plans for these buildings. This act would not allow any response person to inspect for ACM in buildings, prepare a management plan or design or conduct response actions unless the person was accredited by a state or an EPA-approved course. S. 1809 also requires that asbestos manufacturers submit information on their asbestos products to the EPA.

Besides S. 981 and S. 1809, U.S. Rep. James J. Florio, D-N.J., has introduced legislation imposing asbestos controls on all government facilities. Rep. Florio has called this approach an "interim step" requiring asbestos inspections and management plans for all public and commercial buildings. Passage of this legislation may occur in the 101st Congress, although it will probably depend on the implementation of the new asbestos-in-schools program.

The EPA has issued its report on the need for asbestos controls in public and commercial buildings. The report recommends a four-part program that addresses the present asbestos hazards in public and commercial buildings. This program would attempt to: 1. increase the availability of accredited asbestos inspectors and abatement professionals; 2. develop procedures for dealing with thermal system insulation; 3. improve the enforcement of existing asbestos regulations; and 4. assess the effectiveness of the AHERA school program. However, it would not include an AHERA-based regulatory program.

"The new California regulations clarify that Proposition 65 includes any employer who, at the time of the discharge or exposure in question, employed 10 employees."

The EPA is also planning to propose changes in the current NESHAP program requirements. Most of these changes will probably relate to asbestos disposal requirements, including specific work practices for approved disposal facilities and will probably make both the waste operator and the generator liable for violations of NESHAP requirements.

5. (a) *State Developments.* According to recent estimates, 40 states have now passed some type of asbestos-related legislation. Of these states, 32 have adopted an asbestos contractor licensing or certification program. In 1987, asbestos contractor licensing passed in the states of Arizona, Delaware, Hawaii, Idaho, Nevada, Oregon, Texas and Wisconsin.

In contrast to the federal requirements under AHERA, which only apply to school buildings, state laws generally pertain to all types of buildings. The states are establishing a trend that places more types of buildings under the licensing requirements. Training and certification requirements imposed under state laws generally only apply to asbestos contractors and workers. Very few states regulate inspectors and consultants involved in asbestos-related activities.

A number of notable developments have occurred in New York state, including a law requiring contractors involved in the removal of asbestos or ACM to be licensed and that asbestos workers associated with asbestos projects be certified. The New York Department of Labor has now promulgated regulations implementing its responsibilities under this law. These regulations cover licensing and certification requirements, and impose contractor recordkeeping, performance and clearance requirements.

In addition, the New York Department of Health has promulgated regulations establishing requirements and qualifications for the sponsors of training courses which are designed to educate asbestos workers regarding the protection of public health. Completion of a state- or EPA-approved training course is a prerequisite for asbestos worker certification under New York law.

The state of New York has also enacted another asbestos-related law that limits the liability of contractors involved in asbestos abatement projects undertaken for the state or by court order. Under this legislation, contractors will be liable for personal or property damage arising out of abatement projects only if evidence shows "negligence, gross negligence or reckless, wanton or intentional misconduct" on the part of the contractor.

The City of New York's municipal regulations regarding the training and testing of asbestos abatement workers have been upheld as valid. These regulations were issued as part of the New York City ordinance governing building renovation or demolition projects that disturb asbestos materials. Under this ordinance, all buildings that are altered, renovated or demolished in New York City must be initially inspected for asbestos. Those buildings not meeting specified standards are subject to asbestos abatement by certified asbestos workers.

Each state is required to adopt an accreditation plan for the training, testing and certification of inspectors, management planners, abatement

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IT'S THE LAW

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project designers, contractors and workers involved in the federal asbestos-in-schools program pursuant to AHERA. These plans must be based on the model program developed by the EPA, and must be adopted within 180 days after the start of the first regular state legislative session following publication of the model plan.

5. (b) *Proposition 65.* Proposition 65, the Safe Drinking Water and Toxics Enforcement Act of 1986, was adopted as a California law under the state's citizen initiative process, California Health and Safety code §§ 25249.5 *et seq.* This law is aimed at protecting drinking water supplies from exposure to toxic chemicals. Toxic chemicals covered by Proposition 65 include those chemicals known to the state to cause cancer or reproductive toxicity and that have been specifically listed by the governor under the law. Asbestos is included on this list.

Specifically, the law prohibits people in the course of doing business from knowingly discharging or releasing listed toxic chemicals "into water or onto or into land where such chemicals pass or will probably pass into any source of drinking water," see California Health and Safety Code § 25249.5.

The new California regulations clarify that Proposition 65 governs any employer who, at the time of the discharge or exposure in question, employed 10 employees either part-time or full-time. In addition, businesses are also prohibited under the law from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving a clear and reasonable warning of the exposure, see California Health and Safety Code § 25249.6.

Legislation similar to Proposition 65 has been introduced in more than 20 states. However, none of these bills have been enacted into law, and many states are waiting to review the results of the implementation of Proposition 65.

The ever-expanding regulation of asbestos materials has broad implications for owners and occupiers of buildings containing, or suspected of containing, asbestos materials. Generally speaking, buildings constructed prior to the mid-1970s are likely to contain asbestos fireproofing and insulating materials. Asbestos may also be found in wall board and wall finishes, floor tiles, ceiling tiles, roof structures and other building components.

A facility survey for the presence of asbestos-containing materials should be considered, whether conducted independently or as part of a general environmental audit. Asbestos inspection, testing, analysis and abatement activities are best conducted with the assistance of a qualified environmental consultant and legal counsel in order to properly address technical and legal regulatory compliance issues and to avoid potential liability. ■

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