

# MAINE STATE LEGISLATURE

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*Municipalities: Federal authority to inspect properties*  
**STATE OF MAINE**

*Municipalities: Occupational Safety + Health Admin.*

Inter-Departmental Memorandum Date October 26, 1976

To Harold S. Noddin, Director

Dept. Bureau of Labor

From Sarah Redfield, Assistant

Dept. Attorney General

Subject Interpretation - Sec. 2(b)(3) and Sec. 5, Public Law 89-577 (30 U.S.C. 721(b)(3) and 30 U.S.C. 724, Metal and Nonmetallic Mine Safety)

This is in response to your March 4, 1976, request as further clarified by a phone conversation in May, 1976. Basically your request raised two issues:

(I) Does the Mining Enforcement and Safety Administration (MESA) have the authority to inspect municipal highway garages which are not appurtenant to a municipal sand and gravel pit?

(II) Does The Occupational Safety and Health Administration (OSHA) have the authority to inspect municipal highway garages?

The answer to both questions is NO; the reasoning is as follows:

(I) Title 30 U.S.C. 729 grants authorized inspectors entry to any mine for the purpose of making an inspection or investigation. Title 30 U.S.C. 721(b) defines mine as "(1) an area of land from which minerals other than coal or lignite are extracted. . . . (2) private ways and roads appurtenant to such area, and (3) land . . . structures, facilities, equipment, machines, tools, or other property, on the surface or underground, used in the work of extracting such minerals . . . from their natural deposits . . . or used in the milling of such materials. . . ." MESA's authority under 30 U.S.C. 721(b)(3) has been interpreted to include "the prescription and enforcement of standards regarding occupational safety and health conditions of miners who work at loading, dumping, or preparation milling for facilities remote from the mine area but used in the milling or preparation of extracted minerals" and "working conditions of such operations, including such other surface facilities as may be used in the extraction or preparation of extracted minerals" such as "transportation." [Memorandum of understanding between MESA and OSHA, Federal Register, Vol. 39, No. 145, p. 27383 (1974)]

The municipal highway garage qualifies neither as an area of extraction under 721(b)(1) nor as a facility remote from the mine area but used in milling or preparation under 721(b)(3). No extraction or milling [treating crude crust of earth to produce therefrom primary consumer derivatives - Memorandum of Understanding between MESA and OSHA, *Id.*] is done at the highway garage. Since no milling is done at the highway garage, the working conditions of its surface facilities, like transportation, do not fall under MESA's interpretation of its authority under 721(b)(3). Therefore, MESA has no authority over a municipal highway garage which is not appurtenant to a municipal gravel pit and cannot inspect it.

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The conclusion that MESA has no regulatory authority over a municipal highway garage remote from the sand and gravel pit is consistent with OSHA's interpretation of where MESA's jurisdiction ends. See Secretary v. Bettendorf Terminal Co., 8 OSAHRC Reports 343, Docket #837 (1974). In that case the Commissioners held that a company which transported, unloaded and sold sand, dredged from the river and placed on barges ten miles downstream by its parent company, was governed by OSHA not MESA on the grounds that viewing the wholly owned subsidiary's activities as part of a continuous process of sand excavation would conflict with the Metal and Nonmetallic Safety Act which specifically limits its application to mines and milling.

(II) Title 29 U.S.C. 657(a) authorizes OSHA to inspect any ". . . workplace or environment where work is performed by an employee of an employer." Title 29 U.S.C. 652(5) defines employer as ". . . a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State." A municipality is a political subdivision of a State; hence OSHA has no authority to inspect a municipal highway garage under 29 U.S.C. 657(a).

Under Title 29 U.S.C. 667(e) OSHA may inspect workplaces of public employees if a state has submitted a plan, under Title 29 U.S.C. 667(b), to develop and enforce state occupational safety or health standards which would preempt applicable Federal statutes because Title 29 U.S.C. 667(c)(6) requires that such plan "contain satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions. . . ." Maine, however, has submitted no plans for State standards preempting federal standards<sup>1/</sup> so OSHA has no authority to inspect municipal highway garages under Title 29 U.S.C. 667(e).

Although OSHA trial judges have taken the position that to the extent federal agencies, such as MESA, do not exercise their regulatory authority OSHA has jurisdiction, Secretary v. So. Pacific Trans. Co.,

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<sup>1/</sup> Maine has, however, enacted a statute, pursuant to Title 29 U.S.C. 667(a) which allows a state to promulgate occupational safety or health laws concerning issues with respect to which no standards are in effect under Title 29 U.S.C. 655, which authorizes the director of the Bureau of Labor and Industry to inspect any workplace provided by the State, state agency, county, municipal corporation, school district or political subdivision or public corporation. 26 M.R.S.A. 44 (Supp. 1975).

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13 OSAHRC Reports 258, OSAHRC Docket No. 1348 (1974), Secretary v. Penn. Central, 13 OSAHRC Reports 604, OSAHRC Docket No. 738 (1974); such position is inapplicable here since MESA itself has no authority to regulate a municipal highway garage remote from the mine area.

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SR:mfe