



Electronic Dispatch

# Environmental Law Information Memo

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## **NEW YORK STATE DEPARTMENT OF LABOR UPDATES ITS ASBESTOS MANAGEMENT RULE *TIME FOR BUILDING OWNERS TO REVIEW THEIR ASBESTOS MANAGEMENT PROGRAM***

The New York State Department of Labor (“DOL”) enforces a comprehensive asbestos management program at 12 NYCRR Part 56. Generally speaking, Part 56 requires that all asbestos projects be carried out by licensed contractors that use certified workers, and that air sampling technicians conduct air monitoring to ensure that the levels of asbestos fibers do not exceed regulatory thresholds. An asbestos project is work that involves the removal, encapsulation, enclosure, repair or disturbance of friable or non-friable asbestos (defined as any material containing more than 1% asbestos, referred to as “ACM”), or any handling of asbestos material that may result in the release of asbestos fibers.

Part 56 was modified as of January 11, 2006 (referred to herein as “Amended Rule”). All asbestos projects performed until September 4, 2006 can be done using either the Amended Rule or the pre-January 11 version (referred to herein as “Old Rule”). However, as of **September 5, 2006**, the Amended Rule will apply exclusively, and during this transition period, DOL will issue site-specific variances only upon the Amended Rule. This information memo summarizes some of the more substantive changes in the Amended Rule as they may affect building owners.

**Presence of Asbestos.** The mere presence of asbestos does not, in and of itself, present a significant regulatory concern, but its presence does trigger regulatory requirements. Under OSHA regulations, building and facility owners must determine the presence, location, and quantity of ACM and/or “presumed asbestos containing material” (“PACM”) at the work site. PACM means thermal system insulation and surfacing material found in buildings constructed no later than 1980. Employers and building and facility owners must exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM.

The OSHA rule does not require a full building survey with asbestos sampling. However, to the extent a building will be renovated or demolished, EPA requires under its regulatory asbestos management program (that is, its National Emission Standards for Hazardous Air Pollutants – NESHAPS) that an asbestos survey be undertaken.

Similarly, under the DOL regulatory program, if a structure is to be demolished, the Old Rule requires a detailed asbestos survey for all non-agricultural buildings constructed prior to 1974 and the submission of the survey results to DOL and local government officials. The Amended Rule expands the scope of the requirement to require an asbestos survey (including PACM) for any renovation, remodeling or repair in pre-1974 buildings. This brings the state rule closer to the federal requirements.

Under the Amended Rule, the survey must be done by a licensed asbestos contractor using appropriately certified personnel. Note that an asbestos contractor must comply with OSHA and EPA requirements in addition to Part 56 so that it must take into account the presence of ACM and PACM even in buildings constructed after 1974.

The Amended Rule clarifies that if there is an incidental disturbance or other disturbance of ACM or PACM, it is the property owner, who upon discovery of the disturbance, is responsible for contracting with a licensed asbestos contractor for immediate isolation of the disturbed material and cleanup in accordance with Part 56.



**Components of an Asbestos Project.** The Amended Rule makes the asbestos management requirements easier to follow by breaking down an asbestos project into two phases. Phase I (that is, prior to asbestos abatement contractor mobilization) covers the asbestos survey, planning and design and background air sampling. Phase II (that is, abatement) encompasses site preparation and enclosure construction in the regulated abatement work area(s), the asbestos handling, the final cleaning and air clearance sampling, and the removal of the asbestos waste from the site. The requirements of the Amended Rule follow this project sequence and this format is easier to understand when compared to the Old Rule.

**Division of Responsibility on an Asbestos Project.** The air sampling technician shall be contracted by the owner and be independent of the asbestos abatement contractor. This independence is also part of the Old Rule, but the Amended Rule specifically requires that the property owner or his agent contract for these services. The Amended Rule further provides that the air sampling technician must be onsite “to observe and maintain air sampling equipment for the duration of air sample collection.” This tweak to the regulatory scheme will increase the cost of the work, but provide closer supervision of the asbestos project.

The cost of air sampling may also rise because the “period of time permitted between completion of air sample collection and receipt of results on the job site” cannot exceed 48 hours. The air sampling firm is also now required to submit to the DOL satisfactory air clearance results within two (2) business days of receipt and make a submission “immediately, within the same business day” in the event of receipt of an air sampling result that shows an exceedance of the regulatory threshold.

**Final Stages of an Asbestos Project.** The last step on an asbestos project is conducting a visual inspection to ensure that the abatement work is complete. For large and small asbestos projects (as defined), the Amended Rule requires that a certified project monitor be retained to do this inspection.

The project monitor must be retained by the building/structure owner, independent of the asbestos abatement contractor. The visual inspection for completeness of abatement and cleanup is to be conducted in accordance with the current ASTM Standard E 1368 “Standard Practice for Visual Inspection of Asbestos Abatement Projects.”

The Amended Rule also specifies that all asbestos waste be removed from the work site within ten calendar days after the successful completion of all clearance procedures. That waste is to be disposed in accordance with EPA’s NESHAPS asbestos requirements. One should also verify that the transportation and disposal of the asbestos waste is conducted in accordance with the requirements of the New York State Department of Environmental Conservation.

**Part 56 Variances.** Beginning September 5, 2006, every Part 56 variance petition will need to be prepared and submitted by a currently trained and DOL certified project designer who works for a DOL licensed asbestos contractor. All existing applicable variances, blanket variances and statewide and systemwide variances will terminate on September 4, 2006. Existing site-specific variance decisions currently in effect shall remain in effect until the termination date of the variance. However, beginning September 5, 2006, all new site-specific variances will remain in effect only one year from the date of issuance, unless otherwise stated.

**Summary.** In addition to the foregoing, the Amended Rule includes many technical amendments that will affect the work of the asbestos abatement contractor. A review of these changes is beyond the scope of this information memo, but the scope of detailed changes highlights the complex nature of the work.

The Part 56 revision underscores the need for a building owner to review its current asbestos management program and ensure that it is compliant with not only DOL’s Part 56, but also the OSHA and EPA asbestos management programs. Although there may not be a regulatory requirement to remove asbestos-containing materials, it is critical to have a thorough and effective asbestos management program in place to address the extended list of regulatory requirements.

In you have any questions, please call 315-218-8000 or e-mail:

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