



## CHAPTER XV

### ASBESTOS

Asbestos is regulated through a patchwork of state and federal standards. The initial regulations were the workplace standards established by OSHA at 29 C.F.R. §1910.1001. The OSHA regulations set the maximum for workplace exposure to as an “airborne concentration of asbestos in excess of 0.1 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average,” 29 C.F.R. §1910.1001(c)(1), and 1.0 fiber per cubic centimeter over a 30-minute period, 29 C.F.R. §1910.1001(c)(2). Where exposure makes it necessary, the regulations require air monitoring, controls, special gear and facilities, signs, special housekeeping, and medical examinations. 29 C.F.R. §1910.1001.

In 1990, EPA acted under the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §§2601, *et seq.*, to generally phase out the manufacture, importation, processing, distribution and other commercial uses of asbestos materials, by regulations set forth at 40 C.F.R. Part 763, Subpart I. Because the manufacturing ban was struck down by the courts, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), it has been limited to only certain applications. 59 Fed. Reg. 33208 (June 28, 1994).

The federal Asbestos Hazard Emergency Response Act (“AHERA”), 15 U.S.C. §§2641, *et seq.*, was added as Subchapter II to TSCA in 1986, and addresses asbestos in elementary and secondary schools. AHERA requires school authorities to inspect schools, respond to asbestos conditions, and develop a management plan to deal with asbestos left in place in schools. Similar requirements applied under the New York School Asbestos Safety Act (“NYSASA”), Education Law §§430, *et seq.*, which was repealed in 1991. Also, the State Uniform Fire

Prevention and Building Code now prohibits asbestos cement pipe in new or modified construction. N.Y. Executive Law §378(7).

Except with respect to schools, unless OSHA standards are being violated, there is no general requirement to abate asbestos in buildings, whether by removal, encapsulation, or enclosure. However, if an asbestos-containing building is demolished or renovated, both the National Emission Standard for Hazardous Air Pollutants (“NESHAP”) for asbestos established under the Clean Air Act at 40 C.F.R. §61.140, *et seq.*, and state requirements, such as New York State Department of Labor regulations set forth at 12 N.Y.C.R.R. Part 56, are applicable. Some cities, including New York City, also have their own local laws addressing asbestos abatement.

Under the asbestos NESHAP, building owners have a positive duty to survey their buildings for “regulated asbestos containing materials” (“RACM”) (defined at 40 C.F.R. §61.141), and if their planned work will disturb at least 260 linear feet or 160 square feet of RACM or “[a]t least 1 cubic meter (35 cubic feet) of facility components where the length or area could not be measured previously,” the owner may be required to remove the RACM before proceeding with the other work. 40 C.F.R. §61.145(a)(1). For smaller quantities, only notification requirements apply, 40 C.F.R. §61.145(a)(2), and only limited requirements apply to demolition of a building that is “is structurally unsound and in danger of imminent collapse.” 40 C.F.R. §61.145(a)(3).

Notice of an asbestos demolition project must be given to EPA at least 10 days in advance. 40 C.F.R. §61.145(b). The NESHAP standard sets requirements for asbestos removal, including wetting the RACM, ventilation, and leak-type wrapping. 40 C.F.R. §61.145(c).

The asbestos NESHAP requires that the transportation and disposal of asbestos be documented with a Waste Shipment Record. 40 C.F.R. §61.150. Further, the waste must be wet,

sealed in leak-tight containers, labeled, and disposed of in a restricted disposal site that does not cause air emissions. §61.154. Asbestos is not a hazardous waste, so that a properly authorized solid waste facility can store and dispose of waste asbestos.

The New York State Part 56 regulations apply to any asbestos work, except that done by the owner-occupant of a single-family home. 12 N.Y.C.R.R. §§56-1.3, 56-1.4(o). It divides projects into three classes, based upon the amount of asbestos that is disturbed, including “large projects” (260 linear feet or more, or 160 square feet or more), “small projects” (25 to 260 linear feet, or 10 to 160 square feet), and “minor projects” (smaller than small projects). 12 N.Y.C.R.R. §56-1.4(a) (au, bs, aw). Before work is done on a large project, not only must EPA be notified 10 days in advance, but similar notification must be given to the Division of Health and Safety in the New York State Department of Labor. 12 N.Y.C.R.R. §56-1.6. Among other things, the regulations address project recordkeeping, contractor and worker licensing, worker protection, entry and exit from work areas, work practices, worker protective equipment and decontamination, cleanup practices, notification of residential and business occupants, and air testing and analysis. Training for licensees by “asbestos safety program sponsors” is regulated by the New York State Department of Health. 10 N.Y.C.R.R. Part 73.

Due to the regulations of asbestos as a hazardous air pollutant, it is a “hazardous substance,” and releases into the environment are governed by CERCLA. Nonetheless, asbestos inside a building has been generally found by the courts not to constitute a “release into the environment” actionable under CERCLA. *3550 Stevens Creek Associates v. Barclays Bank of California*, 915 F.2d 1355 (9<sup>th</sup> Cir. 1990).