

BASIS STATEMENT
Maine Asbestos Management Regulations
Response to Comments, 2010
Chapter 425: Asbestos Management Regulations

History

- The proposed revisions to Chapter 425, Asbestos Management Regulations, are to simplify and clarify the rule, to promote the use of “risk-based” standards to regulate asbestos more effectively in areas of greatest risk for exposure, to integrate changes to standard industry practice that have evolved over the past 6 years, and to update the notification, licensing and certification fees to be consistent with current Maine statutory requirements.
- A public hearing was held on the proposed revisions on November 18, 2010; the comment period ended on November 29, 2010 at 5:00 p.m.
- Comments were received from 2 people:

- C:1 Jonathan Klane, Klane's Education Information Training Hub, Fairfield, ME
- C:2 Jim Bouquet, Summit Environmental, Lewiston, Maine

Section 1. Definitions

Comment: Paragraph 1.E – Aggressive sampling method. Add “at an angle” to the fan direction. Without this direction it could be interpreted that the fan is to lay flat on the floor.(C:1)

Response: The Department has reviewed the aggressive sampling protocol in the Asbestos in Schools Rule and finds the comment is consistent with the AHERA requirement and has changed the rule accordingly. A review of the AHERA protocol in responding to this comment evidences that the relationship of the required number of fans to the size of the worksite in AHERA is in cubic feet not square feet as appears in the proposed draft rule. The Department has changed in the final proposed draft rule to be consistent the AHERA requirement.

1. **Comment:** Subsections 1.AAA and 1.BBB – Definitions of “Encapsulation” and “Enclosure”. Add “or disturb” to the definition. “Damage” might not be obvious and agreed to by all. (C:1)

Response: The Department agrees and has added “or disturb” to the rule

Section 2. Activities not Subject to This Rule

2. **Comment:** Paragraph 2.F(1) – Reference to “105 square feet”. Refer the reader to the explanation at the back of the reg’s or move the explanation to here. The “105 feet” reference is not well known and readers could be unclear about it. (C:1)

Response: Commentator is referring to how the Department arrived at the threshold amount of 105 square feet of asbestos-containing latex, asphaltic or petroleum-based materials that are cut with mechanical cutters. As noted during the Department ‘s oral presentation during the public

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hearing this is based on EPA's "Interpretive Rule Governing Roof Removal Operations 40 CFR Part 61 Appendix A to Subpart M dated June 17, 1994 which states that cutting 5,580ft² of asbestos-containing roofing material creates 160ft² of friable ACM, the point at which the an asbestos-containing roof project become subject to federal NESHAP requirements; cutting 105ft² of asbestos-containing roofing material creates 3ft² of ACM the regulatory threshold of an "asbestos abatement activity" per Maine asbestos laws and regulations. The Department has added to the Note to further inform on this issue.

Comment: Paragraph 2.F(18) - . Moving two 2'x4' ACM ceiling tiles. Delete this allowance. Moving ACM ceiling tiles generates significant amounts of asbestos laden dust. This subverts the 3 foot minimum regulated. The asbestos is amosite and is quite toxic. Also, this will confuse school personnel and may lead to them creating asbestos hazards in schools. (C:1)

Response: Our objective by adding this to the Activities Not Subject to This Rule is to continue to focus our regulatory oversight on activities that pose the highest risk. While there is some potential to release fibers while moving ceiling tiles, it is the Department's position that other regulatory requirements such as the OSHA Construction standard 29 CFR 1926.1101 (effective August 10, 1994) and the Asbestos-Containing Materials in Schools 40 CFR Part 763 (effective Oct. 30, 1987)[applies to school personnel] provides both personal protective safeguards to individuals and sets forth work practices that will help minimize any potential release to the surrounding area. Additionally, this activity is limited to the performance of needed maintenance, not for the purpose of permanent tile removal; it is anticipated that that moving 2 tiles can be accomplished in less than 5 minutes on average and that a limited number of rooms would be affected by the needed maintenance activity. Finally, as noted during the Department's oral presentation to the Board during the public hearing, the rule as proposed includes language to inform school personnel that they are subject to the AHERA requirements and to check with the school's Designated Person before undertaking any asbestos-related activities. No change to the proposed rule.

Section 4. License Requirements for Business and Public Entities

Comment: Paragraph 4.A(7) - Fees. Do not increase the fees. These increases are many times the current fees. This is still the worst economy in decades. There are contractors who have gone out of business recently. I have had to "comp" (offer at no charge) refresher training for several colleagues who could not otherwise afford to renew their training for their certifications. The change to the law appears to have been done without the necessary and typical advanced notice to the regulated community. We should not be compared to Massachusetts (as the DEP has said in defense of these increases) as Mass has many more people and projects than Maine does. (C:1)

Response: The asbestos fees were updated in statute during the last (2009) legislative session, for the first time since 1993. The rule is merely being updated to reflect that change. No change to the propose rule.

Comment Subparagraph 4.A(7)(e) – Training Provider fee. Delete the added wording “with prior written Dept. approval” We are concerned that the DEP will no longer approve the use of “in-kind” services for a deduction from our fee based on recent experiences. (C:1)

Response: The Department will continue to use “in-kind” services for a deduction from Training Provider fees for needed staff training. This simply states that the approval will be in writing prior to Department staff attending the training course. No change to the proposed rule.

Comment: Subparagraph 4.C(4)(e) - Paper copy. Delete this. Larry Mare at BGS-DSES doesn't want paper copies – only electronic files. The same goes for our clients. It is unnecessary. If absolutely needed it could be changed to “upon request from BGS or LEA, provide a paper copy in addition to electronic files”. (C:1)

Response: The Department, after consultation with BGS, has made changes to the proposed draft rule in response to the comment.

Comment: Subparagraph 4.F(3)(d) – Primary Training Facility. Delete these new requirements. These changes are the same as EPA ones for Lead training and it was unnecessarily complex. Much training occurs at various conference venues and employer locations. If the DEP is concerned about specific locations, they can visit them during a course to see if adequate. (C:1)

Response: It is the Department's position that it is necessary and appropriate to establish training facility standards so that the facility itself is not an impediment to the learning process for students. The Department does not agree that the standards are unnecessarily complex; for example, requiring that there is sufficient lighting and adequate room size to accommodate the students, that background noise is not such that exchanges between the trainer and attendees are not audible, and that tables are sized to accommodate each student comfortably, without crowding is not unnecessarily complex or unduly burdensome requirement. Finally, regarding commenter's suggestion that Department staff visit specific locations to see if they are adequate, absent a standard, there is nothing by which that adequacy can be measured. No change to the proposed rule.

Comment: Subparagraph 4.F(3)(e) – Sign-in/out sheet. Delete this. This is the same as in the DEP Chapter 424 Lead regulations and it hasn't made a significant difference in time spent in the classroom. It has become perfunctory and is unneeded (C:1).

Response: The USEPA Model Accreditation Plan (MAP) that sets forth the required course training curricula for 5 categories of asbestos professionals that these professionals are required to attend in order to be certified in their respective categories. The MAP also requires that attendees be present in the classroom for at least 90% of class training in order to successfully complete the training course. Requiring that attendees sign in/out provides both the training provider and the Department, as part of a Training Provider audit, with a means of verifying compliance with this MAP requirement. No change to the proposed rule.

6. *Pre-Abatement Requirements*

Comment: Paragraph 6.B(1) - It appears the intent of this change is to control the overzealous inspector. However, the weak link in these changes is that the inspector still determines what is a "homogenous area" and can oversample based on their field determination of the number of those areas. (C:2)

Response:

Paragraph 6.B(1) states that bulk samples must be collected by a Department-certified Inspector in a random manner such that they are representative of each homogenous area. An "homogenous area" means a discrete portion of surfacing material, thermal system insulation, or miscellaneous ACM that is uniform in color, texture, and composition. The purpose of this proposed change is to standardize the number of samples that are collected during an inspection. The proposed number of samples by material type in the proposed draft is the industry accepted standard used to determine whether or not a suspect material is asbestos-containing. Furthermore, the proposed sampling protocol in no way limits the professional judgment an inspector may exercise during the inspection; as noted by the commenter; both the current and proposed draft requires the inspector to identify and sample homogeneous areas of suspect ACM. This provides the inspector with the flexibility to sample any homogeneous material the inspector suspects of being asbestos-containing. However, in response to comment, the Department has added language to provide additional sampling flexibility to collect more, but not less than, the required number of samples per homogeneous area as set forth in this section. This includes a requirement that the asbestos consultant has informed the building owner or owner's agent of the standard sampling protocol before any sampling occurs.

Comments: Paragraph 6.B(2) - I believe the intent of changes to 425.6(B)(2) is to protect the building owner from overzealous inspectors and sample collection/analysis practices; however, I am concerned that the professional judgment of the inspector in the field may be overridden by owners who use these new rules to limit the scope of surveys or ultimately sue if their desired result is not achieved. Shouldn't the number and type of analysis be established between the owner and the inspector during the proposal phase? If the owner has concerns at that point, they can always contact the Department and compare the proposal against recommended practice. There needs to be a certain amount of "buyer beware" versus rule changes that limit the judgment of the inspector in the field. If an owner engages an inspector for a project, for that work to proceed without a clear proposal shows a lack of professionalism and common sense by both the owner and inspector. Any good proposal will state the number of samples and method of analysis, as well as an estimate or lump sum cost for the inspection. (C:2)

"With informed documented consent..." Please delete this from the several locations where added. This removes the effective and efficient use of professional field judgment that is often necessary. It would likely increase liability for many. If this is a problem, we suggest that the DEP handle it directly with the parties involved as well as increase public awareness about good practices. (C:1)

Response: The Department has revised this section based on comments received. The revision requires that the asbestos consultant inform the building owner whenever the asbestos analytical

laboratory has determined that it is not feasible or appropriate to have bulk samples analyzed using the standard visual estimation PLM –EPA 600/R-93/116 method. The building owner may then either elect to treat the bulk material as asbestos-containing with no further analysis required, or may approve the use of the alternative analytical methods. In addition, in response to comment, Department has added language to provide analytical flexibility where it is in the interest of the building owner to analyze bulk samples using a more sophisticated Department-approved analytical method such as TEM, or other Department-approved analytical method rather than the standard PLM analytical method set forth in this section. This includes a requirement that the asbestos consultant has informed the building owner or owner's agent of the standard PLM methods before the more sophisticated or other Department-approved analytical method is used for sample analysis[caç1].

Comment: Subparagraph 6.B(2)(e) - “Representatives from previous sampling events...” This will cost owners money as previous samplers will need to be compensated for their time. Often the “previous sampler” is no longer working, living in Maine, and sometimes, not even alive. (C:1)

Response: The Department has revised this section to clarify specifically that the option to have both asbestos inspectors present to resample the bulk material in question, is contingent on both inspectors being able to be present. If they both cannot be present, the building may elect to have a 3rd party asbestos inspector re-sample the bulk material(s) in question. Note also this section does not require that the building owner resample whenever there is a discrepancy between analytical results; this only provides the building with the option to re-sample should the building owner decide it is in his or her interest to resolve the discrepancy rather than treat the bulk material(s) in question as asbestos-containing.

Comments: Subsection 6.B(2)(b)(3) - Non-Regulated Materials and Media. Please delete this change. It sounds like the DEP doesn't regulate these situations at all. Clearly there are times when there is ACM debris in soil, etc. that the DEP regulated. This should be clarified. The DEP may not fully regulate ACM-laden vermiculite, but likely they will in the future. (C:1)

This paragraph (at least the way currently written) should be a note and not a rule. (C:2)

Response: The Department after consideration agrees with commenter's and has revised this section to be a Note in the proposed rule, and has further clarified the issue of ACM debris in soil.

Section 7. Asbestos Abatement Work Practice Requirements

Comment: Subparagraph 7.A(2)(c)(iv) - “Ventilation units may be shut down overnight...” Please delete this change. Units should remain continuously until clearance is achieved. Generators and alarms work well to maintain the containment. If needed, this could be a variance (either standard or non-standard). (C-1)

Response: The Department has added clarifying language that this is limited to projects where, due to site safety or security reasons, the portable generator cannot be left on site over night.

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Comment: Paragraph 7.A(6) subparagraph 7.A(14)(d)(i) - "Wearing a bathing suit underneath...suits is allowed".: Clarify what is and what is not a bathing suit. The intent is likely a nylon or similar suit, but some people wear gym shorts or "cut-offs" and underwear as their bathing suit. This doesn't seem to be DEP's intent. (C-1)

Response: The Department has added language to paragraph 7.A(6) to clarify the type of bathing suit permissible as well as language that gym shorts, "cut-offs" or underwear are not considered to be bathing suits.

Comment: Paragraph 7.A(10) - (iii) is used twice. Change the second (iii) to (iv) It's a typo. (C-1)

Response: The Department agrees and fixed the typo.

Comment: Subparagraph 7.A(14)(d)(v) - Remote decon suits. Add "in a sealed bag" to "carry". Also, offer a second approach. The suit could get contaminated if not sealed. Develop a second approach with wearing both suits and then removing the top one prior to remote deconning. (C-1)

Response: The Department does not agree that it is likely that the clean suit that is left at the designated egress point into the regulated area will be contaminated. The Department has also considered a second approach of wearing two clean suits into the regulated area and then removing the top one prior to exiting the regulated area. It is the Department's position that this method is less protective than the proposed method since protective suits can tear while workers are performing abatement-related activities thereby exposing the inner (clean) suit to contamination. No change to the proposed rule.

Comment: Subparagraph 7.B(3)(e) - "Leak proof". Change this to "leak tight". Leak proof is a difficult standard to define and to meet. Is a 6-mil poly bag leak proof if it is punctured? Leak tight is more fitting here. (C-1)

Response: The Department's position is that there is little if any distinction between "leak proof" and "leak tight". In the example used by the commenter, the poly bag would be neither leak proof nor leak tight if it were punctured. No change to the proposed rule.

Comment: -Paragraph 8.B(1) - "Completely dry". Define "completely dry". It is unclear what constitutes "completely dry and what doesn't meet this standard. Is it a lack of standing water puddles? What about a few drops of water on pipes? What if they are condensate lines of cold water pipes in a basement in the summer? What about the humidity in the space? The DEP's intent should be clarified to avoid unnecessary confusion. (C-1)

Response: The Department has added "such that there is no visible evidence of water in the regulated area" to both paragraph 8.B(1) and subparagraph 8.B(2)(a).

Comment: Subparagraphs 8.B(2)(g)(i) and (iii) - "Wet wash". Use "wet wipe" instead. The terms that we've consistently used are "wet wipe". "Wet wash" is a new term and not well described or defined. Wet wash could be interpreted differently by persons. Is "wash" with soap and water? Is it mopping? How much "washing" is needed? This should be clarified (or use "wet wipe" instead). (C-1)

Response: The Department agrees and has replaced "wet wash" with "wet wipe" to the rule.

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