

Date: November 18, 1996
To: Legislative Rule-Making Review Committee
From: Kay Howard, Director *Kay Howard*
Regulatory Development
Department of Health and Human Resources

Re: Asbestos Abatement Licensing Rule, 64 CSR 63

1. Authorizing statute(s) citation: W. Va. Code § 16-32-3
2.
 - a. Date filed in State Register with Notice of Public Comment Period: 7-18-96
 - b. Other notice, including advertising, given of the public comment period: Copies were circulated to all licensed individuals except individual workers, various potentially interested associations and groups, and other known interested parties. The Department believed that individual workers would, on the whole, be informed through their employers.
 - c. Date Public Comment Period Ended: 8-19-96
 - d. List of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached X No comments received _____
 - e. Date of filing in State Register the Agency-Approved proposed Legislative Rule following public comment period: November 18, 1996
 - f. Name and phone number of agency contact person: Kay Howard, 558-3223
3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation: Not Applicable
 - a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.
 - b. Date of hearing:
 - c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?
 - d. Attach findings and determinations and reasons:

**Discussion of Public Comments Received
Concerning the Proposed
Asbestos Abatement Licensing Rule
64 CSR 63**

The proposed rule rewrites and expands on existing rule. The purpose of the revisions and expansion are: conform to changes in the Asbestos Abatement Licensure Law, W. Va. Code §16-32-1 et seq.; to correct and clarify the present rule; to set forth specific performance standards for various categories of licensure; and to specify more clearly the responsibilities of the owners of buildings where asbestos abatement projects occur.

In conformance to the statute, there are three (3) new licensure categories as follows: asbestos analytic laboratory; asbestos clearance air monitor; and resilient floor covering worker. The rule has the following sections: general; application and enforcement; definitions; license required, procedures, application, qualifications; licensed contractors' duties; asbestos clearance air monitor duties; minimum clearance air standards; asbestos inspector duties; asbestos project designer duties; training accreditation; responsibilities of owners; applicable federal standards; inspections; penalties; administrative due process; severability. The rule adopts various federal regulations for asbestos abatement. Licensure fees are added for the new license categories. The rule now includes the minimum number of air samples for non-school asbestos abatement projects.

Comments were received from several persons representing the asbestos abatement industry and from building owners. All comments were reviewed, and selected changes, indicated with strike-through and underline, are recommended in the proposed rule. Renumbering caused by additions and reorganization are not marked. Several comments were made concerning definitions. The definitions are set in the law and cannot be changed in the rule. Some new definitions have been added as recommended during the comment period. Several comments received referenced OSHA 1926.58. This rule was amended and redesignated as § 1926.1101 Asbestos, and published in the Federal Register August 10, 1994. Therefore, those comments cannot be considered.

1. Comment: Several comments suggested that Section 3 be retitled and redrafted to encompass general license requirements applicable to all licenses under the rule.

Response: The Department agrees with most of the changes suggested and has restructured the rule with a few clarifications.

2. Comment: Section 3.9.5.a. One comment concerned the rule placing a different burden of performance for NVLAP certification than AIHA accreditation or AIHA-Pat rounds performance qualifications.

Response: The word “accreditation” has been added to the NVLAP requirement.

3. Comment: Section 4. Licensed contractor duties should be expanded to include the owners of buildings or other man-made structures who conduct their own asbestos abatement projects because those owners would be exempt from the requirements set forth for a licensed asbestos contractor.

Response: Asbestos contractor is defined in Code § 16-32-2 (g) as a person who enters into a contract for an asbestos abatement project. Although owners of buildings or other man-made structures are not required to possess an asbestos contractor license, persons they employ that perform activities involving the repair, removal, enclosure or encapsulation of asbestos containing material must be properly licensed to carry out those activities.

4. Comment: Section 4.1.4. This comment requested a clarification. Their interpretation that a licensed asbestos project designer is the party responsible for the actual design and layout of the contained work area and is typically the asbestos contractor.

Response: Asbestos abatement project designer is defined in Code § 16-32-2. This person could also be a licensed asbestos contractor, or an employee of the asbestos contractor or a third party. The asbestos abatement project designer does not have to be the asbestos contractor or an employee of the asbestos contractor. The person must possess a valid asbestos abatement project designer license to design the project.

5. Comment: Section 4.1.5. This comment is concerned that the wording “where feasible” is argumentative and should be changed to reflect the words “where required by OSHA 1926.1101 or.”

Response: The suggested language has been added.

6. Comment: Section 4.1.5. This commentator understood that a “glove bag” is different from a “contained work area” and should not be subject to the same requirements.

Response: Using Table 64-63 and the definition of a contained work area, a glove bag would not be subject to the requirements for a contained work area. The requirements for glove bags are covered by OSHA 1926.1101 (g) (5) (ii) found on page 41135 of the federal register.

7. Comment: Section 4.1.7. The commentator wanted to delete this section from the rule stating it was redundant and the clearance air monitor will be informed of the location of the abatement project before performing any required air monitoring.

Response: Code §16-32-6(3) states, “meet the requirements otherwise set forth by the director” authorizes this in the rule.

8. Comment: Section 4.3. Records of Clearance Air Monitoring. This comment states: "The requirement here for "written verification" is unclear. We suggest that upon project completion, the project manager be required to make written verification of compliance. This could be accomplished by the requirement that the laboratory certify on its report that the report has been conducted in compliance with the rule."

Response: Neither the law nor the rule requires a project manager, therefore, the Department cannot make that person responsible for any part of the law or rule. Code § 16-32-6(3) places this responsibility on the licensed contractor.

9. Comment: Section 5.1.3. Aggressive air sampling is required by this section. The commentator is concerned that some industry sites are very dusty and fly ash and other airborne particles can make aggressive air sampling impossible, recommended that provisions be made available to waive the aggressive sampling without formal approval, or notification to the Director. This could cause unnecessary delays and increase cost.

Response: Section 6.4. Describes the procedure for a waiver. This can be accomplished by contacting the Director and describing this situation in detail. However, this must be done well in advance of any asbestos abatement project.

10. Comment: Section 6. "Minimum Clearance Air Standards." This commentator wanted to know, "If clearance air monitoring was required": 1) On all projects regardless of size, friability and ownership? 2) For the removal of 200 linear feet of TSI in a residence? Also, 3) Is the clearance air monitor an employee of the contractor or a third party and 4) Are there any conflict of interest rules?

Response: 1) No, the area must be cleared if the contained work area is 50 square feet or larger. The size of the projects requiring clearance can be found in Table 64-63B. 2) Yes, if the contained work area is 50 square feet or larger. 3) No, Code § 16-32-6 (e) (2) prohibits an employer-employee relationship between the contractor and an asbestos clearance air monitor for an asbestos abatement project performed or contracted for by the contractor. 4) Yes, see the answer to 3) above.

11. Comment: Section 7. "Asbestos Inspector Duties." One commentator has a concern about not being able to thoroughly inspect parts of a plant to identify all asbestos material that may be disturbed during an outage because of extreme temperatures and inaccessibility of materials and records. For example, the inspection and sampling procedures in 40 C.F.R. Part 763 ("Asbestos Containing Materials in Schools") are inappropriate and overburdensome when applied to non-school and industrial settings.

Response: Agree with the commentator position, but a licensed asbestos inspector must perform any sampling of suspect material that is not assumed as outage projects progress. The inspection and sampling procedures taught by all EPA and West Virginia

approved training providers are those described in 40 C.F.R. Part 763, and are required as an accreditation for an asbestos inspector license. In industrial and non-school facilities, the protocol for sampling can be adjusted to fit the facility. The protocol is used as a teaching guide but must be followed in schools.

12. Comment: Two (2) comments regarding asbestos project designer duties: One (1) comment was to make an insertion of a “de minimis” exception to this requirement for smaller projects. The other comment concerned the timing of the design.

Response: Section 2.4 defines asbestos projects and removes the requirement for a project design of projects when the removal is less than three (3) square feet or three (3) linear feet of asbestos-containing materials required in the performance of a maintenance activity not intended solely as asbestos abatement. This is not considered an asbestos abatement project. A design must be provided to properly identify materials that are to be abated and to maintain control of the project. For the asbestos project to be successful, there must be a sequence of events, what is going to happen, when it should happen, and who is responsible to assure that it happens. This must be planned to assure a safe, acceptable and complete asbestos project.

13. Comment: Section 9, “Training Accreditation.” This commentator wanted the director to grant approval (accreditation) for training to any asbestos training course which has met or exceeded the EPA protocol applicable to such courses.

Response: §64-63-9.2 makes this possible. (“Persons wishing asbestos abatement training course accreditation shall submit an application on forms approved by the Director, together with the fee required by W. Va. Division of Health Administrative Rule, 64 CSR 51, Fees for Services.”)

14. Comment: Section 10.1.1. “Responsibilities of Owners.” One (1) commentator, who had his facilities surveyed for asbestos containing materials during 1987 and 1988 by a certified industrial hygienist, before the licensing rule was in effect, questions whether he should be required to have them reinspected by a licensed asbestos inspector prior to commencing any asbestos abatement projects.

Response: The facility owner had the survey work done by certified industrial hygienist, who at that time would be considered adequately trained to perform these surveys. These comprehensive surveys which were completed before the law and rule requiring inspectors to inspect facilities for asbestos containing materials, can be accepted as they are. The Department must require that any suspect asbestos material encountered during preparation for, or during an outage or asbestos abatement project that has not been identified by these surveys as positive or negative, as reported in a laboratory analysis report, be sampled by a licensed asbestos inspector and analyzed at an accredited laboratory, if the suspect material is not “assumed as asbestos containing material” by the facility.

15. Comment: Section 10.1.3. This comment was concerned about the fee accompanying the notification. In projects that must be performed quickly, they request that the fee to be paid within seven to ten (7-10) working days of submission of the notification for the project. Many problems surface with the fees being required to be sent with the notification.

Response: Isolated situations can be handled by contacting the person that processes the notifications on an as needed basis in the office.

16. Comment: Section 10.2, "Delegation of Authority." One comment was to delete this section and address it more clearly elsewhere. Another comment suggested, in general, that the owner or operator should be able to delegate the responsibility for compliance with this section, including compliance with State and federal notifications to the contractor via a written contract.

Response: Section 10.2. The Department believes the item is clear. Delegation is permissible.

17. Comment: Section 10.3. "Weekly Notification." This commentator appreciated the weekly summary in lieu of separate notification for each project, but asked for projects exceeding three (3) months in duration, that notification be allowed to be made on a monthly basis. Payment of weekly fees can be difficult administratively for many of their members, they suggest that fees be allowed to be paid monthly in all cases.

Response: These projects can normally be successfully completed in less than a week, there by eliminating the extended period of three (3) months. Most facilities that have numerous asbestos abatement projects that qualify under this section, and utilize the Notification-Class IV: Annual Industrial Facility paying the one-time fee of \$1500.00. No change is recommended.

18. Comment: Section 11, "Applicable Federal Standards." One (1) comment stated that the rule appears to adopt prospectively future changes to not consistent with the State rule-making process.

Response: The Department did not intend to adopt a future federal rule. The intent was to allow for the unlikely but not impossible potential publication of a lawfully adopted federal revision of a federal standard prior to the end of the comment period, but with an effective date prior to submission of the rule to the Legislature.

19. Comment: Table 64-63A. License Fee Schedule. This comment encouraged the division to streamline and consolidate licensing requirements. This would be helpful to both applicants and reduce processing costs for the division to issue a multiple license.

Response: License criteria are set in the Code. The combination of licenses is in the

rule where possible, as in the license for asbestos analytical laboratory. All disciplines for licensure are set in the law and cannot be changed in the rule.

20. Comment: Table 64-63B, "Minimum Number of Air Samples for Non-School Asbestos Abatement Projects." One (1) commentator objected to being required to take more samples for a non-school asbestos project than the maximum of five (5) for a school project. Another comment was for more clarification. The table listed in 64-63B, lists the required samples for a contained area. Does this mean that a contained work area of three hundred fifty (350) square feet for removal of sixty (60) linear feet of thermal system insulation (TSI), three (3) clearance samples?

Response: The number of clearance air samples required in the table takes into consideration that some projects would be larger than those that normally take place in schools. Yes, the commentator is correct. In reading the table, three (3) clearance air samples are required to clear that contained work area.

Commenters

**Proposed Rule - Asbestos Abatement Licensing Rule, 64 CSR 63
Division of Health, Department of Health and Human Resources**

Allegheny Power - L.D. Myers, Consultant

Glaser - Stephen Glaser

Hico Specialty Contractors Inc. - Evelyn Wagoner

WV Manufacturers Association

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**Planning & Compliance
Business Unit**

800 Cabin Hill Drive
Greensburg, PA 15601-1689
(412) 837-3000 FAX: (412) 838-6888

August 19, 1996

Attn: Kay Howard
Regulatory Development
Department of Health & Human Resources
Building 3, Capitol Complex, Room 265
Charleston, WV 25305

**RE: COMMENTS BY ALLEGHENY POWER ON
WEST VIRGINIA ASBESTOS ABATEMENT LICENSING RULE 64CSR63**

Allegheny Power appreciates the opportunity to comment on the proposed subject rule. Allegheny Power owns and operates six power plants and several office buildings and service centers in West Virginia which may be subject to the rule provisions. The intent of these comments is, in some instances, to seek clarification and in others, to recommend modifications to the rule which will minimize costs and burden to the regulated community without compromising the intent or integrity of the program. Our comments listed below are in sequential order by section of the proposed rule and do not necessarily reflect the magnitude of their potential impact or degree of our concern.

Section 64-63-4. Licensed Contractor Duties

- 4.1.4 As a point of clarification, it is our interpretation that the "licensed asbestos project designer" is the party responsible for the actual design and layout of the asbestos abatement containment and is typically the contractor.
- 4.1.5 It is our understanding that a "glovebag" is different from that of a "contained work area" and should not be subject to the same requirements.

Section 64-63-5. Clearance Air Monitor Duties

- 5.1.3 Aggressive air sampling is normally required by our contracts but there have been problems in the past where this was not possible. Flyash, dust, and other airborne particles can make aggressive air sampling impossible. Section 6.4 does allow aggressive sampling to be waived on the approval of the Director of the Department of Health and Human Resources, but the

time required for this approval can be prohibitive. Outages are performed on a strict time frame with asbestos abatement being one of the first activities. Any delay in containment tear down impacts all other activities in that area. Provisions should be available to waive the aggressive sampling without prior and formal approval by making notification to the Director with an explanation of why neither the sampling nor waiting for approval was practical. Unnecessary delays not only increase costs to our customers but can jeopardize our ability to continuously supply energy to them.

Section 64-63-7. Asbestos Inspector Duties

- 7.0 It is our interpretation that the required report can be developed as the project progresses. Because not all areas can be pre-inspected while generating units are operating, the scope of work can change as access to some areas is made available. Furthermore, many of the drawings being requested are not always available. In some cases, flooding has destroyed plant records and drawings, many of which are unrecoverable or not able to be reproduced. A certified statement to this effect should suffice in those situations.

Section 64-63-8. Asbestos Project Designer Duties

The same comments apply here as in Section 64-63-7 concerning the timing of developing the report.

Section 64-63-10. Responsibilities of Owners

During the period 1987 and 1988, Allegheny Power contracted with an engineering firm to survey all of its power plants in order to identify asbestos material, evaluate its condition and recommend removal or management practices. Those comprehensive surveys were conducted by a certified industrial hygienist prior to the time when licensed asbestos inspectors and designers were available. Since this survey has been completed, it is our position that additional inspections are not needed prior to each maintenance project even though it may involve some asbestos removal.

In general, responsibility for compliance with this section, including compliance with state and federal notifications, should be able to be delegated to the contractor via written contract.

Again, Allegheny Power appreciates the opportunity to comment on these proposed rules. We welcome your responses to our comments and questions. Our comments are focused on streamlining the asbestos abatement process, and assigning the responsibilities to those entities that can best ensure compliance with the rules while minimizing exposure to the material. As a final note, we would appreciate a 60-day comment period on proposed rules, rather than thirty, to allow for sufficient review and response.

Respectfully,



L. D. Myers, Consultant
Strategic Environmental Management

August 16, 1996

Office of Regulatory Development
Department of Health & Human Resources
Room 265, Building 3, Capitol Complex
Charleston, WV 25305

Re:Public Comment about
Changes Proposed for Asbestos
Abatement Licensing Rule

To Whom It May Concern

The following are my general comments on the proposed rules for Asbestos Abatement Licensing Rule

Section § 64-63-2 Definitions

2.8 The wording in defining what a Asbestos Clearance Air Monitor is over states the ability of the person because the words "is safe" is not defined or accepted, thus the person can only "meet the Minimum Air Clearance Standard stated in § 64-63-6" not declare an area safe.

2.15 The wording in defining Contained Work Area is to broad thus with the implication of section of the rule the way I read the rule each Asbestos Abatement Project with area greater than 49 square feet would require air clearance sampling to be conducted because a space is a space. Should we not use the wording as stated in the rule at 2.15 to define "Asbestos Work Area" then use the phrase "Contained Work Area" to be "a negative pressure enclosure when required by OSHA 1926.1101, any enclosed Asbestos Work Area where a OSHA 1926.1101 Negative Exposure Assessment has not been established by the person performing an asbestos abatement activity or when an Asbestos Project Designer or owner requires the asbestos work area to be enclosed."

Section § 64-63-3 License Required, Procedures, Application, Qualifications

The subpart 3.9.5 appears to place a different burden of performance for NVLAP certification, AIHA accreditation or AHIA-PAT as the language requires for AIHA-Bulk. Example under 3.9.5.a. has the added performance of "successful completion of the two (2) most recent" where a "current" or "successful completion" is not used in regard to NVLAP, AIHA accreditation or AIHA-PAT performance qualifications.

Section § 64-63-4 Licensed Contractor Duties should be expanded to include those owners whom are conducting their own Asbestos Abatement Project because those owners doing their own work would be exempt from the same requirements as a licensed asbestos contractor.

The wording "where feasible" in subpart 4.1.5. is argumentative thus the words "where required by OSHA 1926.1101 or" would take the argument out and leave the ability of the project designer to establish the same.

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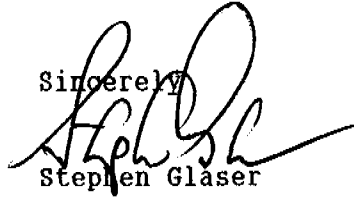
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August 16, 1996

Table 64-63B Minimum Number of Air Samples for Non-School Asbestos Abatement Project requires that an additional air samples be collected and analyzed for projects in a non-school setting for projects over 10,000 square feet. However, school projects no matter the size require 5 samples be collected and analyzed for an area where a response action is completed. Then, why should we require more samples be collected and analyzed than in a school.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stephen Glaser", written in black ink.

Stephen Glaser



P. O. Box 807 • Christiansburg, VA 24073

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Specialty Contractors

VA Class A Contractors License: 030225A

COMMENTS ON PROPOSED ASBESTOS LICENSING RULES

FROM: EVELYN WAGONER, HICO, INC. (540) 382-6532

DATE: AUGUST 19, 1996

It is our understanding that written comments must be received by 4:30 pm, TODAY. However, we did not receive these proposed rules until 9:30 am TODAY. That gives us approximately 7 hours to read, digest and comment.

With such short notice, I only have a few questions:

1. Is a written project design, by a licensed designer required on ALL non-school abatement projects, including "non-friable" / "intact" removal and small quantities of asbestos (<160 , <260 ft) and residential properties. If so, removal costs to homeowners and building owners will be increased substantially.
2. Is the licensed designer required to be an employee of the contractor, or a third party? Are there any conflict of interest rules affecting designers?
3. When specifications written by a third party licensed designer require that the contractor write an "abatement plan" to comply with the specifications, is the plan writer considered a "project designer" and is (s)he required to be licensed?
4. Is an air clearance monitor required on all projects, regardless of size, friability and ownership? (ie. 200 lf. of TSI in a residence). Is the air clearance monitor an employee of the contractor or a third party? Are there any conflict of interest rules?
5. The table listed in 64-63B lists samples required for a contained area. Does this mean that a contained area of 350 sf for removal of 60 lf of TSI requires 3 clearance samples?

If there is a second comment period, please include HICO, INC., on your mailing list. We would again appreciate the opportunity to comment on the proposed regulations.



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August 19, 1996

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Via Hand Delivery

Ms. Kay Howard
Regulatory Development
Department of Health & Human Resources
Room 265, Building 3, Capitol Complex
Charleston, West Virginia 25305

Re: Asbestos Abatement Licensing Rule

Dear Kay:

Enclosed for filing in the usual manner, please find the comments of the West Virginia Manufacturers Association on the Asbestos Abatement Licensing Rule, 63 CSR 64, that the Department of Health & Human Resources filed for public comment on July 18, 1996. The comment period expires on August 19, 1996, at 4:30 p.m.

If you have any questions regarding this submission, please contact Karen Price or me.

Very truly yours,



Michael P. McThomas

Enclosure

cc: Karen Price, President
West Virginia Manufacturers Association
Robert L. Foster, Chair
WVMA, Environmental, Safety and Health Committee

**COMMENTS OF THE
WEST VIRGINIA MANUFACTURERS ASSOCIATION
ON THE
DIVISION OF HEALTH
ASBESTOS ABATEMENT LICENSING RULE
64 CSR 63**

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I. INTRODUCTION

The Division of Health has proposed a significant new version of the asbestos abatement licensing rule that repeals and replaces the existing rule. The proposed rule was filed on July 18, 1996, and offered to accept comments on the proposal until August 19, 1996. In accordance with the notice of opportunity to comment, the West Virginia Manufacturers Association files these comments and recommendations.

The West Virginia Manufacturers Association (WVMA), with approximately 250 member companies, represents the interests of its member businesses throughout West Virginia. WVMA members engage in a wide variety of manufacturing activities throughout the State. Many WVMA members have, are, or will engage in asbestos removal, whether by major renovation or minor repair, and have a great interest and concern in the proposed revisions to this rule. The WVMA has in the past submitted comments on this rule, and continues to be interested in the development of a streamlined program that minimizes costs and regulatory burden to WVMA members while protecting human health, safety, and the environment.

II. GENERAL COMMENTS

The proposed rule has many significant improvements over the agency's prior rule. It is better organized and clearer. We still have, however, concerns that the rule is unwieldy and difficult for the

regulated community to read and apply. We urge the Division to continue to streamline the regulation and offer the following constructive suggestions.

One suggestion we have is to include all the general licensing requirements in one section, and create separate sections for each license. There are now nine licenses authorized by statute, and the agency should make the application requirements, duties, and standards of conduct for each license and licence holder clear and easy to locate without the need to refer to numerous statutory sections. A resilient floor covering worker, for example, cannot simply turn to the index of the rule and find all the requirements applicable to him or her in one or two neat sections (e.g., general requirements; resilient floor covering license requirements and duties). Instead, he or she must read and decipher the entire asbestos abatement licensing rule. The WVMA submits that the simpler the rule the better the compliance. Scattered organization mandating detailed analysis of the requirements of the rule can only result in confusion and non-compliance, albeit unintentional.

In addition, we strongly suggest that one section of the regulation clearly indicate the relationships between the licenses; namely, which licenses are required in tandem and which licenses subsume others or stand alone. The agency may want to consider issuing a flow chart or graphical illustration of the interconnection between licenses.

We also note that the rule lacks a reciprocity provision. The enabling statute expressly contemplates such a provision and authorizes the Director to set appropriate standards as long as the reciprocal state has standards at least as stringent as West Virginia's. W.Va. Code § 16-32-13. The inclusion of a reciprocity provision is extremely important to our membership, which is frequently concerned not just with the complex regulatory compliance problems of state and federal law, but also interstate relationships. We suggest the following language be included in the rule:

Persons and laboratories licensed, certified, or otherwise approved under the laws of another state to perform functions substantially similar to those of an asbestos management planner, asbestos abatement project designer, asbestos contractor, asbestos abatement supervisor, asbestos inspector, asbestos worker, asbestos clearance air monitor, resilient floor covering worker, or asbestos analytical laboratory, may apply to the director for licensure. The director shall license these applicants upon a determination that the standards for certification, licensure, or approval in the other state are at least as stringent to those established by the West Virginia Code §§ 16-32-1 et seq and this rule. Persons licensed under this section are subject to the same duties and requirements for renewal as other persons licensed under the West Virginia Code §§ 16-32-1 et seq. and this rule.

III. SPECIFIC COMMENTS

A. Definitions (64-63-2)

2.4. Definition of "Asbestos Abatement Project"

The WVMA supports the inclusion of the proposed § 2.4. We appreciate the recognition that certain types of projects include incidental asbestos abatement that do not constitute asbestos abatement as the primary focus. Small projects simply do not require the exhaustive regulatory requirements added by this rule. We would ask that in addition to exempting projects with limits on the quantity of asbestos-containing materials to be handled, the director also consider exempting projects where the quantity of asbestos fibers projected to be released is minimal. As an example, removal of tiles or other materials where the asbestos fiber is inert and largely non-friable should not require the level of regulation set out in this rule.

The WVMA submits that to further clarify the definition, the phrase "maintenance activity" should be changed to "maintenance and repair activities" to refine and clarify the Division's intention to allow a minor exemption for small projects. Also, the words "considered to be" should be deleted:

2.4 Asbestos Abatement Project. -- An activity involving the repair, removal, enclosure, or encapsulation of asbestos-containing material: Provided, That the removal of less than three (3) square feet or three (3) linear feet of asbestos-containing materials required in the performance of a

maintenance or repair activity not intended solely as asbestos abatement is not considered to be an asbestos abatement project.

2.10. Definition of "Asbestos Contractor"

Proposed § 2.10 would define this term as "a person who enters into a contract for an asbestos abatement project." This definition, although identical to the definition set out at W. Va. Code § 16-32-2(g), is ambiguous and could be construed to include a persons who are purchasing abatement services, as opposed to persons providing those services. We suggest the following revision:

2.10. Asbestos Contractor. -- A person who enters into a contract for an asbestos abatement project to provide asbestos abatement services.

2.15. Definition of "Contained Work Area"

This proposed definition does not acknowledge the exemption contained in 29 C.F.R. § 1926.58(e)(6)(iv)¹ of the federal OSHA regulations for small-scale, short-duration projects where asbestos abatement is conducted using wet methods, glove bags, removal of entire asbestos insulated pipes or structures, and/or mini-enclosures. See Appendix G to 29 C.F.R. § 1926.58. As we have commented in the past, this definition should recognize that construction of a negative-pressure enclosure or "Contained Work Area" is not required when small-scale, short-duration abatement is conducted.

We believe that consistency with the federal OSHA regulations, and a regulatory scheme no more stringent than federal OSHA requirements, is desirable here to simplify compliance. We cannot,

¹*Exception:* For small-scale, short-duration operations, such as pipe repair, valve replacement, installing electrical conduits, installing or removing drywall, roofing, and other general building maintenance or renovation, the employer is not required to comply with the requirements of paragraph (e)(6) [Requirements for asbestos removal, demolition, and renovation operations] of this section...

in fact, conceive of any situation in West Virginia that would justify regulations more stringent than federal regulations. Without recognition of this minor exception, the state regulation places undue burdens on contractors and businesses undertaking minor projects. For example, under the draft definitions, even if a glove bag method is used, the abatement project would still be subject to unnecessary in-progress air monitoring and air clearance monitoring. For these reasons, the WVMA recommends that the Director expand the proposed definition of "Contained Work Area" to recognize the exemption of the above-referenced small-scale, short-duration abatement projects. This could be accomplished by modifying the definition as follows:

2.1.5. Contained Work Area. -- Designated rooms, spaces, or other areas where asbestos abatement activities are being performed, including decontamination of structures. A contained work area does not include small-scale, short-duration asbestos abatement projects that are being conducted using wet methods, glove bags, removal of entire asbestos insulated pipes or structures, and/or mini-enclosures.

2.1.8. Definition of "Encapsulate"

The definition of encapsulate provided in the rule omits several key portions of the definition. One missing concept is that an encapsulant may coat or bind material to prevent fibers from becoming airborne. We suggest the following language:

2.1.8. Encapsulate. -- The application of any material onto any asbestos-containing material to bridge, or penetrate, coat, bind, or resurface the material to prevent ~~fiber release~~. friable asbestos from becoming airborne.

2.2.8. Definition of "Reoccupancy"

The definition proposed should be revised to clarify that this term relates only to "contained areas." In addition, the definition should recognize that "reoccupancy" and the clearance air monitoring associated with same do not apply to small-scale, short duration abatement projects that are exempt from the requirement to construct negative-pressure enclosures or "contained work

areas." (see comments to section 2.1.5.). We suggest the following revision:

2.2.8. Reoccupancy. -- The temporary or permanent occupancy of a contained work area by persons, after an asbestos abatement project has been completed and the enclosure used to demarcate the contained work area has been removed. This term does not apply to the area immediately surrounding and adjacent to a small-scale, short-duration asbestos abatement project which has been conducted using either the wet method, glove bag method, removal of an entire asbestos insulated pipe or structure, and/or mini-enclosure, and which is exempt from the requirement that a contained work area be constructed or maintained.

B. Definitions that should be added to the Proposed Rules

1. Definition of "Bulk Sample"

The proposed rule does not contain a definition of the term "Bulk Sample" which is referenced in relation to analytical laboratories. Defining this term would help to clarify application of the proposed rules. We suggest the following addition:

2.____. -- Bulk Sample. -- Any sample of material, other than air samples, collected from an existing structure or appurtenance for the purpose of testing and analysis to ascertain whether such material contains asbestos.

2. Definition of "Clearance Air Sampling"

The concept of clearance air sampling is important to define the duties of the clearance air monitor. We suggest the following definition:

2.____. Clearance Air Monitoring. -- Air monitoring performed after the completion of any asbestos abatement project and prior to the reoccupation of the contained work area by the public and conducted for the purpose of protecting the public from the health hazards associated with exposure to friable asbestos-containing material.

C. General Licensing Requirements - Section 3

While we appreciate the Division's attempt to make this rule easier to navigate, it remains somewhat cumbersome to determine the requirements to obtain a specific license. We suggest that this section be retitled and redrafted to encompass general licensing requirements applicable to all

licenses under the rule. One subsection should describe the interrelationship of the different licenses (including the proposed subsections 3.2, 3.3, and 3.4). We suggest the following format:

64-63-3 General Requirements for All Licenses Issued Under this Rule.

3.1. No person shall perform the work of an asbestos analytical laboratory, clearance air monitor, contractor, inspector, management planner, project designer, supervisor, or worker, or of a resilient floor covering worker, without possessing a valid license issued under this rule.

3.2. Individual persons shall must be at least eighteen (18) years of age in order to be licensed, under this rule. [former 3.5]

3.3. A license expires one (1) year from the last day of the month in which it is issued. [former 3.7]

3.4. The director may refuse to issue a license and retain the license fee if the applicant fails to satisfy the requirements of this rule. [former 3.10]

3.5. The director may refuse to issue any license if he or she finds that the applicant has knowingly falsified an application, or documents related to an asbestos abatement project, submitted to the director under this rule. [see former 3.1.1]

3.6. The director must provide a written notice of denial and an opportunity for reapplication to all applicants. [see former 3.12]

3.7. General License Application Procedures

3.7.1. The license application must be submitted with all applicable licensure fees set out in Table 64-63. [see former 3.6]

3.7.2. The license application must be signed by the applicant, or in the case of a contractor or laboratory, the authorized agent or officer. [see former 3.8]

3.7.3. All license applications must include the following:

3.7.3.1. A history of all ~~asbestos~~ enforcement actions taken against the applicant by any federal or state agency or court in the two (2) year period immediately preceding the date of the application. [see former 3.9.1]

3.7.3.2. If the applicant is a person, the applicant's date of birth. [see former 3.9.3]

3.7.3.3. If the applicant is a contractor, the number of a current supervisor's license for the contractor, or the number of a current license for one of the contractor's employees.

[see former 3.9.4]

3.7.3.4. Any other information relevant to asbestos abatement licensure as requested by the director. [see former 3.9.7]

3.8. Relationship Between Licenses Issued Under this Rule

3.8.1. An individual person who is licensed as an asbestos management planner is also required to be licensed as an asbestos inspector. [see former 3.3]

3.8.2. A contractor or at least one (1) of the contractor's employees is also required to be licensed as an asbestos inspector. [see former 3.4]

The WVMA believes that restructuring the license section will assist applicants in determining the appropriate licensure requirements and ensure appropriate compliance with the rule.

3.7. Annual License Expiration

The WVMA has expressed concerns in the past that the annual license expiration provision could result in licenses expiring automatically where renewal applications are denied for minor omissions or administrative errors. This section mandates automatic termination of a license at the end of one year, regardless of whether a renewal application has been timely filed. Such a limitation is not imposed by the Licensure Act, and would be unfair where the applicant has done all in its power to obtain a renewal. This section should be revised to recognize that "an existing license is automatically extended by timely filing of an application for license renewal."

3.1.2. Written Notice of Denial

The rule should require the Director to provide reasons for denial of completed applications as a due process protection for applicants. We suggest the following modification to § 3.1.2.: "The director must provide a written notice of denial, which states the reason or reasons that the application was denied, and an opportunity for reapplication to all applicants whose applications are

denied or deemed incomplete.”

3.9.1. History of Enforcement Actions

We believe the Division is interested only in relevant enforcement actions. This section, however, requires an applicant for a license to file a history of all enforcement actions taken against the applicant, whether they be for back child support, property taxes, or parking tickets. This overly broad requirement can be remedied easily by a revision that requests enforcement data for all state and federal enforcement actions within the preceding two years as follows:

3.9.1. A history of all asbestos enforcement actions taken against the applicant by any federal or state agency or court in the two-year period immediately preceding the date of the application, including but not limited to enforcement actions brought under the “National Emission Standards for Hazardous Air Pollutants” regulations of the United States Environmental Protection Agency, 40 C.F.R. Part 61, Subpart M; “Asbestos Abatement Projects” regulations of the United States Occupational Safety and Health Administration, 40 C.F.R. Part 763, Subpart G; the Asbestos Hazard Emergency Response Act regulations of the United States Environmental Protection Agency, 40 C.F.R. Part 763, Subpart E; the West Virginia Asbestos Abatement Licensure Act, W. Va. Code 16-32-1 et seq.; and this rule.

D. Duties of Licensed Contractors - Section 4

4.1.5. Projects to Occur in Contained Work Areas

This section of the rule requires licensed asbestos contractors to ensure that the project occur in a contained work area. We appreciate the limitation “where feasible” that has been included in this section. The WVMA recommends that the section be revised to recognize that small-scale, short-duration projects where asbestos abatement is being conducted using wet methods, glove bags, removal of entire asbestos insulated pipes or structures, and/or mini-enclosures constitute instances where construction of a contained work areas is not required. (See 29 C.F.R. § 1926.58(e)(6)(iv) and Appendix G to 29 C.F.R. § 1926.58; and the WVMA's comment to the definition of "Contained Work Area"). This could be accomplished by changing the clause “where feasible” to “where

necessary” and by adding the following sentence to the end of proposed § 4.1.5:

For example, a licensed asbestos project designer may determine that construction of a contained work area is not feasible where small-scale, short-duration asbestos abatement projects can be conducted using wet methods, glove bags, removal of entire asbestos insulated pipes or structures, and/or mini-enclosures.

4.1.7. Provision of Written Description to Clearance Air Monitor

This proposed provision would require an asbestos contractor to "ensure that the asbestos clearance air monitor is provided with an accurate and precise written description of the location of any asbestos abatement project prior to the collection of any air samples." This duty does not appear in the State Licensure Act, and that Act does not otherwise appear to authorize the Director of the Division of Health to impose such a duty. This requirement is redundant because the Clearance Air Monitor will have been informed of the location of the abatement project before performing any required air monitoring incident to re-occupancy. Also, the Clearance Air Monitor's involvement with a project does not arise until completion, and the proposed rule suggests that no sampling can be conducted (e.g., compliance monitoring for employees) in the absence of the Clearance Air Monitor. For these reasons, the WVMA recommends that this proposed section be deleted from the final rule.

4.3. Records of Air Clearance Monitoring

The requirement here for “written verification” is unclear. We suggest that upon project completion, the project manager be required to make written verification of compliance. This could be accomplished by the requirement that the laboratory certify on its report that the report has been conducted in compliance with this rule.

E. Minimum Air Clearance Standards - Section 6

Lack of Exemption for Small-Scale, Short-Term Abatement Projects

We appreciate that for non-school contained areas less than 49 square feet, no air samples are required and the area may be cleared for reoccupancy. We request that a clear exemption also be made for air clearance sampling for small-scale, short-duration, removal projects where glove-bags, removal of an entire asbestos-insulated pipe, or use of mini-enclosures have been used to contain the abatement work area as is contemplated in 29 C.F.R. § 1926.58 and its Appendix G.

The proposed rule should also recognize that workers may conduct normal operations in or around a work area where the foregoing methods are being used to contain small-scale, short-duration abatement projects. The WVMA recommends that a new section 6.5 be added which reads as follows:

6.5. Air clearance is not required for small-scale, short-duration, removal projects where glove-bags, removal of an entire asbestos-insulated pipe, or use of mini-enclosures, as contemplated in 29 C.F.R. § 1926.58 Appendix G, have been used to contain the abatement work area.

6.2. Standards for Air Samples

The standards for air clearance monitoring in proposed § 6.2. are too restrictive. This is especially true for outdoor settings or situations where the glove-bag, mini-enclosures, or other methods contemplated in the Appendixes to 29 C.F.R. § 1926.58 are being utilized. This section would set air clearance standards in non-school or industrial settings at levels ten times lower (more restrictive) than the levels for re-occupancy mandated under the OSHA regulations found in 29 C.F.R. § 1926.58.

Appendix F to 29 C.F.R. § 1926.58 recommends that an air clearance level of 0.01 f/cc be achieved for enclosed areas before cleanup is considered complete, this is only a recommendation made in a non-mandatory Appendix to that regulation. It may not be appropriate or necessary in all circumstances to reach this level of cleanup; for example, low-traffic or storage areas may not warrant

such a degree of stringency. The WVMA urges the Director to consider whether it continues to be necessary or appropriate to incorporate the action level of 0.01 f/cc in all circumstances.

We urge that the Director adopt the action level of 0.1 f/cc found in the federal regulations, reserving the right to direct cleanup to the 0.01 level where the Director finds that this additional level is necessary to protect human health. The WVMA believes that the proposed rule will result in a major additional expense to the regulated community without affording any added protection to asbestos workers. Thus, the WVMA recommends that the standard for air clearance set forth in proposed § 6.2.1 be revised to match the 0.1 f/cc action level established in the federal regulations.

F. Asbestos Inspector Duties - Section 7

7.2. Use of Procedures in 40 C.F.R. Part 763 (Asbestos Containing Materials in Schools)

This proposed section requires an Asbestos Inspector to follow the inspection and sampling procedures outlined in 40 C.F.R. Part 763 ("Asbestos Containing Materials in Schools") when non-school or industrial facilities are being inspected. This is inappropriate and overly burdensome. The risks to workers in industrial settings plainly bear no relationship to the risks posed to children in schoolrooms. The WVMA recommends that this section be revised to clarify that the procedures set out in 40 C.F.R. Part 763 are not applicable in industrial settings:

When inspecting schools used to educate students in grades kindergarten through 12, an asbestos inspector must follow the inspection and sampling procedures contained in 40 C.F.R. Part 763, Subpart E, Asbestos Containing Materials in Schools, to identify interior and exterior materials suspected of containing asbestos.

G. Asbestos Project Designer Duties - Section 8

8.8.7 Written Project Design

We believe that the requirements here are unnecessarily excessive and expensive for smaller-scale, outdoor projects. We urge insertion of a "de minimis" exception to these requirements for smaller projects.

H. Training Accreditation - Section 9

9.1. Training Accreditation

The WVMA supports this section to the extent it recognizes that training courses presented in other states are to be granted reciprocity so long as they are accredited by the EPA or the Director. To provide a standard by which the credentials of a particular training course can be measured for accreditation purposes, the WVMA recommends that the following sentence be added to the end of the proposed rule: "Any training course, including but not limited to corporate in-house training courses, which has met or exceeded the EPA protocol applicable to such courses shall be afforded full accreditation by the director." This would clarify the requisites needed for accreditation, and allow industry to better evaluate the available training courses. We note that some of our members have intensive on-site or in-house training, and where this training satisfies EPA protocols, credit should be given.

I. Owner Responsibilities -- Fees - Section 10

10.1.3. Provision of Notification Fees

The requirement that the notification fee be submitted with the notification can be unworkable. In cases where a project must be performed quickly, it may be administratively much easier for a company to submit the notification than to process the notification fee check. Many companies have layers of "red tape" that must be traversed for any check to be requested, processed, and approved. It would greatly ease the administrative burden simply to allow the notification fee

to be paid within seven to ten (7-10) working days of the submission of the notification of the project.

10.2. Delegation of Authority

This section is unnecessary and confusing, and it is inconsistent with federal requirements. Building owners have certain obligations under this and other asbestos abatement laws and regulations, but their obligations are set out separately. This section does little more than confuse compliance issues where they are more clearly addressed elsewhere. This section should be deleted.

10.3. Weekly Notification

This section allows smaller asbestos projects to have notifications submitted weekly, rather than on a project-by-project basis. We appreciate this assistance from the agency. We ask that for projects exceeding three months in projected duration, notification be allowed to be made on a monthly basis. Because payment of weekly fees can be difficult administratively for many of our members, we suggest that fees be allowed to be paid monthly in all cases.

J. Applicable Federal Standards - Section 11

It is improper to incorporate by reference prospective changes to federal regulations. Incorporation by reference is limited to federal regulations that are currently in existence. In State of West Virginia v. Grinstead, 157 W.Va. 1001, 206 S.E.2d 912 (1974), the West Virginia Supreme Court of Appeals held “[a]lthough statutes adopting laws or regulations of other states, the federal government, or any of its agencies, effective at the time of adoption, are valid, attempted adoption of future laws, rules or regulations of other states, or of the federal government, or of its agencies, is unconstitutional as an unlawful delegation of the legislative power. W.Va.Const. art. VI, § 1 and art. V, § 1.” Syl. pt. 1. Thus, the law requires and the WVMA recommends that a date certain be inserted in lieu of the current language providing for “the date of the end of the comment period, or

if a rule has been approved and published, the date it will become effective.”

The WVMA urges the Division to insert an incorporation date that corresponds to the publication of the federal regulations. In this case, the last date of publication of the federal regulations governing asbestos abatement was last published on July 1, 1995 (although no changes were made to the regulations.). The corresponding EPA regulations are also published on July 1 of each year. For convenience and ease of understanding the applicable federal requirements, the incorporation date should be uniform and consistent if at all possible.

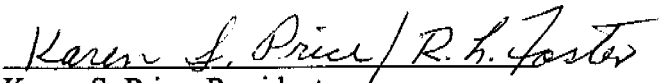
K. Table 64-63A Licensure Fee Schedule

While we appreciate that the statute provides for nine different types of licenses, we believe that is within the province of the agency to attempt to streamline and consolidate licensing requirements wherever possible. This is especially helpful to persons who require more than one license under the statute. In cases where multiple licenses are required, we encourage the Division to adopt a procedure whereby a fee paid for one license covers fees for all other licenses with similarly complex or less complex requirements. Processing multiple licenses and fees should be made easier and less expensive both for the agency and for license candidates.

IV. CONCLUSION

The WVMA congratulates the Division of Health on its proposed changes to the Asbestos Abatement Licensing Rule. We appreciate the opportunity to provide comments. Questions or requests for additional information should be addressed to the WVMA.

Respectfully submitted this 16th day of August, 1996.


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**ABSTRACT - PROPOSED RULE
DIVISION OF HEALTH
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**ASBESTOS ABATEMENT LICENSING RULE
64 CSR 63**

Summary: The proposed rule rewrites and expands an existing rule. The purpose of the revisions and expansion are: to conform to changes in the Asbestos Abatement Licensure Law, W. Va. Code § 16-32-1 *et seq.*; to correct and clarify the present rule; to set forth specific performance standards for various categories of licensure; and to more clearly specify the responsibilities of the owners of buildings where asbestos abatement projects occur.

In conformance with the statute, there are three (3) new licensure categories as follows: asbestos analytic laboratory; asbestos clearance monitor; and resilient floor covering worker. The rule has the following sections: general; application and enforcement; definitions; license required, procedures, application, qualifications; licensed contractor duties; clearance air monitor duties; minimum air clearance standards; asbestos inspector duties; asbestos project designer duties; training accreditation; responsibilities of owners; applicable federal standards; inspections; penalties; administrative due process; severability. The rule adopts various federal regulations for asbestos abatement. Licensure fees are added for the new license categories. The rule now includes the minimum number of air samples for non-school asbestos abatement projects.

For additional information contact: Randy C. Curtis, P.E., Director, Radiation, Toxics and Indoor Air, Environmental Health Services, Bureau for Public Health, Department of Health and Human Resources, 815 Quarrier Street, Charleston, WV 25301-2616, telephone (304) 558-2981, or the Office of Regulatory Development, Bureau of Operations, Department of Health and Human Resources, Building 3, Room 265, Capitol Complex, Charleston, WV 25305, telephone (304) 558-3223.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Asbestos Abatement Licensing Rule, 64 CSR 63

Type of Rule: Legislative Interpretive Procedural

Agency: Division of Health (By the Bureau for Public Health)
Department of Health and Human Resources

Address: Building 3, Capitol Complex
Charleston, W. Va. 25305

1. Effect of the Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$ 40,450	\$ 40,450
Personal Services				23,682	23,682
Current Expense				11,972	14,768
Repairs & Alterations					
Equipment				4,796	2,000
Other					
Revenue				40,450	40,450

2. Explanation of above estimates.

Implementation of the new licensure categories requires one additional sanitarian. The cost for this new position is \$40,450, including salary, employee benefits, and operating expenses. This cost will be supported by new revenue generated. The entire program, at a cost of \$298,942 is operated under a special revenue account, and is self-supporting. Some second-year revenue generated by the new licensure categories will be used for increased current expense and various improvement items. Current expense will likely increase. Cost and revenue estimates are not firm at this time; there is no reliable information concerning the volume of increase in the new licensure categories.

3. Objectives of this rule:

The proposed rule rewrites and expands an existing rule. The purpose of the revisions and expansion are: to conform to changes in the Asbestos Abatement Licensure Law, W. Va. Code § 16-32-1 et seq.; to correct and clarify the present rule; to set forth specific performance standards for various categories of licensure; and to more clearly specify the responsibilities of the owners of buildings where asbestos abatement projects occur.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.

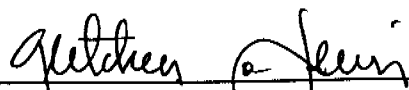
Individuals and industries whose employees require licenses will have slight cost increases.

C. Economic Impact on Citizens/Public at Large.

None.

Date: July 17, 1996

Signature of Agency Head or Authorized Representative



Gretchen O. Lewis, Secretary
Department of Health and Human Resources

PROPOSED RULE

**TITLE 64
WEST VIRGINIA ADMINISTRATIVE RULES
DIVISION OF HEALTH**

SERIES 63

ASBESTOS ABATEMENT LICENSING RULE

Agency-Approved Rule

November 18, 1996

64 CSR 63

**WEST VIRGINIA ADMINISTRATIVE RULES
DIVISION OF HEALTH
ASBESTOS ABATEMENT LICENSING RULE**

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WEST VIRGINIA ADMINISTRATIVE RULES
DIVISION OF HEALTH
ASBESTOS ABATEMENT LICENSING RULE

FILED

Nov 18 4 05 PM '96

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 64-63-1. General.

1.1. Scope. -- This legislative rule establishes procedures and standards for the licensure and training of persons who engage in activities related to asbestos abatement and the operation of asbestos abatement projects; it also identifies the responsibilities of owners of buildings or other man-made structures where asbestos abatement projects are being conducted.

1.2. Authority. -- W. Va. Code §16-32-3.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Repeal of Former Rule. -- This rule repeals and replaces West Virginia Division of Health Administrative Rules, 64 CSR 63, Asbestos Abatement Licensing Rule, 1990.

1.6. Application. -- This rule applies to: all owners of buildings and other man-made structures; all persons who conduct asbestos abatement projects; all asbestos analytical laboratories; all persons who perform the work of asbestos clearance air monitors, contractors, inspectors, management planners, project designers, supervisors, workers; and all resilient floor covering workers: Provided, That any individual, corporation, partnership, sole proprietorship, firm, enterprise, franchise, association or any business entity which contracts to remove resilient floor covering materials in single-family dwellings is not required to be licensed as an asbestos contractor.

1.7. Enforcement. -- This rule is enforced by the director of the division of health of the department of health and human resources.

§ 64-63-2. Definitions.

2.1. AIHA. -- American Industrial Hygiene Association.

2.2. Asbestos. -- The asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite, and actinolite.

2.3. Asbestos Abatement. -- Procedures to control fiber release from asbestos-containing materials.

2.4. Asbestos Abatement Project. -- An activity involving the repair, removal, enclosure, or encapsulation of asbestos-containing material: Provided, That the removal of less than three (3) square feet or three (3) linear feet of asbestos-containing materials required in the performance of a maintenance activity not intended solely as asbestos abatement is not considered to be an asbestos

abatement project.

2.5. Asbestos Abatement Project Designer (or Asbestos Project Designer). -- A person who specifies engineering methods and work practices to be used during asbestos abatement projects.

2.6. Asbestos Abatement Supervisor (or Asbestos Supervisor). -- A person responsible for the direction of asbestos abatement projects.

2.7. Asbestos Analytical Laboratory. -- A facility, company, or place at which asbestos bulk samples or asbestos air samples are analyzed.

2.8. Asbestos Clearance Air Monitor. -- A person who performs air monitoring to confirm clearance levels to establish that an area is safe for reoccupancy after an asbestos abatement project.

2.9. Asbestos-Containing Material. -- Any material or product which contains more than one (1) percent asbestos by weight.

2.10. Asbestos Contractor. -- A person who enters into a contract for an asbestos abatement project.

2.11. Asbestos Inspector. -- A person employed to inspect for the presence of asbestos-containing materials, evaluate the condition of the materials and collect samples for asbestos content confirmation.

2.12. Asbestos Management Planner. -- A person employed to interpret survey results, assess hazards, evaluate and select control options or develop an operation and maintenance plan.

2.13. Asbestos Worker. -- A person who works on an asbestos abatement project.

2.14. Building or Other Man-Made Structure. -- A building or a part of a building, or a group of buildings on the same premises, or any other type of man-made construction, such as a pipe line, barn, shed, trailer, or any appurtenance to a building or other man-made structure.

2.15. Bulk Sample. -- A sample of any material, other than air samples, collected from an existing structure or appurtenance for the purpose of analysis to ascertain whether such material contains asbestos.

2.16. Clearance Air Monitoring. -- Air monitoring performed after the completion of any asbestos abatement project and prior to the reoccupation of the contained work area by the public and conducted for the purpose of protecting the public from health hazards associated with exposure to asbestos fibers.

2.15. Contained Work Area. -- Designated rooms, spaces, or other areas where asbestos abatement activities are being performed, including decontamination structures.

2.16. Director. -- The director¹ of the division of health of the department of health and human resources or his or her designee.

2.17. Division. -- The division² of health of the department of health and human resources.

2.18. Encapsulate. -- The application of any material onto any asbestos-containing material to bridge or penetrate the material to prevent fiber release.

2.19. Enclosure. -- The permanent confinement of friable asbestos-containing materials with an airtight barrier in an area not used or designed as an air plenum.

2.20. EPA. -- The United States Environmental Protection Agency.

2.21. Friable. -- Material which is capable of being crumbled, pulverized, or reduced to powder by hand pressure or which under normal use or maintenance emits or can be expected to emit asbestos fibers into the air, including material normally considered non-friable, which has been or may be rendered friable by the forces acting on the material in the course of demolition or renovation operations.

2.22. HEPA (high efficiency particulate air) Filtering System. -- A filtering system capable of trapping and retaining at least ninety-nine and ninety-seven one hundredths percent (99.97%) of all monodispersed particles three tenths (0.3) micrometers in diameter or larger.

2.23. NVLAP. -- National Voluntary Laboratory Accreditation Program.

2.24. OSHA. -- The United States Department of Labor Occupational Safety and Health Administration.

2.25. PCM (phase contrast microscopy). -- A technique used for counting fibers in air samples which does not distinguish fiber types.

2.26. PLM (polarized light microscopy). -- A technique used to identify, quantify, and report asbestos content in bulk samples.

2.27. Person. -- A corporation, partnership, sole proprietorship, firm, enterprise, franchise, association or any individual or entity.

2.28. Reoccupancy. -- Reoccupancy by individuals of a room, space, or other area in which an asbestos abatement project has been completed.

¹ The Department of Health and Human Resources (DHHR) was created by the Legislature's reorganization of the executive branch of State government in 1989, and the Department of Health was renamed the Division of Health and made a part of the DHHR (W. Va. Code §5F-1-1 *et seq.*). Administratively within the DHHR the Bureau of for Public Health through its Commissioner carries out the public health function of the Division of Health.

² See footnote #1.

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2.29. Repair. -- Returning damaged asbestos-containing material to an undamaged condition so as to prevent asbestos fiber release.

2.30. Resilient Floor Covering. -- Floor tile, sheet vinyl, and associated adhesives which contain more than one (1) percent asbestos by weight.

2.31. Resilient Floor Covering Worker. -- A person who is employed to remove resilient floor covering in single-family dwellings.

2.32. School. -- Any building or man-made structure used for grades kindergarten through twelve (12).

2.33. TEM (transmission electron microscopy). -- A technique which may be used for identifying asbestos structures or fibers in samples.

§ 64-63-3. License Required, Procedures, Application, Qualifications.

3.1. No person shall perform the work of an asbestos analytical laboratory, clearance air monitor, contractor, inspector, management planner, project designer, supervisor, or worker, or of a resilient floor covering worker without possessing a valid license issued under this rule.

3.2. Individual persons shall be at least eighteen (18) years of age ~~in order~~ to be licensed under this rule.

3.3. A license expires one (1) year from the last day of the month in which it is issued.

3.4. The director may refuse to issue a license and retain the license fee if the applicant fails to satisfy the requirements of this rule.

3.5. The director may refuse to issue a contractor's license if he or she finds that the applicant has knowingly falsified or attempted to falsify documents related to an asbestos abatement project or license.

3.6. The director shall provide a written notice of denial and an opportunity for reapplication to all applicants.

3.7. General license application procedures.

3.7.1. All applicable licensure fees set forth in Table 64-63A found at the end of this rule shall be enclosed with a license application.

3.7.2. The applicant, or, for a contractor or laboratory, an authorized agent or officer shall sign the application.

3.7.3. All license applications shall include the following:

3.7.3.a. A history of all asbestos enforcement actions taken against the applicant by

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any federal or state agency or court in the two-year period immediately preceding the date of the application;

3.7.3.b. For an individual person, the applicant's date of birth;

3.7.3.c. If the applicant is a contractor, the number of a current supervisor's license for the contractor, or the number of a current supervisor's license for one (1) of the contractor's employees;

3.7.3.d. Any other information relevant ~~for~~ to asbestos abatement licensure requested by the director;

3.7.4. For an individual person applying for a licensure as an asbestos clearance air monitor, inspector, management planner, project designer, supervisor, or worker, or as a resilient floor covering worker, a current certificate of training for the category of license sought;

3.8. For licensure as an asbestos analytical laboratory, to analyze:

3.8.1. Bulk samples for asbestos, proof of NVLAP ~~certification~~ accreditation or successful completion of the two (2) most recent rounds of the AIHA bulk asbestos quality assurance program;

3.8.2. Air samples for asbestos ~~using~~ by PCM, proof of AIHA accreditation or of successful completion of two (2) rounds of the AIHA proficiency analytical testing program (PAT) to analyze air samples;

3.8.3. Air samples for asbestos by TEM, proof of accreditation by NVLAP for analysis of air samples by TEM; and

3.9. For licensure as an asbestos management planner, the number of his or her asbestos inspector's license.

3.10. Relationship between licenses issued under this rule.

3.10.1. An individual person who is licensed as an asbestos management planner is also required to be licensed as an asbestos inspector.

3.10.2. A contractor or at least one (1) of the contractor's employees is also required to be licensed as an asbestos supervisor.

§ 64-63-4. Licensed Contractor Duties.

4.1. Licensed asbestos contractors shall:

4.1.1. Ensure that each of the contractor's employees or agents who will come into contact with asbestos or who will be responsible for an asbestos abatement project is properly licensed;

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4.1.2. Ensure that each asbestos abatement project is supervised on-site by a licensed asbestos supervisor;

4.1.3. Not begin an asbestos abatement without written documentation that all the requirements for notification and fees set forth in Section 10 of this rule have been met;

4.1.4. Not participate in an asbestos abatement project not designed by a licensed asbestos project designer;

4.1.5. Ensure that each asbestos abatement project takes place in a contained work area, where required by 29 CFR § 1926.1101 or, where feasible, as determined by a licensed asbestos project designer;

4.1.6. Ensure that each contained work area is under a negative-pressure, HEPA-filtered exhaust system and meets the minimum clearance standard set forth in Section 6 of this rule before allowing reoccupancy;

4.1.7. Ensure that the asbestos clearance air monitor is provided with an accurate and precise written description of the location of any asbestos abatement project prior to the collection of any air samples;

4.1.8. Ensure that each contained work area is visually inspected prior to the clearance monitoring air to determine whether the asbestos abatement project has been properly completed;

4.1.9. Remove exterior asbestos-containing sidings, cementitious materials, and roofing materials intact with minimal breakage during an asbestos abatement project;

4.1.10. Not construct a mobile contained work area to remove large amounts of asbestos-containing materials to circumvent the minimum clearance standards set forth in this rule;

4.1.11. Use disposal sites which are in conformance with applicable federal, state and local laws, rules, and regulations;

4.1.12. Prepare a record of each asbestos abatement project as required by Sections 4.2 and 4.3 of this rule, and make the record available to the department, the division of environmental protection, and the division of labor of the bureau of commerce upon request; and

4.1.13. Keep the records required by Section 4.1.12 of this rule at least thirty (30) years.

4.2. The record of each asbestos abatement project shall include:

4.2.1. The name, address and asbestos license number of all individuals who worked on the asbestos abatement project;

4.2.2. The location and a description of the asbestos abatement project, including the amount of asbestos material that was removed;

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4.2.3. The starting and completion dates of each asbestos abatement project and a summary of the procedures that were used to comply with all federal and State standards;

4.2.4. The name and address of each site where waste containing asbestos was deposited, and the disposal site receipts; and

4.2.5. The results of the ~~air~~ clearance air monitoring required by this rule for each contained work area within the asbestos abatement project.

4.3. Records of ~~air~~ clearance air monitoring results shall include at a minimum the following:

4.3.1. The name and signature of any individual who collected the air samples required by this rule;

4.3.2. The locations where the samples were collected;

4.3.3. The date of collection;

4.3.4. The name and address of the laboratory which analyzed the samples;

4.3.5. The date of the analysis;

4.3.6. The results of the analysis;

4.3.7. The method of analysis;

4.3.8. The name and signature of the individual who performed the analysis; and

4.3.9. Proof that the laboratory meets the applicable requirements of this rule.

4.4. The contractor shall make the records required by this rule available to the director, ~~the division of environmental protection, and the division of labor during normal business hours~~ upon request. Records for current projects shall be immediately available. For completed projects, the director may afford the contractor a reasonable time to comply with the requests, depending upon the length of time since the project's completion and whether or not the advance notice might adversely affect an investigation being conducted by any State agency.

§ 64-63-5. Clearance Air Monitor Duties.

5.1. Prior to clearing the contained area of an asbestos abatement project for reoccupancy, a clearance air monitor shall:

5.1.1. Conduct a visual inspection of the contained work area to confirm removal of asbestos-containing materials and for cleanliness prior to taking samples;

5.1.2. Ensure that all sampling equipment is functional and calibrated in accordance with manufacturers specifications, and that a written record of the calibration is maintained;

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5.1.3. Ensure that air monitoring incorporates aggressive sampling condition activity to dislodge any remaining dust by sweeping all floors, walls, and ceilings with a leaf blower with a minimum of one (1) horsepower prior to sampling; and by operating one (1) operating stationary twenty inch (20") fan directed at the ceiling for every ten thousand (10,000) cubic feet or fraction thereof in the contained area during sampling;

5.1.4. Ensure that the recommended air volume is drawn on each sampling cassette as prescribed by the analytical method;

5.1.5. Ensure that asbestos abatement projects which take place in schools are completed in compliance with 40 CFR Part 763, Subpart E, Asbestos-Containing Material in Schools;

5.1.6. Ensure that the minimum number of air samples set forth in Table 64-63B found at the end of this rule are collected in non-school asbestos abatement projects; and

5.1.7. Generate a written report to confirm or deny clearance of the contained work areas of an asbestos abatement project at the conclusion of the project.

5.2. The report required by Section 5.1.7 of this rule shall include at a minimum the following:

5.2.1. The name and signature of any individual who collected any air sample required by this rule;

5.2.2. The locations indicated by drawings and a sample log where samples were collected;

5.2.3. The date of collection;

5.2.4. The name and address of the laboratory which analyzed the samples;

5.2.5. The date of the analysis;

5.2.6. The results of the analysis;

5.2.7. The method of analysis;

5.2.8. The name and signature of the individual performing the analysis;

5.2.9. Proof that the laboratory meets the applicable requirements of this rule; and

5.2.10. Either a statement clearing the contained work areas for reoccupancy, or a statement denying clearance of the contained work areas, which shall contain an explanation for denying clearance.

§ 64-63-6. Minimum Air Clearance Standards.

6.1. A contained work area in a school shall be cleared for reoccupancy in accordance with 40 CFR Part 763, Subpart E, Asbestos-Containing Materials in Schools.

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6.2. A contained work area in a building or other man-made structure which is not a school may be cleared for reoccupancy when the number of samples required by Section 5.1.6 of this rule are taken, and the samples meet the following standards:

6.2.1. 0.01 f/cc (asbestos fibers per cubic centimeter) for each sample analyzed by PCM;
or

6.2.2. 0.02 s/cc (asbestos structures per cubic centimeter) for each sample analyzed by TEM.

6.3. ~~Air Clearance~~ air monitoring is not required for a contained work area in a building or other man-made structure ~~which is not a school, if the area is scheduled for immediate demolition and an asbestos clearance air monitor inspects the area prior to demolition, and determines that all asbestos-containing materials have been removed.~~

6.4. When the ambient asbestos fiber or structure level in the air in a contained work area in a building or other man-made structure which is not a school exceeds the minimum clearance standards established in Section 6.2.1 or 6.2.2 of this rule, the clearance level may, with the prior approval of the director, be based on the level of asbestos fiber or structures in the air outside the contained work area. The samples of air used to determine the asbestos fiber and structure levels in the air inside and outside of the contained work area shall be taken at the same time. The number of samples collected inside and the number collected outside shall each be equal to the number of samples specified in Section 5.1.6 of this rule.

§ 64-63-7. Asbestos Inspector Duties.

Licensed asbestos inspectors shall:

7.1. ~~Identify all~~ Thoroughly inspect interior and exterior materials suspected of containing asbestos which may be affected by the renovation or demolition, and sample the material for testing, unless it is assumed to contain asbestos;

7.2. For all asbestos abatement projects, follow the inspection and sampling procedures contained in 40 CFR Part 763, Subpart E, Asbestos-Containing Materials in Schools, to identify interior and exterior materials suspected of containing asbestos; and

7.3. Generate a written report which at a minimum:

7.3.1. Identifies by narrative any sampling locations where the presence of asbestos-containing material has been confirmed;

7.3.2. Details the location and amount of all materials suspected of or assumed to contain asbestos;

7.3.3. Lists analysis results for all samples taken of materials suspected to contain asbestos;
and

7.3.4. Includes drawings or narrative descriptions of the locations where bulk samples of materials suspected of containing asbestos were obtained.

§ 64-63-8. Asbestos Project Designer Duties.

Licensed asbestos project designers shall generate a written project design that provides:

- 8.1. A chronological time frame for each facet of the abatement activity;
- 8.2. The name and address of the building or other man-made structure where each asbestos abatement project is to occur;
- 8.3. The name, address, phone number, and copies of the asbestos-abatement training certificates and licenses of the project designer;
- 8.4. A schematic floor plan showing the asbestos abatement project area, including a description of the characteristics of the material;
- 8.5. A statement identifying the abatement activity as repair, removal, encapsulation, or enclosure;
- 8.6. A schematic floor plan of the containment area which shows the physical dimensions, entrance, exit, windows, decontamination unit, load-out area, emergency exits, placement of the HEPA exhaust air filtration units, any measuring devices, warning signs, and barrier tape;
- 8.7. The specifications for:
 - 8.7.1. The construction of and the amounts of materials needed to build the project containment area structure, which shall be separated from the uncontaminated environment by polyethylene sheeting or other materials used in conjunction with the existing floors, ceilings, and walls of the structure;
 - 8.7.2. The number and capacity of HEPA exhaust air filtration units and backups;
 - 8.7.3. Air monitoring of personnel; and
 - 8.7.4. Clearance of the contained work area for reoccupancy, including the number of sample collection points and the analytical method to be employed;
- 8.8. A schematic location and the specifications for the heating, ventilation and air-conditioning system shut-offs, electrical power, water source, fire exits, fire extinguisher, fire alarm, telephone, tool and equipment room, supply box, air monitoring station, project field office, and bathrooms;
- 8.9. A description of the work procedures to be used; and
- 8.10. A description of the materials and tools to be used in the abatement project.

§ 64-63-9. Training Accreditation

9.1. The director has the authority to accredit asbestos abatement courses provided within West Virginia. In approving asbestos abatement training courses, the director shall rely on the standards for training courses found at 40 CFR Part 763, Subpart E, Appendix C, Model Accreditation Plan, and these standards are hereby adopted by reference.

9.2. Persons wishing asbestos abatement training course accreditation shall submit an application on forms approved by the Director, together with the fee required by W. Va. Division of Health Administrative Rules, 64 CSR 51, Fees for Services.

§ 64-63-10. Responsibilities of Owners.

10.1. Except as stated in Sections 10.3 and 10.4 of this rule, the owner of a building or other man-made structure shall ensure that:

10.1.1. Each building or other man-made structure he or she owns is inspected for the presence of asbestos by a licensed asbestos inspector prior to any renovation or demolition activities;

10.1.2. Each asbestos abatement project in the building or other man-made structure is designed by a licensed asbestos abatement designer;

10.1.3. The division is notified at least ten (10) working days prior to commencement of each asbestos abatement project and that the that the notification fees specified in W. Va. Division of Health Administrative Rules, 64 CSR 51, Fees for Services, are submitted with the notification: Provided, That in an emergency resulting from a sudden unexpected event which is not a planned renovation or demolition, the notification and fees shall be submitted to the division as soon as possible after the emergency, but no later than the next working day following the emergency;

10.1.4. Any other applicable West Virginia and federal notification requirements for asbestos abatement projects are carried out; and

10.1.5. The asbestos clearance air monitor is provided with an accurate and precise written description of the asbestos abatement project prior to the collection of air samples used to determine compliance with clearance standards.

10.2. The owner of a building or other man-made structure may delegate, in writing, the responsibilities for compliance with this section to a person who is responsible for the operation of the building, and may delegate the responsibilities for compliance with State and federal notification requirements for asbestos abatement projects to the person who contracts for the projects.

10.3. For asbestos abatement projects involving less than one hundred sixty (160) square feet or two hundred sixty (260) linear feet of asbestos-containing material in buildings or other man-made structures which are not used as schools, notification may consist of a weekly summary in lieu of separate notifications for each project. The notification fees specified in W. Va. Division of Health Administrative Rules, 64 CSR 51, Fees for Services shall be submitted with the weekly summary.

10.4. The removal of resilient floor covering materials in single-family dwellings is exempt from the notification and fee requirements of this rule.

§ 64-63-11. Applicable Federal Standards

All persons licensed under this rule shall comply with the applicable portions of the following federal standards which were in effect as of **[the date of the end of the comment period, or if a rule has been approved and published, the date it will become effective]** which are hereby incorporated by reference:

11.1. 40 CFR Part 763, Subparts E, Asbestos-Containing Materials in Schools; F, Friable Asbestos-Containing Materials In Schools; and G, Asbestos Abatement Projects;

11.2. 40 CFR Part 61, Subpart M, National Emission Standards for Hazardous Air Pollutants;

11.3. 29 CFR, Part 1926, Safety and Health Regulations for Construction, Subpart D, Occupational Health and Environmental Controls § 1926.1101, Asbestos; and

11.4. 15 U.S.C. 2646, Toxic Substances Control Act, Section 206.

§ 64-63-12. Inspections.

The director has the right to enter any asbestos abatement project and to conduct inspections to determine compliance with this rule.

§ 64-63-13. Penalties.

13.1. The director shall, depending upon the severity of the violation and upon the degree of health hazard created, reprimand, or suspend or revoke the license of an asbestos analytical laboratory, clearance air monitor, contractor, inspector, management planner, project designer, supervisor, worker, or a resilient floor covering worker, if the licensee:

13.1.1. Fraudulently or deceptively obtains or attempts to obtain a license;

13.1.2. Fails at any time to meet the qualifications for a license or to comply with the requirements of W. Va. Code § 16-32-1 *et seq.* or this rule; or

13.1.3. Knowingly falsifies or attempts to falsify documents related to an asbestos abatement project or license.

13.2. The director may impose a civil penalty of not less than two hundred fifty dollars (\$250) and not more than five thousand dollars (\$5,000) for each separate violation of this rule payable within thirty (30) days of receipt of the penalty notification.

13.3. The director shall investigate all alleged violations of this rule or of W. Va. Code § 16-32-1 *et seq.* reported to the division. Upon the finding of a violation in connection with any asbestos abatement project the director shall, depending upon the severity of the violation and upon the

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degree of health hazard created, initiate an appropriate enforcement action which may include the issuance of a cease and desist order directing that all work on the project be halted immediately. Posting of the cease and desist order on the project site constitutes notice of its contents to the property owner and all persons working on the asbestos abatement project. Where practicable, however, the director shall deliver a copy of the order by certified mail, return receipt requested, to the property owner and to the contractor.

13.4. In any case where a person fails to halt work following the issuance of a cease and desist order by the director, the violation is presumed to be willful and the person shall be assessed a civil penalty by the director of not less than ten thousand dollars (\$10,000) nor more than twenty-five thousand dollars (\$25,000) for an initial violation and not less than twenty-five thousand dollars (\$25,000) nor more than fifty thousand dollars (\$50,000) for each subsequent violation payable within thirty (30) days of receipt of the penalty notification.

13.5. Any person who violates any provision of this rule or of the W. Va. Code § 16-32-1 *et seq.* is guilty of a misdemeanor.

§ 64-63-14. Administrative Due Process

Those persons adversely affected by the enforcement of this rule desiring a contested case hearing to determine any rights, duties, interests or privileges shall do so in a manner prescribed in W. Va. Division of Health Administrative Rules, Rules and Procedures for Contested Case Hearings and Declaratory Rulings, 64 CSR 1.

§ 64-63-15. Severability

The provisions of this rule are severable. If any provision of this rule is held invalid, the remaining provisions shall remain in effect.

Table 64-63A. Licensure Fee Schedule.

Type of License	Fee
Asbestos Worker	\$ 50
Asbestos Inspector	100
Asbestos Project Designer	100
Asbestos Supervisor	100
Asbestos Management Planner	100
Asbestos Clearance Air Monitor	100
Asbestos Contractor	300
Asbestos Analytical Laboratory	
Air Sample Analysis Only	200
Bulk Sample Analysis Only	200
Bulk and Air Sample Analysis	300
Resilient Floor Covering Worker	50

Table 64-63B. Minimum Number of Air Samples for Non-School Asbestos Abatement Projects.

Size of Contained Work Area	Minimum Number of Samples
≤ 49 ft ²	0
50 - 160 ft ²	2
161 - 2,500 ft ²	3
2,501 - 5,000 ft ²	4
5,001 - 10,000 ft ²	5
>10,000 ft ²	Calculate*

*Five (5) samples plus one (1) additional sample for each additional 5,000 square feet.