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## PERSPECTIVE

## The stakes are high, and costly, when asbestos removal goes rogue

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**I**n a previous article we examined some of the risks and liabilities associated with asbestos in buildings and provided background on the material and its uses in construction. In this article we will explore regulations governing asbestos and how to reduce risk when asbestos is present in a building.

Asbestos regulations are designed to protect occupants and workers in buildings and prevent impacts to the public and environment outside of the facility. Increased oversight and escalating consequences for failed compliance with asbestos abatement requirements is evident in recent years.

Local Air Pollution Control Districts (APCD) are responsible for the implementation and enforcement of a wide range of laws and regulations concerning air pollution within its jurisdiction, including asbestos.

Pursuant to authority delegated by the U.S. Environmental Protection Agency (EPA), one such regulatory regime is the Asbestos National Emissions Standards for Hazardous Air Pollutants, also known as the Asbestos NESHAP.

It is instructive to take a look at a local municipal rule regarding asbestos. Depending on your local rules, differences may apply. But just as an example, this rule applies to renovation and demolition operations. Subject to limited exceptions, regulated entities are required to:

**a.** Conduct a survey to confirm the presence or absence of regulated asbestos-containing material;



Workers remove asbestos-laden debris exposed by the Tubbs Fire in Santa Rosa, Calif. | The New York Times

**b.** Notify the APCD prior to engaging in regulated renovation or demolition activities;

**c.** Employ specified work practices to minimize the risk of asbestos release.

This rule applies to property owners, general contractors, subcontractors, asbestos consultants, and asbestos abatement contractors, among others, and the penalties for failure to comply are significant.

Contractors and property owners engaged in significant renovation and demolition operations should take particular note of the requirements and consider conducting refresher training on the rule's compliance, as they are often the targets of such enforcement actions.

From a general liability perspective, there is a risk for visitors and contractors in and surrounding a high-risk asbestos site. From an environmental perspective, it is critically important that asbestos be managed correctly.

Although undisturbed asbestos-containing materials are pretty much harmless, you should know exactly what to do when action is required. In order to protect yourself and your employees:

- Hire a certified company to help you find out where asbestos is located in your building.

- Make sure that the asbestos-containing products are not dangerous.

- Inform your workers about the presence of asbestos and the exposure risk.

- Keep the troublesome materials in good condition or have them encapsulated or removed by professionals.

Keeping the people on your property safe is of high importance and this should be one of your main priorities. Do not take any risks!

Before commencing any renovation that will disturb more than 100 square feet of ACM, or more than 20 cubic feet of ACM from hard-to-access areas, a 10-day notice must be sent to the local air pollution control district (the "District"), along with submittal of an asbestos survey and payment of the applicable fee.

Once the renovation is approved and work commences, rigorous pro-

tection from any exposure to ACM to facility occupants, workers and the public must be maintained. The management of asbestos-containing waste material (“ACWM”) generated by a facility becomes subject to the District rules, and the cradle-to-grave waste management requirements generally overseen by the local Department of Environmental Health.

As steep as the fines can be, perhaps an even greater impact to a facility owner or operator is the fact that the District Executive Officer has abatement authority under the California Health and Safety Code.

Until recently, this authority was constrained by certain due-process rights of the alleged violator. In January 2018, the California legislature granted the District Executive Officers authority to issue, prior to a hearing, interim orders for abatement.

In cases where the District Executive Officer believes that any person is causing an imminent and substantial endangerment to the public health or welfare, or the environment, without a permit or in violation of a rule or order, they

may issue an interim order mandating or enjoining certain actions. The interim order is effective upon notification to the person subject to the order. The order can be based on information provided by a third party, for example, a tenant or worker in the building.

In the example cited in part one of this article, tenant claims of damage to their business and person were filed. Inevitable disputes among the named responsible parties (the owner, operator, the prime and subcontractors and abatement contractor), and their insurance carriers resulted in derailment of the original building renovation plans, significant consultant and legal fees, and loss of owner and operator staff time while dealing with all the issues. In addition to these impacts, the District’s original civil penalty demand was eight figures and had to be negotiated to a fair final number.

Notwithstanding the high civil penalty demand, the impact of the interim and injunctive provisions of the stipulated abatement order and the litigation costs far-exceeded the civil penalty amount. These circumstances should be considered in-

herent risks of any asbestos abatement project in California, and avoidance of such liability should be prioritized. To provide maximum possible protection, all appropriate (even if seemingly costly) asbestos abatement measures should be closely evaluated and employed

during the due diligence phase and at all stages of project planning and implementation.

*This article is the second in a two part series exploring the risks and liabilities, as well as best practices in dealing with asbestos found in buildings.*

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