



THE IMPORTANCE OF PROPER ASBESTOS DOCUMENTATION: A CASE STUDY

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One of the most difficult tasks that I have as CEO of Wonder Makers is to talk with clients who believe that they have dealt with an indoor environmental matter properly and explain that, despite the expenditure of considerable time, effort, and money, critical deficiencies have been identified. These conversations are even more distressing when the building owner, property manager, or general contractor hired a consultant or abatement firm that appeared competent. Unfortunately, general competency, or even state licensing, does not guarantee that the critical individuals on a project understand the appropriate regulations and the ramifications of working outside those rules.

At no time is this more true than when dealing with the identification and removal of asbestos from schools. Public and private schools are required to follow state and federal OSHA regulations related to asbestos, EPA rules that apply to all structures, and a separate set of requirements for educational institutions (known as the AHERA rules). One example of these challenges regarding asbestos came in the form of 11 sheets of paper provided to us as evidence of a school's effort to address some long term asbestos concerns in their building.

The Significance of Knowing What You Are Buying

The paperwork in question was from an abatement effort in 2010. The documents clearly indicated that the air monitoring was sub-contracted through the abatement contractor. However, both the abatement contractor and the analytical firm should know that this is against the regulations for schools. The contractor's misinterpretation of the law will be no excuse if an inspection is performed by the EPA. Remember, there is no statute of limitations for AHERA asbestos violations, so paperwork that documents improper abatement activities can be used as proof of violations in the future.

Specifically, the paperwork to the school from the abatement contractor stated that "third party air monitoring is included for the duration of the work." This is a complete misunderstanding of the term "third party". Subpart E of the AHERA rules (Section 763) has a mandatory Appendix A, which addresses a number of issues, including sampling, when it clearly states: "Sampling

operations must be performed by qualified individuals completely independent of the abatement contractor to avoid possible conflict of interest.”

This is further clarified in the explanatory information put out by the EPA shortly after the AHERA rules were promulgated. Their document entitled “100 Commonly Asked Questions About the New AHERA Asbestos-in-Schools Rule” is even more blunt. Question #72 in that document talks about the collection of post-abatement clearance samples and states: “The abatement firm would not be allowed to subcontract this work since the subcontractor is not ‘completely independent’ of the contractor.”

Enforcement Ramifications

The types of violations identified in the school’s abatement paperwork are specifically called out in the EPA’s enforcement document for their own inspectors. The EPA categorizes violations into six levels, with level 1 being the most significant. While abatement without air monitoring is categorized as a level 1 violation, the type of situation documented in the school’s paperwork is considered abatement air monitoring without the required third party, a level 4 violation (\$200–\$2,000 penalty).

Unfortunately, this is not the only AHERA violation in the slim file that documents the abatement efforts for this school. There are a number of key elements missing from the paperwork prepared by the contractor and consultant. Although there is no proof that many of the following items were *not* followed during the abatement, due to the paucity of paperwork, neither does the school have verification that these critical elements of the abatement process *were* conducted properly. In this case it is especially instructive to remember that the EPA cited a mid-Michigan school district for not sending out annual asbestos notifications, even when there was verbal confirmation that the regulations had been followed. Regardless, the school was missing three forms documenting their notification and received a citation for each missing record.

Enforcement Inspections Tend to Focus on Paperwork

With this in mind, we examined the paperwork from the perspective of an EPA inspector who would be brought on site in response to an incident or complaint regarding asbestos. The deficiencies we identified are followed by a brief description of the probable EPA violations, classifications, and possible fines.

- No indication that the project was designed by a project designer or management planner.
 - Abatement not designed or supervised by accredited people – level 2
 - Possible EPA fines: \$600-\$4,000
- No documentation of State of Michigan asbestos licenses for the abatement workers or the consultant.

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- Possible EPA fines: \$600-\$4,000
- It is questionable whether there was appropriate area air monitoring during abatement, which is designed to ensure that adjacent areas are not impacted. The area sample results are noted as “final clearance samples,” which is important but may not be deemed adequate to meet all of the AHERA requirements.
 - Abatement without air monitoring – level 1
 - Possible EPA fines: \$1,000-\$5,000
 - This may also result in a Michigan OSHA (MIOSHA) violation.
- In the paperwork there is no indication of which engineering controls (negative pressure enclosures, glovebags, warning signs, barrier tape, etc.), if any, were used.
 - *LEA failed to update its management plan by not keeping the records required under 763.94. Notice of non-compliance (NON). Notify the governor regarding non-compliance.*
 - The section of the AHERA regulation referred to in this violation is 763.94 (g) which reads as follows: *For each time that major asbestos activity under § 763.91(e) is performed, the local education agency shall provide the name and signature, State of accreditation, and if applicable, the accreditation number of each person performing the activity, the start and completion dates of the activity, the locations where such activity occurred, **a description of the activity including preventive measures used**, and if ACBM is removed, the name and location of storage or disposal site of the ACM.*[Emphasis added as bold type.]

Although there are no specific sections in the EPA enforcement document dealing with other deficiencies in the paperwork, these items could be used to determine whether specific violations are “minor”, “significant”, or “major.” Each of the following deficiencies would also be considered a serious violation under the MIOSHA regulations.

There was no documentation of:

- Medical exams for the abatement workers
- Personal protective equipment (PPE) used
- Description of work/abatement that was accomplished
- Diagram showing where the work was done and the samples were collected
- Photos
- Evidence of calibration of air monitoring equipment

Finally, the air sample results document sample collection procedures that fall into a gray area of the regulations. For final clearance samples that will be analyzed via transmission electron microscopy (TEM), the AHERA regulations clearly state that sample volume should be equal to at least 1200 liters of air. (“An action may also be considered complete if the volume of air

drawn for each of the five samples collected within the affected functional space is equal to or greater than 1,199 L of air for a 25 mm filter.”) Most professionals interpret this requirement to apply to air samples that will be analyzed by phase contrast microscopy (PCM) even though it is not explicitly stated. In this case, one set of final clearance samples was run with 1,200 liters, while the other three sets only had 960 liters of air. This indicates that the consultant was aware of the 1,200 liter requirement but neglected to follow through with it for all of the final clearance samples.

Doing the Right Thing the Wrong Way Can Still Cause Problems

While the school should be congratulated for responding to concerns related to possible asbestos exposure in this highly regulated environment, a good deed can still be punished if it is not completed correctly and supported by detailed documentation. Contractors and consultants need to see the big picture of how the overlapping regulations impact each specific project and choose the correct path through the thicket of government rules. Therefore, anyone who suspects that they have asbestos in their building, or needs assistance in designing or managing an abatement plan, should contact Wonder Makers to ensure that their situation does not become the next case study.