Revised Industrial Code Rule 56 Expands Requirements for Asbestos Projects by Building Owners
Earlier this year the New York State Department of Labor adopted amendments to the State's asbestos regulations, known as Industrial Code Rule (ICR) 56, to conform it to federal asbestos regulations and to better align New York's asbestos requirements with those of OSHA and EPA. The amended regulations go into effect this September. The changes to the requirements are significant, and they will pose challenges to parties doing (or contracting for) projects that involve repair or remodeling of older buildings that contain asbestos or which have not yet been surveyed for asbestos.

On January 11, 2006, the New York State Department of Labor ("DOL") adopted amended Industrial Code Rule (ICR) 56 to conform it to federal asbestos regulations, and to better align New York's asbestos requirements with those of OSHA and EPA.

Effective Date and Transition Period
The amendments become effective and will be enforced starting September 5, 2008, although the DOL will allow asbestos abatement projects to proceed during the transition period under either the existing Code Rule 56 or the amended version. During the transition period, all applicable variances, blanket variances, and statewide variances will terminate on September 4, 2008. Any existing site-specific variance decisions will remain in effect until the termination date stated in that variance. All new variances issued after September 5, 2008, will have a one-year expiration period.

Most Significant Changes
One of the chief changes in the amendment is to clarify the requirements applicable to obtaining the variances applicable to asbestos projects that may deviate from the regulatory requirements. DOL intended to "streamline" the requirements and reorganize them to reflect the consecutive steps of an asbestos project. Among the most significant potential impacts of the new Code Rule 56 on owners of buildings and structures are:

Surveys—An asbestos survey or inspection is required prior to any building/structure demolition, remodeling, renovation, or repair if construction on the building commenced prior to 1974 (and under OSHA, all materials must be presumed to contain asbestos—unless tested—if the building was constructed prior to 1980). This requirement applies unless the structure is agricultural, structurally unsound, condemned, or is a one- or two-family dwelling and the owner does all the work. Appropriately certified personnel working for an asbestos contractor must inspect or survey the portion of the building impacted by a project. Further, buildings must be re-surveyed to reflect the fact that asbestos is still in certain types of building materials (caulking, mastic, etc.) that might be added to the structure after the survey, if renovation or repairs have been done. Testing of new materials, or certification from the suppliers of such materials that they are asbestos free, will be required.

Multi-employer Work Sites—An asbestos abatement contractor is responsible for informing all employers at a work site about the nature of their work, as well as known and assumed potential asbestos-containing material at the work site. They must inform all non-asbestos contractors as well, and notify the owner, employers, and occupants of areas adjacent to asbestos project work areas each time there is an occurrence of elevated air sample results. Any non-asbestos contractor who discovers asbestos in the course of performing other work has a duty to notify the owner on discovery. Other obligations exist for owners where areas will be impacted by asbestos projects and for contractors who are supervising projects that involve disturbance of asbestos materials.

Property Owner Obligations—The amended rule defines who is responsible for cleanups, placing most burdens on the owners to contract with licensed asbestos contractors to arrange for isolation and removal of discovered asbestos-containing materials, and to vacate affected areas until the cleanup can occur. Although legal recourse may exist against other responsible parties, I.E. building contractors, local fire departments who might burn a structure, demolition and salvage contractors, etc., the owner must take the initial steps. The owner must also contract separately for air monitoring, and the asbestos abatement contractor must be independent of the firm doing such air monitoring. Project air sampling requirements were expanded in numerous ways, spanning everything from the requirement for technicians to be on

site during certain sample collection events to the type of clearance sampling that is required for incidental disturbance and post-work phases.

Work Area Preparation and Clearance Procedures—Various specific and detailed changes were made to the engineering controls used to maintain negative air requirements, for the creation and operation of decontamination units and negative pressure tents, record-keeping, and the like, as well as for handling of asbestos, cleaning and clearance procedures, and visual inspections, and for management of special projects. Provision is made for all waste to be removed from the site within ten calendar days after completion of the final clearance, and for documenting compliance with EPA National Emission Standards for Hazardous Air Pollutants (NESHAPS). Compliance with the majority of these requirements will fall on the licensed asbestos abatement contractors so they are not detailed here, but owners should familiarize themselves with these requirements.

Record-keeping—The rule expands the record-keeping requirements, requiring on-site maintenance of project record documents during the active phase of projects, and mandating the owner to retain the entire project record when the asbestos work has concluded. Such records must be delivered to the new owner upon transfer of ownership of the building.

Variances—Many typical project abatement scenarios will require site-specific variances or SSVs (for example, controlled demolition projects, elevated abandoned piping removals, incidental disturbance cleanups, dry removals, certain floor covering and mastic removals, etc.). All new SSVs must apply the new code rule, although existing site-specific variances will remain valid until the termination date contained in the variance decision document. Specific rules apply to other types of variances.

Compliance Tips for Owners

The new ICR incorporates charts reflecting the phases of an asbestos work project and the sampling required in each phase of the work. Printing these to aid in navigating the new procedures will be helpful. Ensuring that personnel meet the minimum qualifications required in the new rule may be a challenge in the initial months of implementation. Strong contract provisions requiring contractors to “certify” they meet the minimum licensing qualifications required for the job, and incorporating contractual compliance obligations in contracts and work orders, will help protect owners.

The expansive definition of what constitutes a “repair” triggering the survey requirements could be a huge challenge for owners of multiple buildings or campuses involving older structures (such as municipalities, colleges and universities, other large institutions, and developers). If these entities do not have comprehensive asbestos surveys in place, and undertake multiple repairs virtually on a daily basis, it may be impossible to comply by September of this year. It may be necessary to prioritize risks and cluster repairs to focus on areas where the greatest amount of available information exists concerning the location and condition of asbestos, while applying a phased compliance approach to complete more comprehensive surveys for the remaining structures.

The costs of repeated updating of surveys, as new materials become incorporated into the buildings, can be avoided if model materials certification documents are developed as part of the procurement process. If such certifications are not obtained, the new materials may require testing to be able to meet the general duty of employers and building owners to identify the location of asbestos in their structures.

Conclusion

There will be a “shakedown” period while asbestos abatement contractors, building owners, and even the DOL district offices and regional engineering service units digest the ICR and develop procedures to implement it. Our firm's in-house technical professionals and attorneys can assist owners of properties in assuring compliance with the new ICR, and assist in the event of enforcement.