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OFFICE OF THE LIEUTENANT GOVERNOR
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MEMORANDUM

TO: Pete Christensen, AAC Contact
Department of Transportation and Public Facilities

FROM: Scott Meriwether
Special Assistant 
907.465.4081

DATE: May 14, 2015

RE: Filed Permanent Regulations: Department of Transportation and Public Facilities
Regulations re: use of materials containing naturally occurring asbestos (17 AAC 97)

Attorney General File:	JU2013200132
Regulation Filed:	May 14, 2015
Effective Date:	June 13, 2015
Print:	214, July 2015

cc with enclosures: Linda Miller, Department of Law
Genevieve Wojtusik, Administrative Regulation Review Committee
Judy Herndon, LexisNexis

ORDER ADOPTING REGULATIONS OF
DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

The attached 19 pages of regulations, dealing with Naturally Occurring Asbestos, are adopted and certified to be a correct copy of the regulations that the Department of Transportation and Public Facilities adopts under the authority of AS 44.42.420 and after compliance with the Administrative Procedure Act (AS 44.62), specifically including notice under AS 44.62.190 and 44.62.200 and opportunity for public comment under AS 44.62.210.

This action is not expected to require an increased appropriation.

In considering public comments, the Department of Transportation and Public Facilities paid special attention to the cost to private persons of the regulatory action being taken.

The regulation changes adopted under this order take effect on the 30th day after they have been filed by the lieutenant governor as provided in AS 44.62.180.

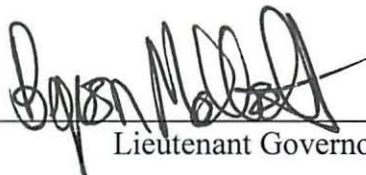
DATE: May 7, 2015
Juneau, Alaska



Marc Luiken, Commissioner

FILING CERTIFICATION

I, Byron Mallott, Lieutenant Governor for the State of Alaska, certify that on May 14,
2015, at 1:50 p.m., I filed the attached regulations according to the provisions of AS 44.62.040 -
44.62.120.



Lieutenant Governor

Effective: June 13, 2015.

Register: 214, July 2015.

17 AAC is amended by adding a new chapter to read:

Chapter 97. Naturally Occurring Asbestos.

Section

- 10. Applicability
- 20. Bulk testing method and laboratory requirements
- 30. Procedures for establishment of designated area
- 40. Procedures for submission and review of site-specific plans
- 50. Responsibilities
- 900. Definitions

17 AAC 97.010. Applicability. This chapter applies to the means by which landowners and contractors are granted immunity under AS 09.65.245(a) (immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants) from a civil action or claim for damages or costs. (Eff. 6/13/2015, Register 214)

Authority: AS 09.65.245 AS 44.42.400 AS 44.42.430
 AS 44.42.030 AS 44.42.420

17 AAC 97.020. Bulk testing method, sampling protocol, and laboratory requirements. The testing method used to determine the percentage of naturally occurring asbestos contained within gravel or other aggregate material to be used in projects described in

Register 214, July 2015 TRANS. AND PUBLIC FACILITIES

this chapter is the California Environmental Protection Agency, California Air Resources Board, *Method 435: Determination of Asbestos Content of Serpentine Aggregate (CARB 435)*, revised as of June 6, 1991 and adopted by reference, with the lowest detection limit of 0.25 percent using the "400 non-empty point" calculation. The department's *DOT&PF NOA Sampling and Classification Protocols*, revised as of March 27, 2015 and adopted by reference, establishes the method for samples taken in undeveloped areas. A laboratory doing the analysis must be certified by the United States Department of Commerce, National Institute of Standards and Technology, National Voluntary Laboratory Accreditation Program (NIST/NVLAP). (Eff. 6/13/2015, Register 214)

Authority:	AS 09.65.245	AS 44.42.030	AS 44.42.420
	AS 18.31.260	AS 44.42.400	AS 44.42.430
	AS 44.42.020		

Editor's note: A copy of the California Air Resources Board, *Method 435*, adopted by reference in 17 AAC 97.020, may be obtained by writing to the California Air Resources Board, P.O. Box 2815, Sacramento, CA 95812. An electronic copy may be viewed at the California Air Resources Board website, http://www.arb.ca.gov/testmeth/vol3/M_435.pdf. A copy of the *DOT&PF NOA Sampling and Classification Protocols*, adopted by reference in 17 AAC 97.020, may be obtained by writing to the Department of Transportation and Public Facilities, P.O. Box 112500, Juneau, AK 99811-2500. An electronic copy may be viewed at the Department of Transportation and Public Facilities website, <http://dot.state.ak.us/stwddes/desmaterials/nea.shtml>.

17 AAC 97.030. Procedures for establishment of designated areas. (a) The procedures for establishing a designated area at the request of a municipality or person outside the limits of a municipality are as follows:

(1) if all or part of the proposed designated area is within the limits of a municipality, the applicant must be the municipality;

(2) if the proposed designated area is inside the limits of a community and outside the limits of a municipality, the community may apply;

(3) if the proposed designated area is outside the limits of a community and outside the limits of a municipality, any person may apply;

(4) the applicant may request the establishment of a designated area by submitting an application to the department containing

(A) a cover letter addressed to the department's chief engineer requesting the establishment of a designated area under AS 44.42.400; if the applicant is a municipality, the letter may be signed by the principal executive officer, an elected official, or other authorized employee;

(B) a resolution from the governing elected body of the municipality requesting the designation of the area under AS 44.42.400(b), if any part of the proposed designated area is within a municipality;

(C) a specific description of the proposed boundaries of the designated area with documentation describing the rationale for the proposed boundaries; the description must include mapping that depicts the limits of the proposed designated area and the material sites evaluated under (D) and (E) of this paragraph;

(D) reports of tests documenting the presence of naturally occurring asbestos in gravel or other aggregate material in the proposed designated area that, when tested using the bulk test method prescribed in 17 AAC 97.020, is determined to have a content equal to or greater than 0.25 percent of naturally occurring asbestos; those test results must include information regarding sampling protocols used to establish the presence of naturally occurring asbestos;

(E) information related to the availability of gravel or other aggregate material free from naturally occurring asbestos in the proposed designated area; and

(F) information related to the project costs associated with using naturally occurring asbestos;

(5) upon receipt of an application, the department will not issue a determination until it has

(A) reviewed all information submitted;

(B) analyzed the effect of the presence of naturally occurring asbestos on construction projects in the proposed designated area; and

(C) solicited and considered public input;

(6) in addition to the information required in (4) of this subsection, the department may request that additional information or studies it determines relevant and necessary, to include additional testing, sampling, or surveys, be provided in order to process the application; the department will not pay for, conduct, or contract for any testing required to process the application;

(7) the department will process the application not later than 90 days after receipt

of the complete application; if the department needs additional time to process the application, the department will issue a public notice to extend the 90 days;

(8) the department will issue a written determination of approval or disapproval of the application; if the department approves the application, the department will include in the approval a specific description of the boundaries of the designated area; the department will provide a copy of the written determination to the applicant;

(9) the department may wholly approve or wholly disapprove an application; the department may revise the boundaries proposed by the applicant of the area to be established as a designated area;

(10) after approval of a designated area, the department will notify potentially affected persons that the area has been designated as an area where landowners and contractors may be granted immunity under AS 09.65.245(a) (immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants) from a civil action or claim for damages or costs;

(11) an applicant may request at any time that the department withdraw a designated area from designation; if all or part of the designated area is within a municipality or community, the municipality or community must be the applicant to withdraw; the department will solicit and consider public input for withdrawal of the designated area from designation; if a designated area is withdrawn from designation, immunity for projects with site-specific plans previously approved by the department under 17 AAC 97.040 continues for those projects as if the area remained a designated area for the purposes of asserting immunity under AS 09.65.245(a); to retain immunity under AS 09.65.245(a), the projects must continue to be

maintained following the monitoring and mitigation plan approved under 17 AAC 97.040(h).

(b) Procedures for establishing designated areas for department projects are as follows:

(1) if any part of the proposed designated area under this subsection is within a municipality, the department will secure a resolution from the governing body of the municipality in which the proposed area is located supporting the establishment of the designated area;

(2) the department will document

(A) a specific description of the proposed boundaries of the designated area;

(B) tests documenting the presence of naturally occurring asbestos in the area, including information regarding testing methods and sampling protocols used to establish the presence of naturally occurring asbestos;

(C) information related to the availability of gravel or other aggregate material free from naturally occurring asbestos in the area;

(D) information and analysis related to the project costs associated with using naturally occurring asbestos; and

(E) any other information that the department identifies as relevant to the establishment of a designated area as proposed;

(3) upon establishing a file documenting the information required under (1) and (2) of this subsection, the department will solicit and consider public input from residents within the proposed designated area;

(4) the department will issue a written determination establishing the designated

area and containing a specific description of the boundaries of the designated area; the department will provide a copy of the written determination to the governing body of the municipality, if applicable;

(5) after establishing a designated area, the department will notify potentially affected persons that the area has been designated as an area where landowners and contractors may be granted immunity under AS 09.65.245(a) (immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants) from a civil action or claim for damages or costs;

(6) the department may at any time withdraw a designated area from designation; the department will solicit and consider public input for withdrawal of the designated area from designation; if a designated area is withdrawn from designation, immunity for projects with site-specific plans previously approved by the department under 17 AAC 97.040 continues for those projects as if the area remained a designated area for the purposes of asserting immunity under AS 09.65.245(a); to retain immunity under AS 09.65.245(a), the projects must continue to be maintained following the monitoring and mitigation plan approved under 17 AAC 97.040(h).

(Eff. 6 / 13 / 2015, Register 214)

Authority: AS 44.42.030 AS 44.42.420 AS 44.42.430
 AS 44.42.400

17 AAC 97.040. Procedures for submission and review of site-specific plans. (a) An applicant intending to use materials containing naturally occurring asbestos at levels at or exceeding those established under AS 44.42.410 from within an area designated under 17 AAC

97.030 and who is seeking immunity provided under AS 09.65.245(a)(2) must submit a site-specific plan to the department. The applicant submitting the plan must

(1) have the plan certified in writing by

(A) an industrial hygienist with certification from the American Board of Industrial Hygiene; or

(B) a registered professional engineer under AS 08.48 with department-provided project designer training;

(2) include concurrence from

(A) all landowners nearby;

(B) the project owner; and

(C) the entity responsible for maintenance; and

(3) submit a cover letter to the department's chief engineer stating that the site-specific plan is being submitted as required under AS 44.42.410 and identify

(A) the project, construction start, and projected completion date; and

(B) the project owner and the entity responsible for project maintenance.

(b) For projects undertaken by the department or contracted by the department, where the department or its contractors are intending to use material containing naturally occurring asbestos at levels at or exceeding those established under AS 44.42.410, from within an area designated under 17 AAC 97.030 and the department is seeking immunity provided under AS 09.65.245(a)(2), the department will produce a site-specific plan. The department will

(1) have the plan certified in writing by

(A) an industrial hygienist with certification from the American Board of

Industrial Hygiene; or

(B) a registered professional engineer under AS 08.48 with department-provided project designer training; and

(2) in addition to providing the information required under (c) of this section,

(A) identify in the plan the project, construction start, and projected completion date;

(B) identify all landowners nearby; and

(C) complete the plan as required in (c) of this section.

(c) A site-specific plan under AS 44.42.410 must contain at least

(1) a description of the project, project components, and intended long-term use of the project;

(2) the applicant's address and telephone number;

(3) identification of all landowners nearby; the applicant must attach a signed and dated approval letter from

(A) each landowner that the project affects;

(B) the project owner; and

(C) the entity responsible for maintenance of the project;

(4) a map depicting the specific location of the project boundary and proposed material sites and the boundary of the designated area established under 17 AAC 97.030;

(5) plans, specifications, and material quantity estimates for construction involving material containing naturally occurring asbestos, the location and depths of material containing naturally occurring asbestos to be incorporated into the project, and identification of material free

from naturally occurring asbestos that will cover or seal the material containing naturally occurring asbestos; if material containing naturally occurring asbestos has been used, the material containing naturally occurring asbestos must be covered or sealed with material free from naturally occurring asbestos, except if material containing naturally occurring asbestos is

(A) an integral part of the production of asphalt concrete, portland cement concrete, or other similarly cemented materials;

(B) used as riprap; or

(C) used as slope stabilization;

(6) a narrative of the benefits of using material containing naturally occurring asbestos on the project; the narrative must include a cost analysis comparing using material containing naturally occurring asbestos to using material that is free from naturally occurring asbestos; the costs of material containing naturally occurring asbestos must include all costs to

(A) develop a site-specific plan;

(B) implement the sampling and analysis plan required under (7) of this subsection;

(C) implement the asbestos compliance plan required under (8) of this subsection; and

(D) implement the dust control plan required under (9) of this subsection;

(7) a sampling and analysis plan (SAP) for construction activities; the sampling and analysis plan must include

(A) details of investigations to identify in the area sources of material free from naturally occurring asbestos;

(B) identification of the testing method used for naturally occurring asbestos;

(C) a description of the sampling protocol used for naturally occurring asbestos;

(D) test results of soil samples from known material sources or areas of anticipated ground disturbance; the test results must identify concentrations of naturally occurring asbestos, including mapped locations; and

(E) a narrative description of plans to minimize the use of material containing naturally occurring asbestos;

(8) an asbestos compliance plan (ACP) for construction activities; the asbestos compliance plan must include

(A) identification of those work tasks on the project with the potential for exposure to material containing naturally occurring asbestos;

(B) a project-specific job hazard analysis detailing steps that are to be taken to prevent or minimize worker exposure to asbestos using engineering or administrative controls and personal protective equipment (PPE); the analysis must include a description of

(i) personal protective equipment to be used on site;

(ii) decontamination practices and equipment to be used;

(iii) general safe work practices to be employed;

(iv) site security measures; and

(v) changed-conditions response plans;

(C) a description of the training to be received by those workers with potential exposure to naturally occurring asbestos; training must be appropriate for responsibilities and potential for exposure;

(D) a plan for monitoring the exposure of workers and the public to airborne asbestos dust; the air monitoring plan must specify the type of each air sampling device, the siting of each air sampling device, sampling durations and frequency, and the analytical method; an individual performing the monitoring and sampling must be supervised by an individual that the United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health has certified with the course titled *Sampling and Evaluating Airborne Asbestos Dust (582) (NIOSH 582)*, dated June 1988 and adopted by reference, or an equivalent to that course; the plan must include

(i) an area air monitoring test documenting the presence or absence of airborne fibers from naturally occurring asbestos; the area air monitoring test must use the test method prescribed in the United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, *Asbestos and Other Fibers by PCM (7400) (NIOSH 7400)*, dated August 15, 1994 and adopted by reference; fiber counts may not exceed a 24-hour average public exposure concentration greater than or equal to 0.020 fibers per cubic centimeter of air; and

(ii) a personal air monitoring test documenting the presence or absence of airborne fibers from naturally occurring asbestos; the personal air

monitoring test must use the test method prescribed in *Asbestos and Other Fibers by PCM (7400) (NIOSH 7400)*, adopted by reference in (i) of this subparagraph; the worker permissible exposure limit (PEL) may not exceed an eight-hour time weighted average full-shift airborne concentration of 0.1 fibers per cubic centimeter of air, and may not exceed one fiber per cubic centimeter of air as averaged over a sampling period of 30 minutes; and

(E) a description of public notification to be made during the construction phase regarding use of material containing naturally occurring asbestos; the description must include a description of proposed signage to be placed near the project area during construction;

(9) a dust control plan (DCP) for construction activities; the plan must include plans to prevent visible dust emission during excavation, stockpiling, transportation, or placement of material containing naturally occurring asbestos; and

(10) a draft monitoring and mitigation plan for the post-construction period or maintenance; the draft plan must include

(A) the long term monitoring and mitigation plan signed by the entity responsible for maintenance for the completed project;

(B) a description of operational and maintenance strategies and timelines for the entity responsible for maintenance for protecting, testing, and reconstructing covering materials over the material containing naturally occurring asbestos in the project; and

(C) a description of planned public notification measures for the entity

responsible for maintenance to ensure the public is made aware of material containing naturally occurring asbestos in the area.

(d) The applicant must submit all components of the site-specific plan not later than 60 days before ground-disturbing activities start. All components of the site-specific plan must be approved before ground-disturbing activities begin.

(e) The department may request any additional information to supplement any component of a site-specific plan.

(f) After the department's preliminary review of a site-specific plan, the department will consult with and seek comments from each of the following agencies regarding the draft monitoring and mitigation plan required under (c)(10) of this section:

- (1) the Department of Environmental Conservation;
- (2) the Department of Health and Social Services;
- (3) the Department of Natural Resources;
- (4) the Department of Law;
- (5) the Department of Labor and Workforce Development.

(g) The department will allow each reviewing agency listed in (f) of this section 10 working days after receipt of the draft monitoring and mitigation plan to review the draft monitoring and mitigation plan with regard to human health concerns arising out of gravel or other aggregate material containing naturally occurring asbestos. A reviewing agency may recommend approval of, disapproval of, or modification to the draft monitoring and mitigation plan. Upon agency request, the department may grant an additional 10 working days to review the draft monitoring and mitigation plan. In this subsection, "working day" means a day other

than Saturday, Sunday, or a state holiday.

(h) The department will incorporate into the final monitoring and mitigation plan each reviewing agency's recommendations to address human health concerns arising out of gravel or other aggregate material containing naturally occurring asbestos.

(i) The department will issue a written determination approving or disapproving the site-specific plan.

(j) After approving a site-specific plan, the department will

(1) provide a copy of the approved site-specific plan, including the approved final monitoring and mitigation plan, to

(A) the applicant; and

(B) the mayor of the municipality, or to the municipal or community executive, if applicable; and

(2) require the applicant to submit all asbestos-related data collected during construction to the department.

(k) At any time the applicant submitting the site-specific plan may request revision of any component of the site-specific plan previously approved under (i) of this section. To request a revision, the applicant must submit the proposed changes for the department's approval along with a cover letter as specified under (a)(3) of this section. The applicant submitting revisions to a site-specific plan previously approved under (i) of this section must submit all revised components of the site-specific plan not later than 60 days before proceeding under the terms of the revised site-specific plan. If without the written approval of the department under this subsection a contractor or project owner makes, institutes, or implements a revision to a site-

specific plan previously approved under (i) of this section, the revision voids the previous approval of that site-specific plan.

(l) The applicant shall submit the final monitoring and mitigation plan not later than 120 days after construction is completed. The final monitoring and mitigation plan must include the monitoring and mitigation plan as modified under (h) of this section, supplemented by as-built plans identifying the final locations for material containing naturally occurring asbestos and the cover or sealing material used.

(m) The applicant shall submit construction monitoring records not later than 120 days after construction is complete.

(n) The contractor shall comply with the recordation and notification requirements of AS 44.42.410(g).

(o) The department will permanently retain

(1) each approved site-specific plan, whether submitted to or produced by the department; and

(2) all associated documentation. (Eff. 6 / 13 / 2015, Register 214)

Authority: AS 09.65.245 AS 44.42.410 AS 44.42.430
 AS 44.42.030 AS 44.42.420

Editor's note: A copy of *Sampling and Evaluating Airborne Asbestos Dust (582)* (NIOSH 582), adopted by reference in 17 AAC 97.040 may be obtained through the United States Department of Commerce, National Technical Information Service website at <http://www.ntis.gov/>, by searching the National Technical Reports Library for publication

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PB89184568. A copy of *Asbestos and Other Fibers by PCM (7400) (NIOSH 7400)*, adopted by reference in 17 AAC 97.040, may be obtained by writing to the Centers for Disease Control and Prevention, 1600 Clifton Road, Atlanta, GA 30333. An electronic copy may be viewed through the Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health website at <http://www.cdc.gov/niosh/docs/2003-154/pdfs/7400.pdf>.

17 AAC 97.050. Responsibilities. The project owner and each contractor are responsible for fulfilling their respective requirements of the site-specific plan approved under 17 AAC 97.040. The contractor shall ensure that each party involved with the project, including each subcontractor, complies with the approved site-specific plan. (Eff. 6/13/2015, Register 214)

Authority: AS 44.42.030 AS 44.42.420 AS 44.42.430

17 AAC 97.900. Definitions. (a) In AS 44.42.400 - 44.42.430 and this chapter,

(1) "landowner" means

(A) the owner of the surface estate of land affected by the use in the project of materials containing naturally occurring asbestos; and

(B) the owner of the subsurface estate of land affected by the use in the project of materials containing naturally occurring asbestos;

(2) "material free from naturally occurring asbestos" means material that may contain naturally occurring asbestos at a concentration of less than 0.25 percent using the "400 non-empty point" calculation in *Method 435: Determination of Asbestos Content of Serpentine Aggregate (CARB 435)*, adopted by reference in 17 AAC 97.020;

(3) "monitoring and mitigation plan" means the plan used for the post-construction period or maintenance;

(4) "municipality" has the meaning given in AS 01.10.060;

(5) "naturally occurring asbestos"

(A) has the meaning given in AS 44.42.430;

(B) includes material containing the asbestiform or fibrous form of

(i) chrysotile;

(ii) the amphiboles belonging to the cummingtonite-grunerite series, commonly referred to by the commercial name amosite;

(iii) the amphibole riebeckite, commonly referred to by the commercial name crocidolite;

(iv) tremolite;

(v) anthophyllite;

(vi) actinolite;

(vii) winchite;

(viii) richterite; and

(ix) fluoro-edenite; and

(C) includes asbestiform zeolite erionite.

(b) In this chapter, unless the context requires otherwise,

(1) "community" has the meaning given in AS 44.42.400(d);

(2) "contractor" has the meaning given in AS 44.42.430;

(3) "department" means the Department of Transportation and Public Facilities;

(4) "designated area" means an area that the department designates under AS 44.42.400 - 44.42.430 and 17 AAC 97.030 as an area where a landowner or contractor is granted immunity under AS 09.65.245(a) (immunity for certain persons supplying or using gravel or other aggregate material; limitations on asbestos-related actions against defendants) from a civil action or claim for damages or costs;

(5) "person" means

(A) an individual;

(B) a corporation;

(C) a community;

(D) an Alaska Native tribe that is recognized by the United States Secretary of the Interior to exist as Indian tribe under 25 U.S.C. 479a (Federally Recognized Indian Tribe List Act of 1994);

(E) a tribal council organized under 25 U.S.C. 476 (Indian Reorganization Act), or a traditional council;

(F) any other entity;

(6) "project owner" means the entity having legal authority for the design and construction of a project;

(7) "riprap" means material used to construct a loose assemblage of stones to provide embankment stability or shoreline protection to prevent erosion. (Eff. 6/13/2015, Register 214)

Authority:	AS 44.42.030	AS 44.42.410	AS 44.42.430
	AS 44.42.400	AS 44.42.420	