BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF AMENDMENTS TO	**)**	
REGULATION NO. 21, ARKANSAS	**)**	**DOCKET NO. 10-001-R**
ASBESTOS ABATEMENT REGULATION	**)**	

RESPONSIVE SUMMARY FOR REGULATION NO. 21, ARKANSAS ASBESTOS ABATEMENT REGULATION

Pursuant to A.C.A. § 8-4-202(d)(4)(C) and Regulation No. 8, Reg. 8.815, a responsive summary groups public comments into similar categories and explains why the Arkansas Pollution Control and Ecology Commission ("Commission") accepts or rejects the rationale for each category.

On February 12, 2010, the Arkansas Department of Environmental Quality filed a Petition to Initiate Rulemaking to Amend Regulation No. 21, Arkansas Asbestos Abatement Regulation. A public comment period began on March 3, 2010. Judge Michael O'Malley conducted a public hearing on April 6, 2010, and the public comment period ended on April 20, 2010. The following is a summary of the comments regarding the proposed amendments to Regulation No. 21 along with the Commission's response.

Comment 1:

One commenter suggested we add the following definition:

"Accredited" or "Accreditation" when referring to a person or laboratory means that such person or laboratory is accredited in accordance with this regulation on the Model Accreditation Plan (MAP).

Response 1:

This change was not made. The proposed definition contains a circular reference (i.e. Accredited/Accreditation …means…person … accredited in accordance with … accreditation plan….) In addition, the few times these words are used in the regulation it is clear from the context what they mean.

No change to the final rule was made based on this comment.

Comment 2:

One commenter asked "What does 'asbestos containing material' really mean?"

Response 2:

Asbestos containing material (ACM) is defined in the regulation as "any material that contains more than one percent (1%) of friable and/or nonfriable asbestos material.

No change to the final rule was made based on this comment.

Comment 3:

One commenter asked why we were deleting the definition of "air analysis."

Response 3:

The definition of "air analysis" is not being deleted.

No change to the final rule was made based on this comment.

Comment 4:

It was suggested that we not add the definition of "Commercial Asbestos" since that term was not used in the regulation.

Response 4:

The term "Commercial Asbestos" is used in the definition of "Asbestos-containing waste materials."

No change to the final rule was made based on this comment.

Comment 5:

One commenter suggested we add a definition of "Completion of response actions." The commenter suggested specific language to be used in this definition and also pointed out that by using the proposed definition we could delete Reg. 21.901(J) thru (N).

Response 5:

The definition proposed is really a set of work procedures rather than a definition and as such they would be better placed in the work procedures section of the regulation (Chapter 9). Furthermore the sections of Chapter 9 they would replace (J thru N) were not designated for change in the public notice. To change them now would be outside this scope of this rulemaking

No change to the final rule was made based on this comment.

Comment 6:

One commenter suggested we add a definition for containment as follows:

Containment: a system installed by the owner or operator designed to minimize or eliminate the risk of the release of asbestos fibers from the work area to adjacent areas not involved in the project. Such systems may include the use of polyethylene sheeting and tape over openings to the work area (critical barriers), establishing controlled entry and exits routes to the work area using decontamination units or chambers, establishing polyethylene barriers with entry/exit "flaps" at entrances to the work area, or the establishment of a negative pressure enclosure as required by OSHA 29 CFR 1926.1101 for Class I abatement activities.

Another commenter suggested language similar to the above.

Response 6:

A definition of containment has been added to the regulation.

Comment 7:

One commenter suggested we add a definition “Decontamination enclosure” and suggested specific language to be used in this definition.

Response 7:

The term “Decontamination enclosure” is only used in Reg. 21.1901(D)(2), Reg. 21.1902(D)(1), and Reg. 21.1905(D)(1) where it is listed as an item that worker, contractor supervisor, and project designer training must address.

No change to the final rule was made based on this comment.

Comment 8:

Several commenters suggested we modify the proposed definition of “Air monitoring to read as follows:

“Air monitoring” means the process of measuring the airborne asbestos fiber concentration by PCM or TEM methodology of a specific quantity of air over a given amount of time before, during, or after demolition or renovation activities.

Another commenter pointed out that NIOSH 7400 doesn’t detect asbestos fibers, but all fibers. They asked that we consider removing the word “asbestos” from the definition of “air monitoring” as it could be interpreted as requiring TEM analysis of all air samples. Yet another commenter suggested we change the end of the definition to read “…before, during, and after response actions involving demolition or renovation activities.”

Response 8:

The original rationale for revising the definition of “air monitoring” was to bring it up to date with the proposed additional monitoring requirements. It was not our intent to require or preclude any specific

monitoring methods. As a result of the comment regarding NIOSH 7400, the proposed addition of the word “asbestos” has been reconsidered. Furthermore, as a result of the response to comments 43 and 46, the words “before, during, and after demolition or renovation activities” are no longer necessary. Accordingly, no substantive changes to the definition of “air monitoring” are being made.

Comment 9:

Under the current regulation a Certified Industrial Hygienist is exempt from the air monitoring training requirements. Several commenters suggested that we remove this exemption and delete the definition of Certified Industrial Hygienist since without the exemption the definition is no longer necessary.

Other commenters strongly supported keeping the exemption in the regulation. The Arkansas Local Section of the American Industrial Hygiene Association was one of commenters who recommended keeping the exemption. They stated:

The American Board of Industrial Hygiene requires a rigorous qualification process prior to a candidate taking the examination for Certified Industrial Hygienist. In order to qualify, an applicant must present documentation of graduation from a regionally accredited college or university with a degree in biology, chemistry, chemical engineering, mechanical engineering, sanitary engineering, physics or an ABET accredited program in industrial hygiene or safety. Beyond completion of a qualifying degree, the applicant must complete a minimum of four years of professional practice of industrial hygiene acceptable to the Board (does not include time as intern or technician).

Following qualification, the applicant must complete a 7 hour exam. Exam questions are categorized into 17 subject areas including Air Sampling and Instrumentation, Analytical Chemistry, Toxicology, Engineering Controls/Ventilation, Health Risk Assessment and Hazard Communication….

These areas of demonstrated competency far exceed the depth of the Air Monitor course outlined in Regulation 21, Arkansas Asbestos Abatement Regulation. CIHs have thoroughly demonstrated their expertise in air monitoring and other related areas by sheer fact that they have completed the process to utilize the title "Certified Industrial Hygienist".

This commenter pointed out that the CIH certification maintenance requires individuals to participate in continuing education courses approved by ABIH, submit continuing education record for review and potential audit by the Board.

They went on to note that the removal of the CIH exemption does not support the basis for revision of this regulation stated in the Petition to Initiate Rulemaking to Amend Regulation Number 21, Arkansas Asbestos Abatement Regulation or Statement of Basis and Purpose published to the ADEQ web site with the proposed Draft regulation. And they also indicated submittal of comment to exclude CIH exemption from this regulation by a licensed Training Provider is a conflict of interest as it would serve to generate additional training attendance requirements.

They concluded their comments with the following statement:

Therefore, the Arkansas Local Section of AIHA and the support of the National American Industrial

Hygiene Association, strongly supports the language in the existing regulation that exempts Certified Industrial Hygienists (as defined in the regulation) from the Air Monitor training course and request that it be retained, as is, in any and all subsequent revisions to the regulation. The exemption offered in Regulation 21 acknowledges a level of understanding related to air monitoring that exceeds the course content outlined in Reg. 21.1906 of the regulation.

The Industrial Hygiene Office at the Pine Bluff Arsenal submitted comments similar to those submitted by the Arkansas Local Section of AIHA.

Response 9:

The draft rule which was public noticed did not propose to remove the exemption for a Certified Industrial Hygienist from the training requirements found at Reg 21.1802(F). Thus, individuals who supported keeping this exemption would have no reason to comment or submit reasons why it should be kept. Revoking this exemption would exceed the scope of this regulatory revision and require an additional public notice.

No change to the final rule was made based on this comment.

Comment 10:

It was pointed that the definitions of "asbestos abatement contractor" and "asbestos abatement consultant" were the same and asked if this was intentional.

Response 10:

It was intentional. The definitions of "asbestos abatement consultant" and "asbestos abatement contractor" in Regulation 21 are the same as those found in A.C.A. §20-27-1003(2) & (3).

No change to the final rule was made based on this comment.

Comment 11:

It was pointed that the definition "glovebag" contained an incorrect reference to 29 CFR. The correct reference should be to 29 CFR 1926.1101 rather than 1910.1101. Another pointed out that Appendix G no longer exists in 1926.1101.

Response 11:

This referenced has been corrected to 1926.1101. The reference to Appendix G has been deleted.

Comment 12:

It was suggested that we not add a definition of "Individual" since it seemed unnecessary.

Response 12:

In this regulation the “individual” is used to refer to a natural person whereas the term “person” is used to refer to any individual, corporation, or other natural entity.

No change to the final rule was made based on this comment.

Comment 13:

It was suggested we add the words “or the most current version” to the end of the definition of “Phase contrast microscopy (PCM).”

Response 13:

Adding the words “or the most current version” to the definition would be interpreted as adopting any future changes to the referenced method without subjecting them to our State rulemaking procedures. This "prospective rulemaking" is not allowable in Arkansas.

No change to the final rule was made based on this comment.

Comment 14:

It was suggested that the definition of “penetrating encapsulant” be deleted since the term is not used in the regulation.

Response 14:

The term “penetrating encapsulant” is used in Reg. 21.1904(G)(10).

No change to the final rule was made based on this comment.

Comment 15:

Several commenters supported the change in Reg. 21.502 as it relates to the project design specifically the requirement that it be written.

Response 15:

We appreciate and acknowledge the support.

Comment 16:

It was suggested to add the phrase “Category I nonfriable” before the word “Resilient” in item E of the definition of RACM.

Response 16:

The definition of category I nonfriable asbestos includes resilient floor covering. To make this definition consistent, item E has been amended to read:

Category I nonfriable resilient floor covering flooring which contains ACM that will be or has been removed by breaking, sanding, grinding, cutting, or abrading; or

Comment 17:

One commenter asked what was meant by "breaking" in item E of the definition of RACM. They also asked if breaking one tile out of 100 square feet makes the entire job RACM. Another commenter disagreed with inclusion of breaking tiles in the definition of RACM and suggested we remove that term from the definition.

Response 17:

The term "breaking" is not established as a legal term of art and maintains its ordinary definition. If one tile is broken that tile becomes RACM, the unbroken tiles do not.

No change to the final rule was made based on this comment.

Comment 18:

It was suggested to revise item F in the definition of RACM to read "Category II mastic which contains ACM that will be removed by breaking, sanding, grinding, cutting, or abrading." Another suggestion similar to the above was to say "Category I mastic…." Another commenter pointed out that the definition of mastic was too general and could lead to unintended consequences. They suggested we adopt the EPA interpretation of when flooring mastic is RACM (i.e. when it is abraded by mechanical methods, but not when removed manually.)

Response 18:

Item F has been revised to read: "Category II mastic which contains ACM that will be removed by sanding, grinding, cutting, or abrading."

Comment 19:

It was suggested that the definition of "Small-scale short-duration activities (SSSD)" needed clarification. The commenter pointed out that (A)(1) and (4) and (B)(3) and (4) contain subjective terms which need quantification in order to assess risk.

Response 19:

The definition of SSSD was not designated for change in the public notice. To change it now would be outside of the scope of this rulemaking

No change to the final rule was made based on this comment.

Comment 20:

It was suggested that the definition of "Suspect building material" be revised either by adding items to the list which are not suspect materials or by rewriting it entirely to read: "Any materials that the Asbestos Certified Inspector considers may contain asbestos is a suspect material."

Another commenter suggested we delete the definition because it is not relevant and "conflicts with suspect ACBM."

Yet another commenter suggested we change it to read, "any building material found in buildings constructed no later that 1980 and considered to potentially contain asbestos by an Asbestos Certified Inspector."

Response 20:

The definition of "Suspect building material" has been revised to read:

"Suspect building material" means any materials that the inspector considers may contain asbestos.

The term "inspector" was used rather than "Asbestos Certified Inspector" because "inspector" is defined and the definition includes the certification requirements.

Comment 21:

Changes to the definition of "Thorough inspection" were suggested. Specifically:

(A) is conducted by an accredited inspector and is written;
(B) no suggested changes
(C) …building materials accessible (ACBM) as determined by an accredited building inspector …
(D) no suggested changes
(E) includes a judgment of conditions (good, poor) assessing the condition (good, damages, significantly damages) of the asbestos-containing material;

The commenter suggested we drop the term "poor" since it is not an established term.

Another commenter questioned the meaning of the word "current" in (B). It was suggested we establish a time limit for a current inspection. This commenter also pointed out that as long as the building materials remained unchanged the inspection could be considered current.

Another commenter suggested the definition, at (C), read "includes all suspect and accessible building materials."

Response 21:

In response to this comment item (E) has been amended to read "includes an assessment of the condition of the asbestos containing material." Item (C) has been amended to read "includes all suspect and accessible building materials."

Comment 22:

It was suggested that we establish different standards for analyzing air samples and bulk samples in the definition of "Transmission electron microscopy (TEM)." The following language was suggested "…or for bulk sample analysis means a method of analysis by a NVLAP Accredited Laboratory utilizing acceptable Transmission electron microscopy methodology…" It was also pointed out that 40 CFR Part 763 is a clearance criteria for sampling and analysis for air as part of the completion of a response action.

Response 22 :

The reference to 40 CFR Part 763 was modified in the draft regulation so that it was tied to the most recent revision of that regulation. The suggestion to establish different standards for analyzing air and bulk samples exceeds the scope of the draft rule.

No change to the final rule was made based on this comment.

Comment 23:

Regarding Chapter 5 (p. 5-2, F), a commenter stated persons conducting air monitoring as prescribed in OSHA 29 CFR 1910.1001 and 1926.1101 to estimate personnel exposure and compliance with OSHA PEL and Excursion Limits should NOT be required to attend Air Monitoring as this is heavily regulated by OSHA. The requirements for sampling addressed within this regulation are primarily focused on environmental release of fibers to the environment and should not place undue requirements on competent safety and health professionals who are within the scope of OSHA assessment for work place exposures.

Response 23:

As a result of this comment, the definition of air monitoring was changed to make it clear that it does not include personal protective monitoring.

Comment 24:

It was suggested we revise Reg. 21.503(F) by leaving in the word "clearance" and adding "…and determining completion of a response action …"after the word "monitoring."

Response 24:

The term "clearance" was removed because "air monitoring" is the defined term, not "clearance air

monitoring." Furthermore, since the definition of "completion of a response action" will not be added, those words will not be added to Reg. 21.503(F).

No change to the final rule was made based on this comment.

Comment 25:

It was suggested that the revised language in Reg. 21.601, 602, 603, 604, and 605 is awkward and the original wording was preferable.

Response 25:

Revisions have been made to Reg. 21.601, 602, 604, and 605.

Comment 26:

It was pointed out that in Reg. 21.605 the phrase "minor episode of RACM" was used while in Reg. 21.801 "minor fiber release episode" is used. It was suggested that "minor fiber release episode" be used in both cases.

Response 26:

Although the phrase "minor episode of RACM' at 21.605 was not proposed to be revised the same phrase is included at 21.801 and was proposed to be changed. Therefore the wording in Reg. 21.605 has been changed to be consistent with Reg. 21.801 and the definitions.

Comment 27:

One commenter suggested that the MAP requires laboratories analyzing asbestos samples to be NVLAP accredited and suggested we revise Reg. 21.606(E) by adding "include analytical methods, laboratory's National Voluntary Laboratory Accreditation Program (NVLAP) Accreditation number."

Response 27:

Reg. 21.901(K) requires that sampling analysis be conducted by a lab which is approved by the National Voluntary Laboratory Accreditation Program. We do not feel it is necessary to require the NVLAP number be submitted.

No change to the final rule was made based on this comment.

Comment 28:

One commenter suggested that Reg. 21.610 should refer to "owner/operator" not just "operator."

Response 28:

The draft rule which was public noticed did not propose to require a NOI revision for a change in the facility's owner. Revoking this exemption would exceed the scope of this regulatory revision and require an additional public notice.

No change to the final rule was made based on this comment.

Comment 29:

One commenter asked that the training notification in Reg. 21.611(A)&(B) apply equally to all AR licensed trainers. The comment went on to state:

A memo from Torrence Thrower on November 6, 2008, stated "We are not asking for notification of training for individuals who will not apply to work in Arkansas". Arkansas licensed trainers in other states would not have to send prior notification if the trainer stated no person in the class will seek AR certification. The prior notification should apply to all AR licensed trainers for all classes. Also, with prior notice ADEQ should audit out-of-state trainers. In 2008-2009 only seven trainers received audits.

Another commenter asked that we place the notification requirement on all trainers, in-state and out-of-state. They pointed out that other states require notification of all courses, regardless of where the course is held and suggested that Arkansas should do likewise.

Yet another commenter suggested that we require seven day notice for courses taught outside the State of Arkansas and three day notice for courses taught in Arkansas.

Response 29:

Reg. 21.611(A) requires all Arkansas licensed Training Providers to notify the Department of "any scheduled MAP asbestos-related training course." There is no distinction made for the physical location of the Training Provider.

No change to the final rule was made based on this comment.

Comment 30:

It was suggested that Reg. 21.611(C) be amended to read as follows: "For each MAP and AR 2-hr Regulation class the trainer shall submit…." The reason for this suggested change was that section C does not currently state which classes require the listed submittals. If the staff needs a post class list of attendees and a class photo to identify an applicant and/or their attendance in a class the 2-hr course attendants should be included.

Response 30:

See response to comment 31.

Comment 31:

It was suggested that the requirement that Training Providers submit post class photos should be deleted or modified to read:

Choice I : eliminate the requirement that the trainer submit a photo. Reason: In years past ADEQ required trainers to submit a class photo of participants and to my knowledge, the Agency never used the photo to determine a person's eligibility. Furthermore many facilities such as chemical and manufacturing and federal facilities where training classes are conducted do not allow a camera of any style to be taken onto the property. As an example the Pine Bluff Arsenal where I teach 40 persons per year at that location do not allow cameras. A special permit can be obtained with the Arsenal viewing and approving the photo prior to release but this is labor intensive.

Choice 2: submit a picture of each participant for which the trainer has not previously submitted a photo. Reason: an applicant to ADEQ is required to submit a photo only once - not every renewal. Also the trainer shall submit a list of class attendees for each class so attendance would be verified without a photo. I have several persons who receive 3-4 training certificates per year in different classes that I teach. It does not seem reasonable to submit 4 pictures of the same person in order for the staff to determine "who this person is".

Choice 3: submit a picture of asbestos workers and supervisor classes for which a participant photo has not been previously submitted by the trainer. Reason: These two groups comprise over 60% of persons seeking ADEQ certification and these are the two groups that the staff may have reason to question persons identity.

The ADEQ justification of the class photo according to the Economic Impact statement is very vague language “the Department will be better able to enforce proper worker related asbestos abatement practices”. “These changes will increase confidence that the individuals receiving certification are the individuals who were trained”. In your response I request that you specifically state how multiple class pictures of the same 2 persons will assist in enforcement.

Response 31:

It is the Department’s intent to ensure, to the extent practical, that the individuals who are submitting applications for certification are in fact the individuals who attended the training. One of the simplest methods to do this is to match the photos of the students who attended the training with the photos submitted with the applications. The Department agrees that requiring multiple photos of the same person is of limited use. Accordingly, we have modified 21.611(C)(3)(c) (which is now 21.611(C)(4)(c)) to make it clear that photos are only required for initial training coursed only, not for refresher or Arkansas awareness course.

Comment 32:

Another commenter stated they “disagreed totally” with the individual photo requirement. They suggested it be deleted but if it was decided to retain the requirement it only be for first time applicants. They also complained that the specific requirements were confusing.

Response 32:

The Department also wished to ensure, to the extent practical, that the individuals who are working in Arkansas are the same individuals who received the certifications. One of the most effective ways to do this is to issue certification cards with a photo of the individual being certified on the card.

No change to the final rule was made based on this comment.

Comment 33:

Regarding Reg. 21.702, a commenter asked:

The regulation states that the "Director" must provide written approval. May this approval be provided by a designee in the Director's absence or the Director only? Is there a prescribed time frame for a response from the Director's office? This has potential to create a schedule impact in the event that a timely response is not received.

Response 33:

To clarify this we have amended the definition of Director to read the same as in other Air Regulations, to witt:

Director means the Director of the Arkansas Department of Environmental Quality, or its successor, acting directly or through the staff of the Department.

The Department staff is aware of the importance of timely responses and will make every effort to respond in a timely manner.

Comment 34:

Regarding Reg. 21.703(A) a commenter asked:

What monitoring results are required to be available on site? Bulk? Pre-Sampling baseline? Personnel?

Response 34:

This language is the same as in the current rule. Our intent is that any data collected during the inspection and any data collected pursuant to Reg. 21.901(G) be made available if requested by the Department.

No change to the final rule was made based on this comment.

Comment 35:

It was suggest that we leave the term RACM in Reg. 21.801 because removal of some nonfriable material such as Category I nonfriable (asphalt roofing) and Category II nonfriable (transite) do not

require trained/licensed persons to conduct asbestos response actions. The training/certification/license requirement only applies to RACM.

Response 35:

This proposed change is being made for clarity. The term "minor episode of RACM" (as used in the existing rule) is not defined. Inserting "fiber release" after "minor" and deleting "of RACM" makes use of a defined term—"minor fiber release episode"—as well as defines the scope of response action ("three square or linear feet of friable ACM") that can be performed without cert/license. The removal of asphalt roofing or transite would not normally result in visible emissions; and thus,would not be considered as "minor fiber release episode."

No change to the final rule was made based on this comment.

Comment 36:

It was suggested that we add the words "involving RACM projects" to the opening paragraph of Chapter 9. Another commenter pointed out that the term "RACM" was missing but stated it would not be a problem since all the sub-paragraphs mention RACM or ACM specifically, except for G and H. Yet another commenter suggested we use the term "asbestos or known asbestos."

Response 36:

The opening paragraph of Reg. 21.901 has been amended to include the term RACM. It is clear from the full context of Regulation 21 that only projects involving RACM are subject to the work procedures contained in Chapter 9. Adding the term to the opening paragraph of Reg. 21.901 will not increase the scope of the regulation and may avoid confusion.

Comment 37:

It was suggested that the word "poor" be removed from Reg. 21.901(B)(1). The commenter feels that "poor" is not a correct term. It was suggested "damaged" and "significantly damaged" be used instead.

Response 37:

Section 901(B)(1) was not designated for change in the public notice and changing it now is not a logical outgrowth of any other changes being made. Making the suggested change is outside this scope of this rulemaking

No change to the final rule was made based on this comment.

Comment 38:

It was suggested that Reg. 21.901(B)(3) be revised as follows: "It was not accessible for testing inspection…"

Response 38:

The term "testing" is used in 40 CFR 61.145(c)(1)(iii) and will be maintained in Regulation 21.

No change to the final rule was made based on this comment.

Comment 39:

It was suggested that the Department consider referencing at Reg. 21.901(B) the NESHAP Guide to Demolition proper work practices when non-friable ACM is left in place.

Response 39:

Reg. 21.901(B)(1-4) is nearly identical to 40 CFR 61.145(c)(1) as written.

No change to the final rule was made based on this comment.

Comment 40:

It was suggested that Reg. 21.901(E) be modified by inserting the word "ensure" before adequately since the owner or operator will not likely be the one to perform this task. A similar comment was submitted regarding Reg. 21.901(F)(2).

Response 40:

Owner or operator is defined in part as any person "…operates, controls, or supervises the demolition or renovation operation…" Under this definition the people actually doing the work will be considered the "operator."

No change to the final rule was made based on this comment.

Comment 41:

It was suggested to change the phrase "…greater than 80 linear meters…" in Reg. 21.901(G) & (H) to "… at least 80 linear meters…." It was also pointed out that we did not specify what (RACM, ACM) the 80 linear meters was.

Response 41:

Reg. 21.901(G) & (H) as proposed in the Draft Rule has been deleted. See response to comment 43 and 46.

Comment 42:

It was suggested to add "inside and outside the work area" to paragraph Reg. 21.901(G).

Response 42:

See response to comment 43.

Comment 43:

One commenter asked what is the purpose of the baseline monitoring requirement. They claimed it would be an unnecessary cost since the baseline data can't be used as a comparison number to determine the final clearance level. They also suggested that if we keep the baseline monitoring requirement we establish a detection limit or specify an air volume for the samples. Another commented:

The objective of this requirement is not clear or substantiated. There is no regulatory limit established for airborne concentrations inside containment prior to initiating a project nor is direction provided for sampling methodology or application of results. Baseline sampling is inappropriate if containments are not utilized.

Response 43:

It is useful to have baseline monitoring results for an area prior to any disturbance of materials. Sometimes it is difficult to establish clearance levels when the area was contaminated prior to any regulated activity. In such situations, baseline monitoring can be used to document that the area is cleaner than it was prior to any activity.

However, Regulation 21 establishes a firm clearance level which must be met regardless of the level of contamination before the project begins. Upon further consideration we agree with the commentors that a baseline monitoring requirement would not serve any real purpose. Accordingly, we have deleted the requirement for baseline monitoring [21.901(G)] of the draft regulation.

Comment 44:

One commenter asked if baseline data needs to be collected for jobs utilizing containment that are conducted outdoors.

Response 44:

See response to comment 43.

Comment 45:

It was suggested that we clarify if we expect baseline data to be conducted prior to the construction of containment.

Response 45:

See response to comment 43.

Comment 46:

Regarding Reg. 21.901(H) one commenter stated:

21.901 (H) requires daily outside perimeter monitoring. OSHA regulations require perimeter monitoring for containment in the vicinity of non-asbestos located outside the containment to ensure that there is no potential exposure to the co-located workers. OSHA requirements for smoke testing the containment are much more effective and efficient than conducting sampling to document a fiber release episode after the fact. Therefore, if the containment is OSHA compliant, the risk of fiber release is nominal. Additionally, this sampling adds no benefit or effectiveness to the regulation. To ensure fiber count is asbestos, TEM analysis is required, TEM has significant cost and schedule impacts to contractors due to lack of accessibility to certified TEM laboratory in the state of Arkansas. It is not clear whether these impacts were addressed in the Economic Impact Statement.

An additional commenter questioned the need for air monitoring during a project since the asbestos would be contained within the enclosure.

Response 46:

OSHA regulations are intended primarily for the protection of workers at a job site. The original purpose for proposed monitoring outside of containment during asbestos abatement activities in the Draft Rule was to ensure fibers are not entering the ambient air from the containment structure for the purpose of protection of public health and the environment. However, as a result of this and other comments the value-added benefit of requiring monitoring during a project was reevaluated and it was decided to remove the requirement for monitoring during a project (21.901(H)) from the regulation. The reasons for this include:

- As pointed out in the comments there are other more cost effective ways to help ensure the containment is not breached.
- Additional technical requirement (see Response to Comments 49, 50 & 50) are needed to make the monitoring requirement as effective as originally anticipated. It is not clear that information could be developed in a timely manner.
- The monitoring can not be conducted in real time so it will not be possible to discover a containment breach until some time after the breach has occurred.
- The regulation contained no action level or ambient asbestos level. Thus, if the operator conducting the abatement did detect asbestos fibers outside containment, the regulation contained no clear instructions of what to do about it. This would result in requiring monitoring just for the sake of monitoring.

Comment 47:

It was suggested that the word “proposed” be deleted from Reg. 21.901(H) since if the project was ongoing, it was no longer proposed.

Response 47:

See response to comment 46.

Comment 48:

It was suggested that paragraphs (G) and (H) of Reg. 21.901 need additional clarification. Specifically, the commenter suggested we remove the word containment from each paragraph and substitute the phrase RACM because the term containment is not currently defined and there is no agreement among the staff nor the regulated community as to the meaning of containment, yet the entire requirements for before and during air monitoring is based on whether containment is used. Another commenter suggested that we define the word "containment" or use the term RACM to more clearly define when air monitoring is needed.

Response 48:

A definition of containment has been added (see comment and response 6).

Comment 49:

Several commenters suggested that paragraph (H) of Reg. 21.901 should also contain the phrase "air monitoring is conducted at the perimeter of the proposed …"

Response 49:

See response to comment 46.

Comment 50:

One commenter pointed out what he/she felt were problems with Reg. 21.901(H). Namely: What are the number of air samples that will be taken - one or more? What is the frequency of sampling-Daily to establish baselines prior to and during the project? What is the acceptable analytical method? What is the acceptable microscope that is permissible? Add: (G) a minimum of three air samples and for (H) add the word "daily" during the renovation ..... The Economic Impact Statement calculates air monitoring cost based on daily monitoring, but this requirement is not in the rule.

Response 50:

See response to comment 46.

Comment 51:

It was suggested to add the phrase "daily" to Reg. 21.901(H) to address the frequency and number of samples.

Response 51:

See response to comment 46.

Comment 52:

It was suggested that along with the new definition of "completion of response actions," Reg. 21.901(I) be modified to read:

"The owner or operator shall ensure "completion of response actions" is properly conducted involving RACM…"

Response 52:

Since the definition of "completion of response actions" was not added (see comment 5) this change is not being made.

No change to the final rule was made based on this comment.

Comment 53:

One commenter strongly supported the idea that air monitoring not be done by the abatement contractor; however, they felt that Reg. 21.901(J) was not clear as to who can or can not perform air monitoring. They request that Reg. 901(J) be reworded to make it clear that the abatement contractor may not take samples, and the asbestos consulting firm, or the owner if they have someone in house certified as an Air Monitor, can take samples.

Another commenter suggested we use the term "full time employee" instead of "employee" since "if you write him a check he is your employee."

Response 53:

The term employee has a common meaning, "a person who works for another for compensation." American Heritage College Dictionary, Third Edition, 1993. Whether the employee is full time or part time is not relevant. The intent of the draft rule was to assure that the Air Monitor was employed by someone other than the firm conducting the demolition, renovation or asbestos response activities. This independent nature is anticipated to provide an unbiased certification by the Air Monitor.

No change to the final rule was made based on this comment.

Comment 54:

It was pointed out that the phrase NIST or NVLAP in Reg. 21.901(K) is inaccurate; NVLAP is a laboratory program under the agency NIST. They suggested we correct the phrase by removing the word "or" and adding a comma. Another pointed out that it should read "National Institute of Standards and Technology (NIST)."

Response 54:

This change has been made. [Reg. 21.901(K) is now 21.901(I)].

Comment 55:

It was suggested we modify Reg. 21.901(K) by adding the phrase: "…uses NIOSH method 7400 including the AIHA Pat Rounds and for TEM…," because the Pat Rounds are a component of the NIOSH 7400 method but are not utilized by many air monitors.

Response 55:

We believe the paragraph is adequate as written. It was not the intent to make substantive changes proposed to 21.901(K). If Pat Rounds are in fact required by NIOSH 7400 then 21.901(K) [which is now 21.901(I)] will require them as written.

No change to the final rule was made based on this comment.

Comment 56:

It was suggested that we insert the words "for which containment was utilized" at the end of paragraph (L) of Reg. 21.901 to be consistent with the definition of "Clearance Air Monitor."

Response 56:

This change has been made. [Reg. 21.901(L) is now 21.901(J)].

Comment 57:

Regarding Reg. 21.1001(B)(3) it was pointed out that 29 CFR 1910.145 addresses general requirements for labels while 29 CFR 1910.1001(j)(3)(ii) and 1926.1101(k)(8) addresses specific labeling requirements related to asbestos activities. The commenter recommends adding these references to this paragraph as well.

Response 57:

The petition for rulemaking did not include any notice of changes to this paragraph. Thus, individuals interested in this regulatory action would have no reason to comment on changing or not changing this paragraph. Making this change would exceed the scope of this regulatory revision and require an additional public notice. However, it should be noted that the existing language does not preempt the legal requirement for the owner or operator to adhere to all applicable regulations not specified in Regulation 21 in regard to related matters governed by other state or federal agencies, such as the Department of Transportation, OSHA, etc.

No change to the final rule was made based on this comment.

Comment 58:

The meaning of Reg. 21.1101(A)(3) was questioned. The commenter wanted to know if the use of the word "may" was intentional. It was suggested this section be clarified.

Response 58:

Reg. 21.1101(A)(3) gives an owner/operator three options for shipping asbestos containing waste. Since one of the three options must be used the word "may" was changed to "must."

Comment 59:

It was pointed out that the reference to OSHA standards in Reg. 21.1101(B) should be 1910.1001(j)(4) and 1926.1101(k)(8).

Response 59:

These changes have been made.

Comment 60:

It was suggested that Reg. 21.1102(C)(2)(a) and (b) should be Reg. 21.1102(D) and (E).

Response 60:

This formatting error change was made.

Comment 61:

It was pointed out that Reg. 21.1101(C)(1) references Reg. 21.1101(F)(1) which does not exist and that Reg. 21.1101(L)(2) references Reg. 21.1101(B)(6) which does not exist.

Response 61:

There is no Reg. 21.1101(C)(1); however, 21.1104(C) does reference Reg. 21.1101(F)(1). The draft rule reorganized some of the existing provisions of Chapter 11 including what was formerly designated as 11.1(D)(i) [identified in the reformatted Draft Rule redline as 21.1101(F) (1)]. The regulatory provisions were moved, without amendment, to 21.1102(A). The final rule corrects the erroneous cross reference at 21.1104(C) from 21.1101(F)(1) to 21.1102(A).

The Draft Rule does not contain 21.1101(L)(2) referenced by the commentor; however, the draft rule at 21.1104(L)(2) does list an incorrect cross reference to 21.1102(B)(6). The correct cross reverence is 21.1104(I); this correction has been made in the final rule. We thank the commentor for bringing these incorrect cross-references to our attention.

Comment 62:

It was pointed out that Reg. 21.1101(D) needs modification. The commenter pointed out that as written, this section would prohibit the disposal of ACM in Class Ill and Class IV landfills. One commenter suggested deleting the term Class I and substituting "that is permitted to accept asbestos waste." The commentor also suggested we add: Category II nonfriable in good condition not rendered friable during the removal process may be disposed of as construction debris. They also suggested the Air Division consult with the Solid Waste Division to assure that the two regulations are not in conflict.

Response 62:

The language proposed in the Draft Rule was based on prior consultation with the ADEQ Solid Waste Division. However, upon consideration of the Comment and further consultation with the ADEQ Solid Waste Division, the phrase “Class I waste” is replaced in the Final Rule with “asbestos containing waste material.”

Interested persons should take note that APC&EC Reg. 22, Chapter 7 (Special Material Requirements) states that Special Materials (including asbestos containing materials) may be disposed of in Class I permitted landfills – provided that the landfill has notified the Department of its intent to receive and dispose of such special wastes and has received authorization by permit or permit modification. Class 3 or 4 permitted landfills may not dispose unless the landfill is specifically designed for the receipt and disposal and has been approved by the Department by permit or modification [APC&EC Reg. 22.701 (a)]. (Asbestos) owners or operators should undertake due diligence to insure that the disposal facility has the requisite approvals from the Department before transporting the waste to a landfill for disposal.

Comment 63:

It was suggested that we delete the statement “... by the Arkansas Insurance Department of the State of AR” found in Reg. 21.1301. The commenter felt that the "old" requirement (E)(3) that Contractor/Consultants "must provide insurance by an AR Resident Local Agent licensed…" has not been enforced for many years because ADEQ staff attorneys decided that this requirement violated the Federal Commerce Clause. They went on to ask: “Does not the same legal issue remain?”

Response 63:

The previous regulation required the agent to be physically located in Arkansas. We have changed this to require they be licensed by the Arkansas Insurance Department but the agent may be located anywhere.

Under Arkansas law, all insurance companies desiring to do business in Arkansas must be registered and licensed by the Arkansas Department of Insurance. Unless the insurance company is registered and licensed to do business, it is outside the regulatory structure of Arkansas. Only licensed agents can sell insurance in the State.

No change to the final rule was made based on this comment.

Comment 64:

One commenter pointed out that the reference to liability insurance should read professional liability insurance. He/She also asked if the $1,000,000 insurance policy was for single events or aggregate events. Other commenters pointed out that most people carry at least $2,000,000 for single events and $5,000,000 for multiple events and questioned if $1,000,000 would be enough.

Response 64:

The insurance requirements have been amended so that 21.1301(E) now reads "Proof of a minimum of …." The reference to "professional" liability insurance is not necessary due to the wording in 21.1301(E)(1).

Comment 65:

It was suggested we delete Reg. 21.1401(C) and add Reg. 21 .1402(A)-(I) thus deleting Reg. 21.1402 introductory paragraph. Also delete (I)(5) and (6). The reason given was:

The two sections (1401 and 1402) are confusing and inconsistent and should be combined into one. Paragraph C of 1401 calls for the trainer to simply verify that the course complies with EPA MAP and does not provide for the staff to require the information called for in 1402. Items I(5) and (6) are not required in the MAP for an initial trainer license and are impossible for a trainer to identify in advance. The pre-notification of classes should be sufficient to obtain the information regarding class location and instructor.

Response 65:

Reg. 21.1401 is the section a Training Provider should follow if they wish their training courses to be approved according to the MAP. Indeed, this is the option chosen by most Training Providers. If, for some reason, a Training Provider wishes to be approved to teach courses in Arkansas but does not wish to be MAP approved, they should comply with Reg. 21.1402. Combining these two sections would eliminate the option to have a non-MAP approved training course and force everyone to seek MAP approval.

In addition, the paragraphs the commenter suggests deleting are contained in the existing Reg. 21 and were not proposed for deletion in the Draft rule. Deleting them at this time would be beyond the scope of the proposed rule.

No change to the final rule was made based on this comment.

Comment 66:

One commenter suggested that we modify Reg. 21.611(A) to read as follows:

All courses taught by the Training Provider comply with the Code of Federal Regulations Title 40, Part 763, Appendix C to Subpart E, Model Accreditation Plan (MAP) and Arkansas Pollution Control and

Ecology Commission Regulation 21, Asbestos Abatement.

They suggested the regulation spell out the CFR reference in order to make it specific to the section on asbestos training. They also suggest adding the reference to Regulation 21 because there are things in Regulation 21 which are not in the federal regulations.

Response 66:

Since it is the intent of this Regulation to give Training Providers to option to have a MAP approved training course or not, this change is not being made. If such a change were to be made it would be more appropriate to make in chapter fourteen rather than chapter six.

No change to the final rule was made based on this comment.

Comment 67:

It was pointed out that Reg. 21.1501(A) does not specifically require the training course to be approved by ADEQ, as is stated in the requirement for renewals in Chapter 16.

Response 67:

This requirement is included by use of the term "Training Provider" which is defined in Reg. 21, Chapter 4.

No change to the final rule was made based on this comment.

Comment 68:

It was suggested that "from" in Reg. 21.1501(E) should be "form."

Response 68:

This change has been made.

Comment 69:

Changes were suggested to replace existing language regarding the two-hour Arkansas Regulation Course Suggested. Specifically:

Reg. 21.1603(A) delete 'Licensed Training Provider' and substitute 'from an EPA accredited firm.' If this change is not made then Reg. 21.2401 Reciprocity would not apply to EPA accredited classes where trainers were not licensed in Arkansas.

Reg. 21.1603(B) "An official certificate of training for the Arkansas Two-Hour Awareness Training Course. If the refresher course was completed out-of-state the training certificate shall state that the Arkansas Regulations were covered by the trainer. Such awareness training shall be conducted by a

Training Provider which has been licensed in accordance with this regulation.

Response 69:

The suggested change to Reg. 21.1603(A) has been made.

The suggested change to Reg. 21.1603(B) was not made. The petition for rulemaking did not include any notice of substantial changes to this paragraph. Thus, individuals interested in this regulatory action would have no reason to comment on changing or not changing this paragraph. Furthermore, treating Training Providers differently depending on where they are physically located is problematic.

Comment 70:

Another commenter suggested that Reg. 21.1603(B) end with "Training Provider" not "training course."

Response 70:

This change has been made. Unlike comment 69, we feel this change does not substantiality change the meaning of 21.1603(B) and is consistent with our stated intent to add clarifying language to Regulation 21.

Comment 71:

It was suggested that Reg. 21.1701 be modified as follows:

"Substitute underlined: … shall not conduct asbestos-related work subject to the requirements of this regulation '(delete in Arkansas until all renewal requirements)' and a new license or certificate…"

Response 71:

This change has been made. The phrase "in Arkansas" is redundant since we added the phrase "subject to the requirements of this regulation."

Comment 72:

Regarding Reg. 21.1803 a commenter stated:

Reg. 21.1803 dictates each discipline will have a "...separate and distinct training course and shall not be combined…," however, the requirement for Air Monitor requires completion of the Contractor/Supervisor course in lieu of an Air Monitor Refresher. These paragraphs seem to contradict each other.

Response 72:

There is no contradiction. 21.1802 (F)(1) clearly states that an applicant for an Air Monitor certificate must (as a prerequisite for admission to an Air Monitoring course) hold a valid Contractor/Supervisor

accreditation. The initial air monitor training course is separate and distinct from the contractor supervisor course. The requirement for refresher courses is found in Chapter 20. Reg. 21.2001 clearly states that Air Monitors will receive refresher training through the contractor/supervisor training course.

Comment 73:

It was suggested that Reg. 21.1806 be modified as follows:

Individuals who have successfully completed ASHARA-approved training courses conducted by an EPA accredited provider out-of state shall attend an Arkansas two hour awareness training course to learn about Arkansas asbestos regulatory requirement and policies. Such awareness training shall be conducted by a Training Provider which has been licensed in accordance with this regulation.

Response 73:

The purpose of this paragraph is to require individuals who were not trained by a Training Provider licensed in accordance with Regulation 21 to complete the two hour Arkansas awareness course. It does not matter where the Training Provider is physically located. If individuals are licensed under Regulation 21, no awareness course is necessary; if they are not licensed under Regulation 21 then the awareness course will be required.

No change to the final rule was made based on this comment.

Comment 74:

It was suggested that the phrase regarding bulk samples in Reg. 21.1903(I) might be more appropriate in Reg. 21.501.

Response 74:

The phrase in question has been moved to the end of Reg. 21.501.

Comment 75:

Regarding Chapter 19, one commenter pointed out that the requirements for safety hazard training should be addressed as recognition training which enables workers to recognize the hazard of each project. They stated each project will present unique hazards and should be addressed specifically for that project through an established health & safety program. This commenter also pointed out that the training elements covered will not fully meet OSHA requirements for confined space (1910.146), respiratory protection (1910.134), or electrical safety/lockout tagout (1910 Subpart S).

Response 75:

The proposed change exceeds the scope of this rulemaking and has not been made.

Comment 76:

It was suggested that Reg. 21.1907 be modified as follows:

Arkansas Two-Hour Awareness Training course is a two hour course for individuals who have successfully completed an ASHARA approved training course conducted by an EPA accredited firm out-of-state. Such awareness training shall be conducted by a Training Provider which has been licensed in accordance with this regulation.

Response 76:

This comment is similar to comment 73. The response provided for that comment applies here as well. No change to the final rule was made based on this comment.

Comment 77:

Several commenters suggested that all fees should be in dollar amounts with no cents for ease of implementation. It was pointed out that even the IRS allows rounding to dollar amounts.

Response 77:

The fees have been change to whole number amounts. $112.50 fees are now $115; $26.40 fees are now $25; and $56.25 fees are now $55.

Comment 78:

Several suggested changes to the fee section were made. They were:

- Delete Reg. 21.2215, Reg. 21.2216, and Reg. 21.2217.
- Add Demolition if no asbestos is present (a new section Reg. 21.2214).
- Any NOI involving demolition of a facility described in Reg. 21.601 where no asbestos is present does not require a fee. Reason Reg. 21.601 states that "…must be accompanied by the required fee…" Since this paragraph refers to a fee in Chapter 22, for clarity the fee for no asbestos present should be listed.
- Change Reg. 21.2214 to number to Reg. 21.2215 and change the text to indicate demolition - greater than one…foot of identified ACM.
- Reg. 21.2216 new paragraph: Any NOI involving demolition of a facility described in Reg. 21.602 which is structurally unsound and in danger of imminent collapse, which may contain RACM shall be accompanied by a fee of $300.00. Reason: Reg. 21.901(A) states Generally…shall remove all RACM … before demolition ... yet due to storms, fire, etc. the building cannot be safely entered This would be comparable to Reg. 21.901(B)(3) which states: "It was not accessible for testing ... " Thus there is an unknown and an assumption that asbestos may be present, but if the building is unsafe to enter then an inspection or abatement cannot be accomplished.

Response 78:

The intent of the fee section modification was to reduce fees by approximately 25% not to create new fee categories. These suggested changes go beyond the scope of the proposed rulemaking and have not been made.

Comment 79:

It was pointed out that the title in Reg. 21.2219 may be wrong.

Response 79:

The title to Reg. 21.2219 has been corrected.

Comment 80:

Several commenters pointed out errors in Chapter 24. Specifically Reg. 21.2401(A)(1) and (2) were identical. Various ways to fix this were suggested.

Response 80:

Reg. 21.2401(A)(1) has been revised to read, "An original certificate of completion of a discipline specific training certificate issued by an EPA approved trainer, and…"

Comment 81:

One commenter expressed support for requiring resumes of all instructors and copies of current initial or refresher training certifications be submitted to indicate the instructors are keeping up with training courses they will teach.

Response 81:

The draft rule public noticed for this rulemaking did not include any notice of requiring instructors to submit resumes or current initial or refresher training certifications. More importantly, there was no indication the regulation would be amended to require the review of resumes or current initial or refresher training certifications as a requirement for approval. Thus, individuals interested in this regulator action would have no reason to comment on including or not including these requirements. Making these changes would exceed the scope of this regulatory revision and require an addition public notice.

No change to the final rule was made based on this comment.

Comment 82:

One commenter expressed support for not requiring disclosure forms for individuals renewing asbestos certifications in consecutive years.

Response 82:

We acknowledge this comment and note that the draft rule did not require submission of disclosure statements for renewals of certifications or licensed under Regulation Number 21. In addition, APC&CE Reg. 8.204(C)(7)(a)(xii), as amended February 2009, already provides an exemption for the submission of the Disclosure Statements for Asbestos Certification Renewals..

No change to the final rule was made based on this comment.

Comment 83:

One commenter expressed support for suggested revisions regarding "the Director shall review regulations and any other information the Director, or his/her designee deems relevant to determine whether such application shall be approved or denied."

Response 83:

We acknowledge this comment. This language is included in Chapter 23.

No change to the final rule was made based on this comment.

Comment 84:

One commenter expressed support for requiring individuals applying for individual certification to complete a two-hour Arkansas Awareness class when they have not received training from an Arkansas licensed Training Provider.

Response 84:

This is currently required. See response to comment 73.

No change to the final rule was made based on this comment.

Comment 85:

One commenter suggested we carefully review the proposed regulation and correct all errors in punctuation, spelling, and formatting, as well as dropped words and other typographical and scrivener errors.

Response 85:

Every effort has been made to correct "editorial" errors as described in the comment.

Effective Date:
Due to the large number of changes being proposed by this regulation as well as amendments being made as a result of public comments received it was felt that it would be less confusing if this regulation

took effect on a specific date rather than "10 days after filing with the Secretary of State." Accordingly, the effective date of this regulation has been changed to be April 1, 2011.

Conclusion:

Regarding the proposed revisions to Regulation No. 21, three people submitted written and/or oral comments during the public hearing and eight others submitted written comments during the public comment period. Changes to the proposed amendments to Regulation No. 21 have been made as outlined in the comments and responses above.

Prepared by:
Arkansas Department of
Environmental Quality

By: Mike Bates
Mike Bates