

SUNSET REVIEW

OF

ASBESTOS CERTIFICATION PROGRAM

Submitted by
The Colorado Department of Regulatory Agencies
Office of Policy & Research
June 1994

August 31, 1994

The Honorable Vickie Agler, Chair
Joint Legislative Sunrise/Sunset Review Committee
State Capitol Building
Denver, CO 80203

Dear Representative Agler:

The Colorado Department of Regulatory Agencies has completed the evaluation of the Asbestos Certification Program in the Colorado Department of Public Health and Environment and is pleased to submit this written report, which will be the basis for my office's oral testimony before the Joint Legislative Sunrise/Sunset Review Committee. The report is submitted pursuant to Section 24-34-104 (8)(a), of the Colorado Revised Statutes, which states in part:

"The Department of Regulatory Agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The Department of Regulatory Agencies shall submit a report and such supporting materials as may be requested, to the Sunrise and Sunset Review Committee created by joint rule of the Senate and House of Representatives, no later than July 1 of the year preceding the date established for termination..."

The report discusses the question of whether there is a need for the regulation. The report also discusses the effectiveness of the division and staff in carrying out the intention of the statutes and makes recommendations for statutory and administrative changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Joseph A. Garcia
Executive Director

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EXECUTIVE SUMMARY

The Department of Regulatory Agencies has completed its sunset review of the Asbestos Certification Program administered by the Colorado Department of Public Health and Environment.

This sunset report recommends that the regulatory program continue. Due to potential improper removal of asbestos, the regulatory activities conducted by the Department of Public Health and Environment serve to protect the public health, safety and the environment.

The report makes several recommendations to strengthen the enforcement of the regulatory program. For instance, this sunset review increases the authority of the Department of Public Health and Environment to discipline certificants who have been disciplined in other states if the action would have been actionable under Colorado law. This is an important safeguard to help prevent incompetent practitioners from practicing in Colorado. Another recommendation would make Letters of Admonition a formal disciplinary action.

This sunset review also discusses two issues, the definition of public access for purposes of certification and present debate within the industry regarding air sampling analysis equipment. No recommendations are provided regarding either of these issues. Evidence presented was not persuasive enough to support policy directions.

BACKGROUND

SUNSET PROCESS

The Asbestos Certification Program instituted under the authority of the Air Quality Control Commission (AQCC) and enforced by the Air Pollution Control Division (APCD) in the Division of Administration of the Colorado Department of Public Health and Environment (DOH) shall be terminated on July 1, 1995 unless continued by the General Assembly. During the year prior to this date, it is the duty of the Department of Regulatory Agencies to conduct an analysis and evaluation of the asbestos certification program in the state of Colorado pursuant to 24-34-104.

The purpose of this review is to determine whether the Asbestos Certification Program should be continued for the protection of the public and to evaluate the performance of the Air Pollution Control Division of the Colorado Department of Public Health and Environment. During this review, the Department of Public Health and Environment must demonstrate that there is still a need for the certification program and that the regulation is the least restrictive regulation consistent with the public interest. The Department's findings and recommendations are submitted to the Sunrise and Sunset Review Committee of the General Assembly. (Statutory criteria used in Sunset Reviews may be found in the Appendix of this report).

The Sunset Review process included an analysis of the statute, interviews with State and Federal authorities, staff, industry representatives, and local government officials. The Department makes every effort to elicit information and comments from all interested parties.

HISTORY OF ASBESTOS ABATEMENT REGULATION IN COLORADO

The original Asbestos Control Act (Colorado SB 166) was enacted in 1985. Legislative intent was to reduce exposure of the public to asbestos. The program was created to protect the public health and safety and the environment. Asbestos is a known cancer causing agent often used as heating insulation and in noise abatement products; it is considered "friable" if it can be crumbled, pulverized, or reduced to powder by hand pressure. The original law did not contain a certification program for practitioners. The legislation directed the APCD and AQCC to produce a report on asbestos-related issues including performance standards and practices for asbestos abatement and a minimum allowable asbestos level. The report, which did contain a recommendation for a certification program was submitted to the General Assembly on January 15, 1986.

In 1987, HB 1239 was passed to bring the law into compliance with the 1986 federal Asbestos Hazard Emergency Response Act (AHERA) (P.L. 99-519). The AHERA required all persons engaged in asbestos abatement work in schools as inspectors, management planners, project designers, work-site supervisors and asbestos abatement workers to be certified.

The State requirements for persons engaged in asbestos abatement work included a certification program for abatement contractors and supervisors and a requirement that contractors train all workers in proper abatement procedures. HB 1239 established dual certification programs, one for schools and one for non-school work.

In 1988 SB 191 was passed limiting APCD jurisdiction to areas of public access in some areas of responsibility. However, the restriction did not apply to certification requirements. SB 191 also established a maximum allowable asbestos level of fibers in the air in areas of public access.

The changes in 1990 were a result of recommendations made during the 1989 Sunset Review. The amended law required that the APCD develop or purchase examinations to be administered to applicants for certification under the program. In addition the bill established procedures to be followed and requirements for applicants who failed such examination and sought reexamination. The Sunset legislation also provided grounds for disciplinary action against persons certified under the program for violation of its provisions.

As of June 1994, approval was pending which would grant an AHERA waiver to the DOH. This waiver regarding school asbestos inspections would allow the DOH to directly enforce the notice of noncompliance instead of submitting these notices to the U.S.E.P.A. for enforcement.

SUMMARY OF STATUTE AND RULES

STATUTE

This section of the report provides an overview of the highlights of the Colorado statute and regulations concerning asbestos abatement.

Part 5 of article 7 of title 25 outlines Colorado's statutory requirements regarding asbestos abatement. Pursuant to part 5, the Air Quality Control Commission is directed to promulgate rules and regulations regarding asbestos abatement. In addition, part 5 outlines the requirements for certification of asbestos abatement projects and for certification of personnel who perform asbestos abatement.

Part 5 is based on federal standards such as the Asbestos Hazard Emergency Response Act of 1986 (AHERA) which covers asbestos abatement requirements in schools and the National Emission Standards for Hazardous Air Pollutants (NESHAP) which covers procedures which must be followed when dealing with asbestos to prevent emissions to the outside air. Rules and regulations promulgated by the AQCC have been adopted pursuant to the requirements of AHERA and NESHAP.

None of the statutory or regulatory requirements regarding certification or abatement apply to an individual who performs abatement on a single-family dwelling which is the individual's primary residence.

The Department of Public Health and Environment's Air Pollution Control Division is responsible for administering and enforcing the provisions of the Act. In doing so, the APCD provides administrative and technical assistance to the AQCC board, investigates complaints, administers examinations, and enforces compliance with the board's Act through inspections of asbestos projects. The APCD is also empowered to enforce compliance with the board's Act through cease and desist orders, through hearings before an administrative law judge, and through injunctive proceedings.

In addition, the Division is responsible for administering and enforcing the portion of the federal government's National Emission Standards for Hazardous Air Pollutant (NESHAP) Act which relates to asbestos.

The statute requires any person who conducts asbestos abatement work to obtain a general abatement contractor certificate from the APCD. The contractor must provide a training program for employed asbestos abatement workers.

The statute defines the scope of abatement work as wrecking or removing parts of the ceiling, floor, wall or beams that contain friable asbestos-containing material. Asbestos abatement work is also defined as procedures that are intended to prevent the emission of asbestos, including enclosure, encapsulation, and removal.

The Division is granted the authority to certify those persons who must be certified according to the federal regulations (P.L. 99-519). There are five categories of certification including inspectors, management planners, abatement project designers, supervisors, and abatement workers.

The APCD may deny certificates, or revoke, suspend, or refuse to renew certificates. They may take disciplinary action if there is a violation of the statute or rule. The Division may also revoke or suspend the certificates of a contractor for failure to implement an employee training program for asbestos abatement workers. For violations of the Act, the APCD may issue notices of violations and cease and desist orders. The Division may also assess fines of up to \$25,000 per day of violation.

General abatement certificates are valid for three years. All other certificates issued are valid for one year. Renewal applications are due at least 30 days prior to the expiration of certificates. To be eligible for renewal, all applicants must complete a refresher course prior to the submission of their renewal applications. If an individual allows his/her certificate to lapse for more than one year, he/she is ineligible for renewal and must reapply to the Division for certification.

Regulation No. 8 - Rules Implementing the Control of Asbestos

Regulation No. 8 designates training and education requirements for inspectors, management planners, project designers, abatement supervisors, and abatement workers for both non-school and school abatement work. Regulation No. 8 has provisions for refresher training or continuing education. AHERA mandates a one-day continuing education course for abatement workers, supervisors, and project designers. Inspectors must have a half-day of continuing education and management planners must attend the same half-day course for inspectors as well as one half-day on management planning.

Application procedures, fees for certificates and certificate renewals, and reciprocity requirements are included in the regulations. The regulations also include the permitting process, asbestos abatement work practices, measurement of asbestos levels, and the handling of waste material.

FEDERAL REGULATION

There are several federal agencies involved in asbestos control. Numerous federal acts cover work practices, emergency responses, emission standards, industry standards, construction standards, respiratory protection standards, other worker protection standards, and the transportation of asbestos.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA)

The Environmental Protection Agency (EPA), under provisions of the Clean Air Act, regulates removal, demolition, transportation and disposal activities involving asbestos. The EPA's regulation on asbestos is part of the National Emission Standards for Hazardous Air Pollutants (NESHAP) and is found in 40 CFR Part 61, Subpart M.

Toxic Substances Control

The EPA enforces the Toxic Substances Control Act, part of which relates to asbestos control. In 1986, the U.S. Congress enacted the Asbestos Hazard Emergency Response Act (AHERA, or TSCA Title II) which mandated a regulatory program to address asbestos hazards in schools. A part of AHERA dealt with the mandatory training and accreditation of persons who perform certain types of asbestos-related work in schools. There were five accredited "disciplines" for asbestos-related activities in schools which included worker, contractor/supervisor, inspector, management planner, and project designer. For each discipline, it outlined a functional role and set of job responsibilities, and stipulated minimum training, examination, and continuing education requirements.

AHERA required states to adopt a state accreditation program that was no less stringent than that described in the Act. Persons could then obtain accreditation by completing either an EPA-approved training course, or a training course approved by a state with a program that was at least as stringent as the federal program. Individual states, however, could elect to impose more stringent requirements as a condition of accreditation.

Subsequently, in 1990, Congress enacted the Asbestos School Hazard Abatement Reauthorization Act (ASHARA) which amended AHERA and expanded the training and accreditation requirements to apply to persons who work with asbestos in public and commercial buildings as well as schools.

Clear Air Act of 1971.

The federal Clean Air Act of 1971 was passed to allow EPA to set standards for hazardous air pollutants from stationary and other sources. In 1971, asbestos was classified as a hazardous air pollutant. The regulations promulgated under the act are known as the National Emission Standards for Hazardous Air Pollutants (NESHAPs). This act contains the national emission standards for asbestos, which must be maintained in the work place, and apply to such activities as demolition, renovation, spraying, fabricating, insulating, and waste disposal. APCD has been delegated the federal NESHAPs program, and the NESHAPs regulations are contained within AQCC Regulation No. 8.

Occupational Safety and Health Administration (OSHA)

All employers or contractors who employ asbestos abatement workers to perform any asbestos-related work in the private sector must comply with OSHA regulations. The Colorado Asbestos Certification program is not designed to overlap, replace, or duplicate these regulations.

Federal OSHA, part of the U.S. Department of Labor, contains major provisions that cover the following issues:

- Monitoring of asbestos concentrations in the air;
- Permissible exposure limits (PEL) of fibers in the air;
- A short duration exposure limit of fibers in the air over 30 minutes;
- Methods to ensure any exposure remains within the PEL;
- Limiting access to and regulating employee actions in contaminated areas, including posting warning signs;
- Permissible work practices and housekeeping;
- Use of respirators and protective clothing;
- Hygiene facilities and practices;
- Employee training;
- Medical surveillance for employees exposed to asbestos; and
- Record keeping practices.

ASBESTOS REGULATION IN OTHER STATES

The National Conference of State Legislatures (NCSL) has conducted surveys among the states to assess the response to federal legislation. As of 1991, 32 states require inspector certification for those inspectors. Thirty-five states certify management planners and 49 states have some kind of certification or licensure program for contractors and approximately 47 states certify or license supervisors. Thirty-nine states have established some form of reciprocity to facilitate movement of asbestos personnel across state lines.

Other states which border Colorado or are located in the West have programs which are similar to Colorado's while others do not have legislation necessary to meet EPA certification requirements. Both Wyoming and Arizona have no accreditation program in place. The following information summarizes programs in other Western states.

Arizona has no certification program.

California is an OSHA-certified state, so the state implements asbestos control through this program. The state does not require management plans for any buildings nor does the state approve training courses. Accreditation requirements apply to asbestos projects in all buildings. California does not allow for reciprocity.

Nebraska has contracted for a statewide survey of state-owned buildings. The Department of Public Institutions and the Department of Corrections conduct asbestos inspections in state-owned buildings. There is a site certification program for all asbestos occupations for all asbestos abatement work. Accreditation requirements apply to asbestos projects in all buildings.

New Mexico has a cooperative agreement with the EPA to enforce the AHERA accreditation requirements within the state because the state has insufficient resources to solely administer the program.

Texas requires abatement contractors, supervisors, workers, and facility owners using their own employees to conduct work on their own facilities to have minimum qualifications or accreditation. There is an exemption for industrial facilities without public access. Texas does not have a policy regarding air sampling during the assessment of asbestos in buildings.

Utah enforcement of the AHERA accreditation is limited to producing reports of observations based on inspections. However, the actual enforcement of violations is reserved for EPA because the state does not have this authority under state law. There is no state examination given in Utah. The training providers are responsible for overseeing the accuracy of their own tests.

SUNSET ANALYSIS

REGULATORY EFFORTS OF THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Licensing

The Air Pollution Control Division of the Department of Public Health and Environment is designated as the agency that provides regulatory oversight of the asbestos abatement program in Colorado. The Air Pollution Control Commission promulgates rules to regulate emission standards for asbestos.

C.R.S. 25-7-505 provides that upon application for a certificate to perform asbestos abatement from the Air Pollution Control Division, payment of a fee determined by the Board, and fulfillment of minimum qualifications, a certificate to perform asbestos abatement will be issued. This statute (C.R.S. 25-57-504) also requires that any person who inspects schools, public or commercial buildings for the presence of asbestos, prepares management plans, designs abatement actions or conducts abatement actions shall obtain certification. The fee is currently \$525.00 for an asbestos abatement certificate, \$122.50 for building inspector, \$175.00 for management planner, \$122.50 for worker, \$175.00 for project designer, and \$175.00 for supervisor. For a fee of \$175.00 one may combine either the supervisor/project designer or the building inspector/management planner. Renewals are required annually except for the asbestos abatement certificate which is renewed every three years.

The asbestos abatement certification program in Colorado is cash funded. The following FTE's are the designated positions within the Air Pollution Control Division:

- 1.0 Unit Supervisor
- 1.0 Industrial Hygienist
- 1.0 Inspector (permit approvals)
- 1.0 School Project Inspector (permit approvals)
- 1.0 Processes Certification
- 1.0 Processes Certification and New Program Development

The chart below lists the number of asbestos abatement permits issued in Colorado from January, 1989 through May, 1994.

	1989	1990	1991	1992	1993	5/1994
30 Day Permits \$275	537	684	632	605	652	257
60 Day Permits \$550	65	43	51	55	60	25
1 Year Permits \$825	35	50	46	47	40	24
Approval Notices \$55	280	577	698	724	904	374
Courtesy Notices \$0	49	233	242	263	364	117
Transfers of Ownership \$40	5	7	5	9	16	6

Examinations

The Division currently administers five examinations which include worker, supervisor, project designer, building inspector, and management planner. These examinations were developed by the Environmental Information Council and the National Assessment Institute, Inc.

There are currently five test center locations: two in the Denver Metro area, and one each in Colorado Springs, Fort Collins, and Grand Junction. The Grand Junction test center gives the tests once a month, while the other four test centers operate daily. All centers operate on a walk-in basis. Persons passing the State examinations receive identification indicating that they are certified in a specific discipline.

The following chart illustrates the number of tests given throughout the state for the period October 1990 through February 1994:

October, November, December 1990	80
January thru December 1991	1124
January thru December 1992	1240
January thru December 1993	2703
January, February 1994	389

Complaints and Investigation Procedure

One of the responsibilities of the Air Control Pollution Division is the handling of complaints against certified asbestos personnel. The Division routinely screens complaints to make sure that the Division has jurisdiction to respond and that the complaint at least arguably rises to the level of being a violation of the law. However, the Division reports that "complaints" are not tallied as "complaints". Rather, they give complaints priorities in terms of follow-up investigations, assuming they appear legitimate. Consequently, for purposes of this report there are no statistics for the number and types of complaints. One of the administrative recommendations is for the Division to track complaints and compile this data. All inspections are logged simply as inspections and do not typically get flagged as being initiated by a complaint. Ninety to ninety-five percent of the complaints are telephoned in, and the rest are written complaints.

According to the Division, complaints generally have more to do with work practice violations than for non-notification or improper certification of workers. Safety complaints are rare, but they are sometimes received. Since OSHA regulations focus more on safety than the State regulations, these complaints are usually referred to OSHA.

There are several outcomes of a state inspection of an asbestos abatement project. If a violation is determined on site, a letter of admonition may be issued or correction of a violation may be made immediately on site. Often after an inspection, a letter of inquiry (LOI) is sent to the certificant. Quite often the certificant's response to the LOI satisfies the DOH and the case is closed. The Division's action is based upon the response of the contractor, and whether or not the response is sufficient to: (1) give the Division the ability to close the case because no real violation is apparent; (2) indicate that, while a violation may have occurred, it is not serious enough to warrant more formal enforcement action, necessitating a Letter of Admonition as detailed in the statute; or (3) provide the Division with information that warrants formal enforcement action.

Enforcement

A goal of the asbestos abatement program is to enforce compliance with the provisions of Part 5 of the Act and the rules and regulations. The Division may enter, inspect, and monitor any property, premises, or place where demolition, renovation, or the performance of asbestos abatement is taking place, for the purpose of investigating any actual, suspected, or potential source of air pollution or noncompliance with the law.

C.R.S. 25-7-511 authorizes the Division to issue a notice of violation and cease and desist order. The Division recounts that violations are related to the following problems:

- Problems with the construction of the containment or the decontamination unit;
- Improper negative pressure setup which could lead to escape of asbestos fibers into occupied space;
- Inadequate wetting, the single best method of minimizing the amount of fibers that become airborne during removal;
- Problems with the disposal containers (leaking);
- Poor air cleaning, leading to excess levels of asbestos fibers in the air;
- Poor or delayed spill response activities;
- Improper clearance procedures, involving either the visual inspection or the final clearance air monitoring;
- Waste handling and disposal infractions; and
- Uncertified technicians.

Since July 1989, the computer database reveals 683 state and 3,540 county inspections of asbestos projects. The State Health Department has a contractual arrangement with Denver, El Paso, Jefferson, Larimer, Pueblo, Tri-County and Weld Counties to perform inspections. Where there is not a deputized county program, the state inspectors perform the inspections.

During an inspection, the inspectors examine whether there is a certified supervisor on site, review copies of training certificates, and check for valid photo IDs. The ventilation (air filtration) systems are part of a thorough inspection, as is the overall cleanliness of the equipment. Air samples are checked only if the inspection occurs at the conclusion of the project.

Disciplinary Actions

The Board and the Air Pollution Control Division have a variety of enforcement mechanisms available to them which are created by statute to assure that the asbestos abatement program provides for the health, welfare, and safety of the citizens of Colorado. The Division may take disciplinary action in the form of the issuance of a letter of admonition, suspension, revocation, refusal to renew certification, requirement for corrective education and administrative fines. The Division has denied certification due to insufficient evidence of training or falsified information; withheld certification due to failure to pay fines; and, importantly, the Division has obtained four felony convictions against persons who falsified state asbestos certification. In addition, two other felony prosecutions are pending.

The chart below represents penalties assessed by the Division from 1989 through April 30, 1994.

	1/1-12/31 1989	1/1-12/31 1990	1/1-12/31 1991	1/1-12/31 1992	1/1-12/31 1993	1/1-4/30 1994
Letters of Inquiry Sent Out	0	0	1	50	56	14
Responses to LOI's Received	0	0	1	30	38	14
Warning Letters Issued	10	16	4	5	0	0
Letters of Admonition Issued	0	0	0	7	1	14
NOV Letters Issued	16	32	16	11	5	3
NOV Conferences Held	15	21	26	13	7	3
DOP Letters Issued	5	13	25	19	3	3
Cease and Desist Orders Issued	0	0	0	0	1	1
NOV = Notice of Violations DOP = Determination of Penalty						

RECOMMENDATIONS

STATUTORY FINDINGS AND RECOMMENDATIONS

Should the Certification Program be Continued?

Asbestos is a naturally occurring mineral that is fibrous and virtually indestructible. Asbestos becomes a human health hazard when fibers are released into the air. The potential for the release of fibers depends on the friability of the asbestos. The aerodynamic properties of the fiber allow it to drift indefinitely. When the fibers settle on objects in a room such as books or chairs, disturbing the objects will cause fibers to be released and become airborne again.

Asbestos is found in a variety of products, including asbestos cement pipes and sheet products, asbestos spray on ceiling materials or acoustical ceilings, vinyl asbestos floor tile, gaskets and packings for equipment, coatings and sealants, automobile brakes, clutches and other friction products, textiles, transite board, asphalt roofing felts and coatings, insulation products, and asbestos reinforced plastics. Renovation, demolition operations and maintenance work, and asbestos abatement procedures, disturb the asbestos that has previously been installed.

Harm to human health from asbestos exposure occurs from inhaling fibers, and once past the body's defense system, lodge themselves in the lung or other areas of the body. Because the fibers are indestructible, they are potentially carcinogenic. There is no way to reverse the effects of exposure. When in the human body, the fibers remain latent for 20 to 40 years.

Exposure may result in one of three diseases: asbestosis, lung cancer or mesothelioma. Generally speaking, asbestosis has the shortest latency period and mesothelioma the longest (20 to 40 years).

The more controversial area on the harmful effects of asbestos is that of the effects of asbestos exposure on the general public. This would be exposure that is limited, such as a one-time exposure or a lower-level exposure such as that experienced by an office worker, student, or a frequent visitor to a building where friable asbestos is a problem. The EPA has attempted studies on building occupants exposed to low levels of asbestos, but its studies have been hampered because there is limited data available on prevailing fiber levels in public and other buildings and schools. In addition, it is difficult to quantify the number of persons exposed.

For persons in the general public who enter buildings with asbestos problems and breathe fibers, the effects of exposure are irreversible. Unlike documentation for asbestos industry workers and their families, documentation on persons who contact asbestos-related diseases from low-level exposure is not readily available.

Effectiveness of the certification program

From 1989 through April 1994, 83 notices of violations were issued, whereas in the two year period from July 1987 to July 1989, 58 notices of violations were issued. These violations occurred mostly in abatement projects along the Front Range. Many of these violations were brought into compliance through conferences and settlements, making it unnecessary to issue further compliance orders or cease and desist orders.

The certification of contractors, supervisors, inspectors, workers, project designers, and management planners is necessary to ensure that there are at least minimal qualifications for those working in an area where an unsuspecting public could be placed at substantial risk. If the state certification requirements were abolished, employers under OSHA and EPA could still impose penalties for violations, but these are directed towards work practices and asbestos hazard responses in the work place and not towards the general public.

If the Colorado certification program was abolished, there would still be the federally approved training programs that exist now in all categories of certification. Certificates would continue to be issued upon completion of a training program, but the certificate reflects attendance in a program and a test at the end of the attendance period that may not provide an adequate test measurement of competency. Currently there is a state examination given to all disciplines of asbestos abatement personnel administered by the Air Pollution Control Division.

It is also highly probable that there would be a loss of some federal funds if the state does not provide a certification program. An interview with an EPA official revealed that there would be inadequate personnel to maintain a highly effective program, both in terms of examination requirements, disciplinary actions, and enforcement.

It is the conclusion of this review, that the asbestos control program serves to protect the public health and the environment by ensuring that persons involved in asbestos abatement activities meet minimum standards of competency. Due to potential health risks associated with the improper removal or encapsulation of asbestos, the board's regulatory activities serve to protect the public health and safety and the environment. Asbestos is a known carcinogen which is harmful to humans when its fibers become airborne and are inhaled. Therefore, the asbestos control program should continue. The training requirements are not unduly burdensome and trained personnel can be a factor in saving members of the general public from undue exposure to airborne asbestos.

RECOMMENDATION 1: THE GENERAL ASSEMBLY SHOULD CONTINUE THE ASBESTOS CONTROL PROGRAM IN THE AIR POLLUTION CONTROL DIVISION (APCD) OF THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT.

OTHER STATUTORY FINDINGS AND RECOMMENDATIONS

If the General Assembly decides to continue the asbestos abatement certification program under the Air Pollution Control Division of the Colorado Department of Public Health and Environment, the following statutory and administrative recommendations are offered to clarify the statute and to improve the regulatory performance of the Division.

RECOMMENDATION 2: UPDATE SECTION 508 OF THE ASBESTOS CONTROL ACT CONCERNING DISCIPLINARY ACTIONS IN OTHER STATES

C.R.S. 25-7-508(2)(II) currently empowers the Board to discipline its certificants who have been subject to disciplinary action in another state on grounds "substantially similar" to those that would constitute a violation of the Colorado Act. The current law provides that evidence of such disciplinary action is prima facie evidence of grounds for disciplinary action in Colorado. The current language creates needless impediments for the Board to pursue disciplinary action when a registrant has been disciplined in another state. For instance, often other jurisdictions issue consent decrees which impose discipline without making sufficient findings for the Colorado Board to determine if the "grounds are substantially similar" nor do these decrees contain admissions of guilt, yet the licensee agrees to the suspension, surrender or revocation of the license.'

The General Assembly should amend the disciplinary action section C.R.S. 25-7-508(2)(II) to replace the term "substantially similar" with "that would be subject to discipline under Colorado law" and striking the existing language and replacing it with the following or similar language:

Violating any law or regulation governing the practice of asbestos removal in another state or jurisdiction. A plea of nolo contendere or its equivalent accepted by the (Board, administering agency) of another state or jurisdiction may be considered to be the same as a finding of guilt for purposes of any hearing under this part.

In such cases, the Board has the burden of proof to show the violation was "substantially similar" to that which would be grounds for discipline in Colorado. Because the violation occurred on work performed outside the state, to meet this burden the Board must expend substantial funds to ensure successful prosecution. Further, if a certificant is considered to be a public threat sufficient to warrant suspension, revocation or denial of certificate in one jurisdiction, then it is reasonable to assume that licensee may be a threat to the health, safety, and welfare of the citizens of Colorado regardless of any lack of admission of wrong doing in the consent decree.

Changing the language as recommended will allow a shift in the burden of proof to the licensee who may present evidence of rehabilitation or mitigation during disciplinary proceedings.

RECOMMENDATION 3: INCLUDE ALL DISCIPLINES OF WORKERS IN SECTION REGARDING RENEWAL OF CERTIFICATES

C.R.S. 25-7-506 currently only addresses renewal for supervisors, there is no provision in the statute for renewal of the other disciplines of asbestos workers. In practice, there are provisions for all categories of work. Subsequently, this section should include renewal for workers, building inspectors, management planners, project designers, and for the general abatement certificate.

RECOMMENDATION 4: REVISE THE ELIGIBILITY PERIOD FOR REINSTATING AN EXPIRED CERTIFICATE

25-7-506(5) allows an individual to reinstate an expired certificate within two years of expiration. Therefore, it is recommended to revise the time from two years to one year in which an applicant may reinstate an expired license.

However, the Board has already established, by rule, a one year reinstatement option for an expired certificate. The practice of asbestos removal may change during a two year period to a degree that a person who once held a certificate would not be adequately trained to perform asbestos abatement. Therefore, it is recommended to revise the time from two years to one year in which an applicant may reinstate an expired certificate.

RECOMMENDATION 5: EXTEND RECERTIFICATION PERIOD AFTER REVOCATION OF A LICENSE.

Currently 25-7-508(5) states that if a certification is revoked the certificant may apply for recertification after a period of six months. A very serious violation of the statutes must have been committed to warrant a revocation of a license. Therefore, a six month revocation hardly seems punitive for such a serious offense that resulted in the revocation of a license. A period of two years would be consistent with many occupational licensing board's laws.

RECOMMENDATION 6: MAKE LETTERS OF ADMONITION A FORMAL DISCIPLINARY PROCEEDING

Under the present statutory construction, the letter of admonition is issued in lieu of formal disciplinary action. Yet, the statutes also state that LOA should be issued in response to complaints or investigation disclosures that should not be dismissed without merit. In practice, this means that LOA's are not reported to the national database and therefore, the public is not able to access this information.

This sunset review finds that the LOA should be issued when there is a violation of the practice act that does not warrant suspension or revocation of the certificate. The Division already uses warnings and informal conferences to correct deficiencies.

To strengthen the use of the LOA, it is recommended that 25-7-505(2)(IX)(b) be amended to replace "does not warrant formal action" with "does not warrant suspension or revocation".

RECOMMENDATION 7: INCREASE TRAINING REQUIREMENTS TO CONFORM WITH FEDERAL REGULATIONS

The Division should adopt the amended Asbestos Accreditation Plan (MAP) that increases training requirements.

Section 15 of ASHARA mandates that EPA, as part of revising its MAP, increase the minimum number of training hours, including additional hours of hands-on health and safety training, required for the accreditation of asbestos abatement workers in schools and public and commercial buildings. EPA interprets the phrase "asbestos abatement workers" to include both workers and contractors/supervisors. The revised MAP incorporates one additional 8-hour day of hands-on training for both the worker and the contractor/supervisor disciplines. This will increase the worker course from a total of 3 days to 4 days of training, with the hands-on training component increased from 6 hours to 14 hours. Similarly, the 4-day contractor/supervisor course is upgraded to a 5-day course with 14 hours of hands-on activity.

The additional day of training is to allow workers to practice their jobs under actual working conditions, to gain necessary experience in performing tasks such as erecting and dismantling containment barriers and scaffolding, and in working inside containment areas, or while wearing personal protective equipment, or in other common workplace situations. It is anticipated that the additional day of hands-on training would help acclimatize workers without risk of exposure, and also would eliminate complaints regarding the need for on-the-job training.

RECOMMENDATION 8: ADOPT EPA TRAINING AND ACCREDITATION REQUIREMENTS FOR PROJECT MONITOR

The U.S. Environmental Protection Agency defines project monitors as those persons who observe abatement activities performed by contractors and generally serve as a building owner's representative to ensure that abatement work is completed according to specification and in compliance with all relevant statutes and regulations. They may also perform the role of air monitoring for purposes of determining final clearance for a building. A project monitor is generally required only in a large scale project.

The EPA recommends that a state seeking to accredit individuals as project monitors consider adopting a minimum 5-day training course. Such state law would not mandate that project monitors be used in every instance, but rather, would require their accreditation whenever a building owner or manager elected to employ the services of a project monitor.

OTHER ISSUES

This section discusses several issues that arose during this sunset review. This discussion is included to aid the General Assembly in a better understanding of the Asbestos Control Program.

AREA OF PUBLIC ACCESS

The statutory definition of "area of public access" has presented many problems of interpretation to both the asbestos abatement community regulated and to the regulatory agency, the Department of Public Health and Environment. The definition lends itself to much interpretation instead of providing a framework of specificity for the regulating agency. There have been many challenges to the law from condominium and apartment builder owners, as well as owners of hotels, movie theaters, and museums.

Research revealed that no other state differentiates between public and nonpublic access in respect to state asbestos rules and law.

Recently, the U.S. Environmental Protection Agency promulgated revisions to help clarify and delineate the scope and applicability of the Asbestos Model Accreditation Plan (MAP) to work performed in public and commercial buildings. For purposes of federal regulations, the term "public and commercial building" is defined to mean "any building which is not a school building, except that the term does not include any residential apartment building of fewer than 10 units". This definition identifies those buildings where persons performing certain asbestos-related work are subject to the MAP training and accreditation requirements. Such buildings generally include apartment complexes, condominiums and cooperatives of more than 10 units, office buildings, government-owned buildings, colleges, museums, airports, hospitals, churches, preschools, stores, warehouses, and factories. It also includes all industrial buildings. In addition, the term is interpreted to include only the interiors of buildings except for exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space.

Power companies and other industrial/manufacturing concerns object to including "industrial" buildings within the scope of the rule. They argue that the public generally does not have access to these buildings, is therefore not exposed, and that workers in these industrial buildings are already adequately protected by the OSHA asbestos standards or the EPA Worker Protection Rule.

However, the EPA's 1988 Report of Congress on Asbestos in Buildings specifically identified industrial buildings as one of the types of structures included under the definition of "public and commercial buildings."

The Division is currently negotiating the issue of public access with industry, in particular, Public Service Company of Colorado to resolve this issue.

MEASUREMENT OF ASBESTOS FIBERS FOR THE MODEL ASBESTOS ACCREDITATION PLAN

There is debate in the industry regarding air sampling analysis equipment.

In the February, 1994 revised rules and regulations the EPA strongly recommends that asbestos abatement site air be analyzed by transmission electron microscopy (TEM) prior to building reoccupancy . This position is in keeping with EPA's on-going activity in schools where the allowance for the use of phase contrast microscopy (PCM) has been greatly diminished. TEM is capable of measuring all asbestos fibers including those thin fibers not measured by PCM; therefore TEM is a more stringent analytical tool that may be used for analysis of airborne asbestos during abatement site air clearance.

Often, the argument against requiring the use of TEM analysis is one of economics. Per sample, the cost for TEM is between \$200 and \$250 while an analysis done with a PCM is approximately \$30.

ADMINISTRATIVE RECOMMENDATIONS

This sunset review recommends only two changes to the DOH's administration of the Asbestos Control Program.

1. The Division should revise its application and renewal forms to secure information regarding disciplinary actions in other states. A license may be denied based on disciplinary action taken by other states, therefore, to provide the highest level of public protection, the Division must have this information.
2. The Division needs to develop and implement a recordkeeping system for complaints received. The lack of such a system can make it difficult to evaluate the effectiveness of the regulatory program.

APPENDIX A

SUNSET STATUTORY EVALUATION CRITERIA

- I. Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- II. If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- III. Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices of the Department of Regulatory Agencies and any other circumstances, including budgetary, resource and personnel matters;
- IV. Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- V. Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- VI. The economic impact of regulation and, if national economic information is available, whether the agency stimulates or restricts competition;
- VII. Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- VIII. Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- IX. Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.