

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of Proposed Rules Relating
to Asbestos Abatement; Minn. Rules
4620.3000 - 4620.3724 and 4717.7000

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis on February 15, 1996 at the Metro Square Building, 7th Place and Robert Street in St. Paul.

This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Department of Health has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable and whether or not the rules, if modified, are substantially different from those proposed originally.

The Department of Health (Agency, Department, MDH) was represented at the hearing by Wendy Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, MN 55103, Jane A. Nelson, Department Rules Coordinator, Kathy Norlien, Research Scientist, Becky Lofgren, Supervisor in the Department's Asbestos Unit, Kathy Svanda, Manager of Environmental Health Hazard Management and Industrial Hygienists William Fetzner, Pincus Weitzman and David Wulff.

Approximately 55 - 60 persons attended the hearing, 43 of whom signed the hearing register. 17 members of the public offered oral testimony.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the Agency takes any further action on the rule(s). The Agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of Health makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Agency must submit it to the Revisor of Statutes for a review of the form of the rule. The Agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On December 5, 1995 the Department of Health filed the following documents with the Chief Administrative Law Judge:

- (a) an uncertified copy of the proposed rules;
- (b) the signed Order for Hearing;
- (c) a proposed dual notice to adopt rules without a hearing and with a hearing;
- (d) a signed Statement of Need and Reasonableness (SONAR); and
- (e) An estimate of the length of time needed for MDH to present its evidence and of the expected attendance at the hearing.

2. On December 11, 1995, the Department filed a copy of the proposed rules as certified by the Office of the Revisor of Statutes.

3. On December 11, 1995, the Department filed Appendix B to the SONAR, by which document the Department of Finance reviewed and approved the fees proposed by the rules pursuant to Minn. Stat. § 16A.1285.

4. On December 20, 1995, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the MDH for the purposes of receiving such notice and to persons on an additional discretionary mailing list.

5. On December 26, 1995, a copy of the proposed rules was published at 20 State Register 1633. Since the Department received written requests for a rule hearing from more than 25 persons within 30 days of December 26, 1995, this hearing process followed.

6. On January 17, 1996, the MDH filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing (dual notice) as mailed;
- (b) the Agency's certification that its mailing list was accurate and complete;
- (c) an Affidavit of Mailing the Notice to all persons on the MDH's mailing list;
- (d) an Affidavit of Mailing of Additional Discretionary Notice;
- (e) the names of persons who would represent the Agency at the hearing;
- (f) a photocopy of the pages of the State Register on which the Notice of Hearing and Proposed Rules were published;
- (g) copies of the Notices of Intent to Solicit Outside Opinion with copies of all comments received from interested parties -- such Notices were published in the State Register on August 16, 1993 (18 SR 583), December 19, 1994 (19 SR 1372) and September 18, 1995 (20 SR 502).

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

7. The period for submission of written comments remained open for 20 calendar days, through March 6, 1996. The record closed on March 13, 1996, the fifth working day following the close of the comment period.

Nature of the Proposed Rules and General Statutory Authority

8. The legislature began regulating asbestos in 1987 and rules were initially adopted in 1988. During the 1993, 1994 and 1995 legislative sessions changes to the Asbestos Abatement Act were adopted, extending regulation to residences and requiring certification of new specialties (such as air quality monitoring) within the arena of asbestos work. The Asbestos Abatement Act, Minn. Stat. §§ 326.70 to 326.81, as amended by Minn. Laws 1995, Chapter 165, Sections 12 to 15, grants authority to the Commissioner of Health to adopt rules regulating asbestos abatement. General authority to establish standards for the protection of public health are contained in Minn. Stat. §144.05. The rules promulgated for that purpose are being modified by this rulemaking proceeding.

9. The purpose of the proposed rules is to prevent unnecessary public exposure to asbestos when it is removed, enclosed, or encapsulated. As a result of public exposure to a known carcinogen, serious health problems may arise if the material is not handled properly. In addition, the Agency anticipates this modification of the rules will also provide more effective enforcement than has been experienced since the existing rules took effect in 1989. The Administrative Law Judge finds the MDH has general statutory authority for revising and adding asbestos rules so as to implement the statutory changes made to the Asbestos Abatement Act.

Effect on Agricultural Land

10. The amendments and additions proposed by the Department in this proceeding will have no direct or substantial adverse impact on agricultural land. The proposed rules are not specifically designed to affect farming operations. An impact to an individual farm home or community farm building may occur, but that impact is no more than the impact to the community or residential structures in the state in general. No regulatory controls are directed at or triggered by farming operations as such. Therefore, no additional action was taken by the Department within the meaning of Minn. Stat. § 14.11.

Fiscal Impact

11. The Department does not anticipate that the proposed rules will directly cause a fiscal impact of over \$100,000 on local public bodies. The proposed rules attempt to reduce conflict between federal rules and laws that impact state and local public bodies. The Department argues that the proposed rules simply direct how the asbestos-related work must be performed to ensure protection of public health when the public body has decided to perform asbestos-related work, and that the costs imposed by the new requirements are caused by its decision not the Department's. It is found that the Department's reasoning is correct, and no fiscal note was necessary, but an estimate of the additional costs imposed in order to comply with the new rules would have clarified the true impact of these provisions.

Small Business Considerations

12. The Agency notes that most of the small businesses in asbestos-related work were present at the work group meetings and participated in the drafting of these proposed rules. The five statutory considerations regarding small businesses were discussed in the Statement of Need and Reasonableness, with the Department addressing each in turn. The Department considered the five factors and stated that an adverse impact on the public would occur if the rules were modified to implement them. The goal of the rules is to protect the public. The Department's assessment of the small business considerations, as stated in the SONAR, is an adequate articulation of what MDH did to consider small businesses under the statute. It is found that any easing of the burden to the regulated community imposed by the proposed rules risks endangering the general public, which would compromise the impact of the rules and the authorizing statute..

13. The Department recognizes that the majority of businesses impacted by the proposed rules are small businesses within the definition in Minn. Stat. § 14.115. The statute requires an agency to consider five factors to reduce the impact of rules on small businesses, as follows:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards required in rule; and

(e) the exemption of small businesses from any or all requirements of the rule.

14. Since the purpose of the rules is to protect public health by preventing unnecessary exposure of individuals to asbestos, establishing less stringent compliance or reporting requirements for small businesses is not feasible in this case because all the proposed rules are designed to ensure that public exposure to asbestos is

minimized to the greatest extent possible by asbestos abatement work practices and the training of individuals dealing with asbestos. Establishing less stringent compliance or reporting requirements may increase the potential for asbestos exposure and consequently endanger public health.

15. The establishment of less stringent schedules or deadlines for compliance or reporting requirements would compromise public health. Further consolidation or simplification of compliance or reporting requirements is not feasible because all the proposed requirements in that regard are necessary to protect public health. Establishing performance standards for small businesses to replace design or operational standards is not feasible in this matter because all the design and operational standards are necessary to protect public health.

16. Exempting small businesses from any or all of the requirements of the proposed rules in this instance is not feasible because all the proposed rules are necessary to protect public health. The legislature did make a specific exemption with respect to the size of a project. The Department's position that the issue of exceptions was addressed legislatively and further exemption is not warranted is found to be reasonable.

General Issues

Personal Checks

17. The Department is modifying the language in the proposed rules about the forms of payment the Department will accept for licensing, certification and training course permit fees, as well as for duplicate certificates. The proposed rule, as published, required that these fees be paid with a business check, cashier's check, or money order.

18. The Department has differentiated between fees for duplicate certificates and fees for licensing or certification. The Department is modifying the proposed rule to require that licensing, certification and training course permit fees be paid in a form other than a personal check. See modifications for proposed rule parts 4620.3200, subpart 2, item B; 4620.3300, subpart 4, item B; 4620.3300, subpart 4, item B; 4620.3310, subpart 5, item B; 4620.3310, subpart 6, item B; 4620.3330, subpart 5, item B; 4620.3330, subpart 6, item B; 4620.3340, subpart 5, item B; 4620.3340, subpart 6, item B; 4620.3350, subpart 5, item B; 4620.3350, subpart 6, item B; 4620.3702, subpart 1, item B; and 4620.3702, subpart 2, item B. These modifications are found not to be substantial changes since they are clarifying in nature, do not impose any additional burden on the regulated community and do not result in a fundamentally different rule. Under both the proposed rule and the modified rule, personal checks would be unacceptable for licensing, certification and training course permit fees. The noted subparts, as modified, are found to be necessary and reasonable.

19. With respect to duplicate certificates, the Department is modifying the proposed rule to allow duplicate certificate fees to be paid by personal check. See modifications for proposed parts 4620.3300, subpart 8; 4620.3310, subpart 9; 4620.3330, subpart 9; 4620.3340, subpart 9; and 4620.3350, subpart 9. These

modifications are found not to be a substantial change because they are made in response to comment, do not impose any additional burden on the regulated community, and do not result in a fundamentally different rule. The subparts noted, as modified, are found to be necessary and reasonable.

20. There was comment at the hearing about the proposed rule's prohibition of personal checks. See comments by Mr. Singler (Transcript (T.) p. 149.150), Mr. Prescher (T. p. 156, 157, 159, 165), Mr. Viskocil (T. p. 160), and Mr. George (T. p. 165-167). The Department has shown the reasonableness of not accepting personal checks for licensing or certification fees. As noted in the Department's Statement of Need and Reasonableness (Ex. 5, p. 16, part 4620.3200, subpart 1, item B), the Department has experienced problems with personal checks bouncing. If, as suggested at the hearing, the Department were to accept personal checks and revoke a license or certificate after a personal check bounces, this would result in substantial extra time and expense to the Department. The license or certificate issued on the basis of a bounced check could only be revoked after providing an opportunity for a hearing. (See, e.g., Minnesota Statutes, section 144.99, subdivision 10 (Supplement 1995).) Since revocation of a license or certificate may jeopardize a person's livelihood, it is reasonable to anticipate that persons facing revocation would often request a hearing. The time and expense involved in such a hearing would require an increase in fees, since the asbestos program is a fee-supported program.

It is a minor inconvenience for an individual to obtain a money order or cashier's check. When this minor inconvenience is balanced against the cost of dealing with bounced personal checks for licensing or certification fees, it is reasonable to prohibit personal checks.

21. Although the Department determined not to accept personal checks for licensing or certification fees, the Department has determined, based on the comment received, that it is unnecessary to prohibit personal checks as fees for duplicate certificates. Individuals obtaining duplicate certificates are already certified. The fee for the duplicate certificate is a nonrecurring charge which produces insignificant revenue. (See Minnesota Statutes, section 16A.1285, subdivision 4 (Supplement 1995)). In addition, the proposed rule, as published, did not prohibit personal checks for duplicate licenses. (See proposed part 4620.3200, subpart 8, p. 14, lines 7-8.) The Department has modified the proposed rule regarding duplicate certificates so that it is consistent with the proposed rule regarding duplicate licenses.

Delegation of Authority

22. Brian Blesi (T. p. 162-164) questioned why the Commissioner could not delegate to the trainers the function of issuing certificates. The statutory authority for the issuance of certificates rests with the Commissioner. (See Minnesota Statutes, section 326.78, subdivision 2 (Supplement 1995); Minnesota Statutes, section 326.73, subdivisions 1-4 (1994).) Generally, an administrative agency may not delegate its powers to another entity without statutory authorization. Muehring v. School District No. 31 of Stearns County, 224 Minn. 432, 28 N.W.2d 655, 658 (1947). The Commissioner does not have statutory authorization to delegate to another entity her power to issue certificates.

Application and Notification Forms

23. The Administrative Law Judge questioned the Department about the proposed rule language requiring that applications for certificates and licenses be completed on a "form provided by the commissioner." (T. p. 341-343.) To clarify that the Commissioner does not have unlimited discretion in what to ask on an application form for a license, a certificate, or a training course permit, the Department is adding language which limits the nature of the information the Commissioner is permitted to seek on an application form for an initial or renewal certificate, license, or training course permit. See modifications for proposed parts 4620.3200, subpart 2, item A; 4620.3300, subpart 4, item A; 4620.3300, subpart 5, item A; 4620.3310, subpart 5, item A; 4620.3310, subpart 6, item A; 4620.3330, subpart 5, item A; 4620.3330, subpart 6, item A; 4620.3340, subpart 5, item A; 4620.3340, subpart 6, item A; 4620.3350, subpart 5, item A; 4620.3350, subpart 6, item A; 4620.3702, subpart 1, item A; and 4620.3702, subpart 2, item A. These modifications are found not to constitute substantial changes since they are clarifications, they do not impose any additional burden on the regulated community, and they enable the Commissioner to seek on an application form the type of information that persons would ordinarily expect to be elicited on an application form. The subparts noted, as modified, are found to be necessary and reasonable.

The Department proposes to delete also the "form provided by the commissioner" language with respect to applications for duplicate licenses or certificates. See modification of proposed parts 4620.3200, subpart 8; 4620.3300, subpart 8; 4620.3310, subpart 9; 4620.3330, subpart 9; 4620.3340, subpart 9; and 4620.3350, subpart 9. These modifications do not constitute substantial changes because they do not change the substantive meaning of the rule. The subparts noted are found to be needed and reasonable, as modified.

24. In reviewing the proposed rule with respect to application forms, the Department also found the "form provided by the commissioner" language in the proposed rule related to notifications. The Department has similarly modified these proposed parts, either to delete this language or limit the nature of the information the Commissioner is permitted to seek on a notification form. See modifications for proposed parts 4620.3410, subpart 2, item A; 4620.3410, subpart 3, items B to E; 4620.3415, item A; 4620.3420, subpart 1, item A; 4620.3420, subpart 2, item A; and 4620.3710. Where the department has deleted the "on a form provided by the commissioner" language, the department has clarified that the notification must be in writing or that the notification must include the permit number. (See proposed parts 4620.3410, subpart 3, item B and 4620.3415, item A.) It is found that the modifications relating to notification do not constitute substantial changes since they are clarifications, do not impose any additional burden on the regulated community, do not result in a fundamentally different rule, and do not allow the Commissioner to seek information other than the type of information that persons would ordinarily expect to be elicited on a notification form. The subparts listed here, as modified, are found to be necessary and reasonable.

Renewal of Licenses and Certifications

25. Commentators James Viskocil and David Gutterud, Concept Environmental Services, Inc. (Exhibit (Ex.) 48); Brian Haynack, Potlatch Corporation (Ex. 54); Susan Bendix, Southwest/West Central Service Cooperative (Ex. 60); Linda Rohde, Environmental Training Institute (Ex. 59); Ron Wieber, representing himself (Ex. 40); Roger Berkowitz, Rust Environmental and Infrastructure, Inc. (Ex. 39); Brian Blesi, William Braun and Sue Goepfert, RE/SPEC Inc. (Ex. 53); and William George, representing himself (Ex. 51); stated that the requirement to submit a renewal application at least 30 calendar days before the expiration date on the certificate being renewed is excessive and an unnecessary burden on the regulated community. The commentators further stated that the 30 day submission requirement would reduce the certification period each year by one month and the date by which a refresher training course would have to be completed would regress one month each year. Some commentators took issue with the requirements of Minnesota Statutes, section 326.78, subdivision 2 with regard to determining the expiration date on the inspector certificate. In addition, testimony regarding the requirement to submit a certificate renewal application form at least 30 days before the expiration of the certificate to be renewed was given by David Horn, Potlatch Corporation (T. p. 70, 73-74); Michael Singler, Northern States Power Company (T. p. 77-78, 151-155); Jeffrey Prescher, Hopkins School District (T. p. 156-159); Kenneth Hickey, Hickey Inspection Consultants (T. p. 162); William H. George, Target (T. p. 76); James Viskocil, Concept Environmental Services, Inc. (T. p. 79-83); Brian Blesi, RE/SPEC Inc. (T. p. 162-164); and Genette Carleton, Blue Earth Environmental (T. p. 164-165). The testimony given was without regard to which certification was addressed, but rather focused on the 30 day submission requirement.

26. The Department proposes to modify the language in the proposed rules regarding the time frame during which an applicant must submit a renewal application to the department. At the hearing, the Department presented a proposal (Ex. 70, p. 7-8) which would modify the originally proposed 30 calendar day period to 14 calendar days. The Department reasoned that the requirement to submit a license or certificate renewal application at least 14 calendar days before the expiration of the license or certificate was proposed to help the applicant submit a timely renewal application so there would be no lapse in licensed or certified status disrupting the applicant's ability to work. The Department is persuaded that this requirement can be eliminated with the understanding that the Department will take the time necessary to process the application. With the elimination of this requirement, if the applicant submits a license or certificate renewal application on or immediately before the expiration date of the license or certificate, the applicant will not be able to work until the Department can process the application and is able to issue the license or certificate renewal.

27. The Department proposes to delete the language in the proposed rule about the time frame during which a renewal application must be submitted. See modifications for proposed rule parts 4620.3200, subpart 5; 4620.3300, subpart 5; 4620.3310, subpart 6; 4620.3330, subpart 6; 4620.3340, subpart 6 and 4620.3350, subpart 6. It is found that these modifications of the proposed rule are not substantial changes because they are made in response to comment, do not impose any burden on

the regulated community, and do not result in a fundamentally different rule. The proposed rules, as modified, are found to be needed and reasonable.

Certification

28. James Risimini, Environmental Management Associates (Ex. 34) wrote that he hoped the Department was not going to issue a certificate for each certifiable discipline for which a person applies. Mr. Risimini suggested that the Department consider issuing one certificate listing the various disciplines for which the individual had received certification. Commentator Kenneth J. Hickey, Hickey Inspection Consultants (Ex. 81 and T. p. 162), provided a copy of his State of Illinois renewal application form to the Department. Mr. Hickey pointed out that Illinois assigns one date for the expiration of all state certificates applied for and describes the advantage of the Illinois system for administration of certificate renewals.

29. The Department notes that Minnesota Statutes, section 326.78, subdivision 2 establishes the expiration date of each asbestos certificate issued by the Commissioner of Health. If the Agency issued one document which addressed more than one certification, this document would have to be renewed and updated each time one of the certifications expired, resulting in no benefit to the Department or the regulated community by using the suggested certificate issuance format.

30. Commentator Jeffrey Prescher, Hopkins School District (Ex. 75) stated there should be a one year "grace period" following expiration of a certificate before the applicant must retake the initial training course. This comment also applies to other certificated disciplines in proposed rule parts 4620.3300 to 4620.3350. The "grace period" Mr. Prescher is referring to is provided in the proposed rules in parts 4620.3300, subpart 3a, item B; 4620.3310, subpart 4, item B; 4620.3330, subpart 4, item B; 4620.3340, subpart 4, item B; and 4620.3350, subpart 4, item B.

Residential Abatement

31. Commentator Frank Dickson (T. p. 191-192; 200-201) voiced his concern that the residential requirements will raise costs such that more people will do abatement themselves or have it done illicitly. It is found that Minn. Stat. § 376.71, subd. 4 governs this issue by specifying that certain residential projects are to be regulated as "asbestos related work."

32. Commentator Jerry Larson, EnviroBate Metro (Ex. 64) stated "residential abatement excludes flooring, roofing, siding and all ceilings" and he does not believe these types of materials should be excluded, "especially ceiling [sic], which is often very friable material." The Department agrees with Mr. Larson and is aware that ceiling removal of friable asbestos-containing material can be a very hazardous job. However, these materials are specifically excluded from regulation by Minnesota Statutes, section 326.71, subdivision 4. A legislative change would be necessary to allow the Department to regulate asbestos-containing floor tiles and sheeting, roofing materials, siding, and all ceilings with asbestos-containing material in single family residences and buildings with no more than four dwelling units.

33. Mr. Larson (Ex. 64) stated that he would like the Department to allow residential abatement to be performed by a certified worker who is “under the direction of a supervisor.” The Department responds that it is necessary to have the site supervisor certification for the purposes of performing residential abatement, particularly if the individual performing abatement is acting alone at the abatement site. The additional training as a site supervisor provides the individual with the knowledge to make key decisions that affect the safety of the project.

Jerry Larson (Ex. 64) also raised the issue of increased cost for residential abatement and the department penalizing asbestos abatement contractors who are licensed and trying to do a good job. Mr. Larson estimates that “it will take an additional 5-7 hours to complete a typical job.” The Department believes that the work practices for small residential abatement projects are necessary to protect against potential exposure to asbestos. As stated by the Department, exposure to asbestos from small residential projects can be just as great as from large projects because people tend to spend more time in their own home, and many times children are living in that home where the latency period between exposure and disease becomes a critical exposure issue (T. p. 40). Where possible to do so without compromising health and safety, the Department has reduced requirements for small residential abatement projects (T. p. 41). This is exemplified in reduced air monitoring requirements and by requiring a decontamination unit which is smaller than decontamination units required on commercial abatement projects.

34. The asbestos unit continues to issue administrative penalty orders to entities not following Minnesota asbestos abatement rules and statute. The Department plans to proceed with an educational campaign to educate heating contractors and other entities who may not be aware of the rules and the dangers of improperly removing asbestos from residences.

Specific Rule Proposals

General

35. Any rule provision not discussed specifically below is found to be necessary and reasonable.

In its Final Comments filed on March 6 and Response to Comments filed on March 13, 1996, the MDH proposed a number of revisions to the rules as published originally in the State Register, and incorporated into the texts changes proposed at the rule hearing. Many of those revisions are discussed in earlier Findings. In subsequent Findings, the Administrative Law Judge will comment on the remainder of such changes, except for any clerical, spelling or other changes overlooked inadvertently. Any such changes not discussed specifically are found to be needed and reasonable because they provide clarity to the proposed rules and are found not to be substantial changes.

Rule-by-Rule Discussion

Definitions

36. At Part 4620.100, subpart 1a, the Department proposes to insert the word "area" into the last sentence of the definition of "abatement", such that the final sentence would read:

"Abatement includes area preparation, containment removal, and clean up."

The Department proposes the addition so that the definition of abatement is consistent with parts of the rule addressing work practices. The term "area" clarifies what needs to be prepared and is consistent with the definition of "asbestos-related work" at Minn. Stat. § 326.71, subd. 4. The addition of the word "area" is found not to be a substantial change, because it is clarifying in nature. The resulting definition is found to be needed and reasonable.

37. At Part 4620.3100, subpart 2d, the MDH proposes to add a definition for the term "area preparation". A phrase used elsewhere in the rule, "area preparation" was requested to be defined by commentators Tim Huber and Sean Gabor. The Department agreed, and proposes the following definition:

Area preparation. "Area preparation" means:

A. the construction of a decontamination unit under parts 4620.3569; 4720.3580, subpart 2; and 4620.3581, subpart 3;

B. the installation of a HEPA-filtered negative pressure system under part 4620.3570; and

C. The performance of any activities required by parts 4620.3580, subpart 4, items A, B, D, E, G, and H; 4620.3581, subpart 4, item A; 4620.3582, subpart 3, item A; 4620.3566; 4620.3567; and 4620.3568.

The above definition is found to be necessary and reasonable and is not a substantial change because it is a clarification of a term used elsewhere in the rules.

38. In subpart 7e (definition of "asbestos project design") the Department proposes to modify the last sentence of the originally-published definition to read: "Written technical project specifications incorporated into bidding documents are also considered project design.", and to strike the words "Bidding documents that incorporate. . ." at the beginning of the originally-published sentence. It is found that the proposed change is clarifying in nature and not a substantial change. The resulting definition is necessary and reasonable.

39. In response to a suggestion from Jeffrey Prescher of the Hopkins School District, the Department proposes to strike the word "equipment" at the end of the definition of "emergency project" (subpart 16) and substitute the words "the facility or facility components". This proposed change is found not to be a substantial change and the resulting definition is necessary and reasonable.

40. In response to a comment from Tim Huber, the Department proposes to add a sentence to subpart 25b, the definition of "maintenance or maintenance activity". The new sentence reads:

"Maintenance or maintenance activity does not include any encapsulation to return damaged, previously encapsulated ACM to an undamaged condition or to an intact state to prevent fiber release."

The additional language is consistent with Minn. Stat. § 326.71, subd. 4, which defines "asbestos-related work" to include "encapsulation". It is found that the additional language is not a substantial change because it clarifies the rule and is consistent with statutory language. The resulting definition is found to be needed and reasonable.

41. At subpart 27, the Department proposes to change the term "abatement area" to "asbestos work area". This proposal is found to be consistent with OSHA language, and clarifying in nature, so it is not a substantial change. It was made in response to a comment by William George. The resulting definition is found to be necessary and reasonable.

42. Mr. Prescher questioned the need for requiring the "responsible individual" at subpart 29 to be certified as a site supervisor. The Department justified the requirement adequately in its SONAR, at page 15. The requirement is reasonable because it helps assure that important safety decisions are made by a person who is trained adequately and has the requisite knowledge, skill and experience to be designated "responsible" in this context. Broadening the definition to include persons who have agent-type authority to act on behalf of an asbestos contractor would confuse and distract from the primary issue (safety) here.

43. In the definition of "tunnel" at subpart 33, the Department proposes to delete the term "storage" from areas in the definition excluded from the concept of "tunnel". This change is found to be a clarification, and not a substantial change, and the resulting definition is necessary and reasonable.

Contractor Licensure

44. At part 4620.3200, subpart 2, (Application for license) the Department proposes to make clerical changes at items D and G. The first replaces the word "card" with "certificate", and the last eliminates the requirement proposed initially to provide the United States Internal Revenue Service employer identification number on the application. Both proposed changes are found to be not substantial in nature, and the resultant subparts are necessary and reasonable.

Certification of Asbestos Worker

45. At proposed rule 4620.3300, subpart 5 (Renewal), item C, the Department initially proposed that a worker seeking to renew certification submit "evidence of completion of" the most recent asbestos worker refresher training course. The Administrative Law Judge suggested that the language was vague and recommended it be clarified. The Department complied by proposing to delete the quoted language and substitute "a copy of the training course diploma from". This proposal is found not to constitute a substantial change, and the resulting rule is necessary and reasonable. The change clarifies the originally-published language and removes a possible vagueness defect.

Certification of Asbestos Site Supervisor

46 In response to a comment from Joseph Schwartzbauer of the Institute for Environmental Assessment, Inc., the Department proposes to modify Part 4620.3310, subpart 2 (qualifications or experience requirements), items A and B, to allow experience in "other general commercial construction trades" to count for eligibility for certification as an asbestos site supervisor. The Department agrees that the eligibility of general construction experience should be recognized in order for the rule to be consistent with Minn. Stat. § 326.73, subd. 1. These modifications are found not to be substantial changes because they provide consistency with the governing statute. The resulting rules are found to be necessary and reasonable.

Much comment was elicited against the need for prior general construction trade experience to qualify for asbestos related work. The concern, however valid, cannot be addressed here because Minn. Stat. § 326.73, subd. 1 requires evidence of such work experience in order to be certified.

Asbestos-related Work Project Notice

47. At Part 4620.3410, subpart 3 (Notice of abatement schedule), the Department proposes to modify subpart 3.B. by requiring licensed asbestos contractors performing abatement to submit written notice to the Commissioner of abatement dates and work shift times. The proposed requirement for written notice is found not to be a substantial change and the resulting subpart is found to be necessary and reasonable.

Permit Fees

48. At 4620.3430, subpart 2 (Fees for abatement other than small residential abatement), and subpart 3 (Fees for air quality monitoring other than small residential abatement), the Department added clarifying language in response to several commentators who wanted clarified who was to pay the associated fee for each project. The Department proposes to add language to specify that "the asbestos contractor performing abatement" must ensure that fees are paid. The proposed changes to subparts 2 and 3 are found not to be substantial changes, but are clarifying in nature. The resulting subparts are found to be necessary and reasonable.

Certification and Training Fees

49. Many commentators protested as too high the proposed fees for certification of asbestos inspectors, management planners and project designers and for training course permits. The MDH's fees must conform with Minn. Stat. § 144.122, and be based only on the costs of operating the designated programs. The rules certify the three named disciplines and authorizes new training courses, all to implement legislation. Minn. Stat. § 16A.1285 provides for a Department of Finance review, which has been done, to assure the fees raised cover the costs of new programs required by the rules and no more. See Attachment B to the SONAR. It is found that the fees proposed in the rules are necessary and reasonable.

Records

50. Commentator Roger Berkowitz remarked that it was unclear if each licensed contractor on an abatement site (the abatement contractor and the air monitoring contractor) needed to maintain logs. With respect to on-site records, as noted at Part 4620.3440, the Department proposes to add a clarification that the responsibility for keeping the records is that of the asbestos contractor performing abatement. This addition to Part 4620.3340, subpart 1 is found not to constitute a substantial change, and the resulting rule is needed and reasonable.

51. At subpart 1, item C, the Department proposes to delete the word "excursion", part of the text of the originally-published subpart, as unnecessary. It is found that removal of the term is necessary and reasonable to prevent confusion with the term "excursion" used by the United States Occupational Safety and Health Administration to define its short term exposure limit. Since the change is clarifying in nature, it is found not to be a substantial change and the resulting subpart is found to be necessary and reasonable.

Inspection and Assessment of Asbestos-Containing Materials

52. A word-order adjustment is proposed by the Department at Part 4620.3460, subpart 3.A (Asbestos analysis) to clarify that the American Industrial Hygiene Association does not accredit laboratories for bulk analysis. Rather, it rates laboratories as proficient or non-proficient in bulk analysis for asbestos. The changes to subpart 3, item A to clarify the level of accreditation or rating from the various entities noted is found to be necessary, reasonable and not a substantial change.

53. Subpart 3, item B of Part 4620.3460, as published originally, did not allow for compositing of samples according to Environmental Protection Agency clarification documents. The Department proposes now to modify item B to include those EPA documents. The modification proposed is found not to be a substantial change because it was made in response to comments (from William George and Genevieve McJilton) and clarifies the rule's intent. There is no effect on the substantive meaning of the rule. The resultant item is found to be necessary and reasonable.

54. The Department proposes to modify subpart 5 of 4620.3460 (Inspector duties) to clarify the requirement that an asbestos inspector must have a current asbestos inspector's certificate at the location where the inspector is conducting work. The language proposed is found to be clarifying and not substantial in nature, and the resulting subpart is necessary and reasonable.

55. In response to commentators Berkowitz, Prescher and Greg Olson, the Department proposed to modify subpart 5, item G to allow an inspection report to be provided to the party requesting the inspection, even if that party is someone other than the facility owner. This clarification broadens the parties who may receive the inspection report, since it was not always the building owner who requested the inspections. This modification is found not to be a substantial change because it is a clarification that does not impose any additional burden on the regulated community and does not result in a fundamentally different rule. The item as modified, is found to be necessary and reasonable.

Asbestos Management Plan and Asbestos Project Design

56. As it proposed regarding the necessity for an inspector to carry a certificate on-site, the Department proposes, at Part 4620.3470, subpart 2, item B, to require asbestos management planners to possess current asbestos management planner certificates at the location where asbestos management planning work is being conducted. The proposed language to effectuate this requirement is found not to constitute a substantial change and the resulting item is found to be necessary and reasonable.

57. As noted in the preceding Finding, the Department proposes also to specify that asbestos project designers be required to possess their appropriate certificates at locations where asbestos project design work is being conducted. This change, to Part 4620.3480, subpart 2, is found to be clarifying in nature and not a substantial change. The resulting subpart is found to be necessary and reasonable.

Installation of Critical Barriers

58. Commentator Frank Dickson requested that Part 4620.3567, item B be modified to be consistent with current OSHA regulations that require two layers of six-mil polyethylene sheeting to achieve a seal around all heating, ventilating and air conditioning intake and exhaust openings in asbestos containment areas. The Department, seeking consistency with federal standards, proposes to modify item B by changing the phrase "one layer" to "two layers" in item B. The change proposed is found to be made in response to comment from the regulated community and consistent

with the requirements already existing under OSHA. It has the added benefit of avoiding confusion by the regulated community. To the extent that adding another layer is an inconvenience not noted in the rule as published originally, that consideration is outweighed by the necessity for consistency and lack of confusion with OSHA. The modified rule is found not to constitute a substantial change and is necessary and reasonable.

59. With respect to item C of 4620.3567, the Department proposes a clarifying change as a result of comment submitted by Genette Carleton. the modification is to insert the phrase "penetrations around" to clarify that electrical conduits, telephone wires, water supply and drain pipes are all areas where asbestos fibers may settle and need to be sealed with polyethylene sheeting during abatement procedures. The proposed change is found not to be a substantial change but a clarification that does not affect the substantive meaning of the rule. The resulting item C is found to be necessary and reasonable.

Containment

60. At subpart 2a (floor sheeting) of Part 4620.3568, the Department adds the words "or comparable material" to the requirement that floor sheeting must consist of at least two layers of six-mil polyethylene plastic sheeting. This modification clarifies the intent of the Department and does not affect the substantive meaning of the rule. It is consistent with existing language at Part 4620.3500, subp. 4, item B, subitem (5) requiring that "at a minimum, floor sheeting must consist of two layers of 6-mil polyethylene plastic sheeting or comparable material". It is found that the proposed change is not substantial, and that the resulting rule, consistent with existing rule, is necessary and reasonable.

61. Subpart 3, item F of 4620.3568 (wall sheeting) was commented upon by Mr. Prescher and Genette Carleton, who stated that the installation of a clear viewing window may not be feasible in residential and commercial projects. The Department modifies item F by inserting the words "where feasible" and eliminating the originally-published inapplicability to single family residences where the containment area is located in a basement. The proposed modifications are found not to be substantial changes. The resulting item is found to be necessary and reasonable.

62. At subpart 4 of 4620.3568, item C (Freestanding containment walls and freestanding containments), the Department proposes to add language, in response to comments by several interested persons in the regulated community, to recognize that porous framing materials are often covered with polyethylene sheeting and that it is feasible to clean or encapsulate wood members. In order to clarify the situations where painting is necessary, the Department proposes to add "unless the framing materials are covered with polyethylene sheeting or the framing materials are disposed of as asbestos waste at the end of the project" at the end of subpart 4, item C. This proposed modification is found to be not a substantial change and the resulting item is found to be necessary and reasonable.

Decontamination Units

63. At Part 4620.3569, subpart 5 (Decontamination units other than small residential abatement), the Department proposes to remove the requirement that the air lock chambers be at least three feet square. This modification is found not to be a substantial change because it was made in response to comments from the regulated community, imposes no additional burdens on them, and does not result in a fundamentally different rule. The subpart as modified is found to be necessary and reasonable.

Removal of Asbestos-Containing Material

64. At Part 4620.3571, subpart 1A. and subpart 2, items B and C, the Department proposes to delete the word "adequately" from the term "adequately wet". This modification is proposed because the term "adequately wet" has a very specific definition in the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP). Based on that definition, commentators Jerry Larson and Genette and Stuart Carleton contended it is impossible to get a material "adequately wet" before beginning removal. With reference to that stage of a project (before, but not during or after removal), the Department modifies the originally-published subparts to reflect the reality that a material need only be "wet" before beginning removal. This modification is found not to be a substantial change and the resulting subparts are found to be necessary and reasonable.

Encapsulation and Enclosure of Asbestos-Containing Material

65. In response to comments from Jeffrey Prescher, Frank Dickson and James Viskocil, the Department proposes to modify Part 4620.3572, item E, to be consistent with labeling requirements found in OSHA standards. The originally-published sentence is deleted and replaced with a requirement that encapsulated materials must be specially designated according to the appropriate portion of the Code of Federal Regulations to warn individuals who may disturb the material. This modification is found to be not a substantial change and the resulting item is necessary and reasonable.

66. A change identical to that in the preceding Finding is proposed at Part 4620.3573, item D, (Permanent enclosure of asbestos-containing material). For the reasons stated in the preceding Finding, the proposed modification is found not to be a substantial change and is found to be necessary and reasonable.

Completion of Abatement

67. It is suggested that the Department specify, at part 4620.3575, subpart 4, who is allowed to perform the visual inspection after removal of containment walls and floors. The subpart as proposed is found to be necessary and reasonable, but further clarification would be helpful to the regulated public.

68. Part 4620.3575, subpart 8 (Replacement of heating, ventilating and air conditioning system filters) is proposed for modification by the Department to clarify that filters only need to be changed when contamination is indicated by visual inspection. It is found that the proposed modification is not a substantial change but rather a

clarification that does not change the substantive meaning of the rule. The resultant subpart is found to be necessary and reasonable.

Glove Bag Procedures

69 Part 4620.3580 (Glove bag procedures) generated a great deal of comment and controversy. A "glove bag" is a bag, fitted with arms, through which limited types of asbestos-related work is performed. See Part 4620.3100, subpart 23. The proposed rule allows for a limit of the amount of asbestos to be removed using glove bag techniques. The limits are actually increased from the current rule, which allows removal only of up to ten linear or six square feet, to the present proposal of 25 linear or ten square feet per room. The Department believes the limit is reasonable because it allows for two vertical runs of asbestos-covered pipe to be removed from an average room using glove bag techniques. Such projects are common and the work is usually done in a specific area such as the corner of a room, where asbestos is not released throughout the room if precautions are taken.

70. The 25 linear foot or 10 square foot limits are the same numerical units that OSHA uses for "Class I" asbestos work. The Department notes that OSHA regulations were written to protect workers, who are typically protected with respirators and protective clothing and have been trained in asbestos-related work, whereas the Health Department is concerned primarily with protecting the general public, suggesting that the requirements proposed could be even more conservative. OSHA allows asbestos workers to take fewer precautions during glove bag operations when the employer can produce a negative exposure assessment. The Department argues that to loosen the standards to those allowed by OSHA is inappropriate in this case because to do so assumes that there is no difference between the types of asbestos to be removed, no difference between the job performed by the novice and the expert, and no difference between someone who is in a hurry and someone who does a careful job. The ALJ agrees with this argument.

71. Grayling Industries of Alpharetta, Georgia is the country's largest producer of glove bag equipment. In written comment from its President, Kurt Ross, and oral testimony at the hearing by company representative Ben Greene, the company attempted to persuade the ALJ that it has documented evidence that glove bag operations produce ambient levels of asbestos well below the rules' standard of 0.01 fibers per cubic centimeter. The Department has introduced data to show that sometimes, when trained workers are operating with glove bag equipment, the indoor air standard will not be exceeded while at other times, with the same worker performing removal using a glove bag, the standard will be exceeded. As a result, the Department believes that placing a 25 linear foot or 10 square foot limit on the amount of asbestos allowed to be removed using a glove bag is reasonable and has a rational basis.

72. At the hearing, Mr. Greene stated that no other state has size limitations in effect regarding asbestos removal using glove bags. (T. 122, 125) The Department replied in its March 6, 1996 comments that although it has not had time to research glove bag regulations of all states, both New York and Rhode Island have very clear size limitations on the use of glove bags. New York allows them only if the entire project is less than 25 linear feet or 10 square feet, and Rhode Island permits glove bag

procedures in abatement projects involving more than 260 linear feet or 160 square feet so long as the area in which the glove bag procedure occurs has both floor sheeting and wall sheeting (in essence, a containment is required). These two states with restrictions were ascertained by the Department even though its staff only had time to search the regulatory requirements for eight states.

73. The Administrative Law Judge finds that the Department's position, and its proposed rule as published originally, is necessary and reasonable. It has a rational basis, in that the protection of the general public is the Health Department's primary concern, and the danger of negative air not capturing all asbestos fibers released, with potential contamination remaining for carpets, desks and other items which are not covered in polyethylene and which may become contaminated during fiber release from the glove bag is a valid concern. An immediate concern from such releases is that small microscopic fibers reentrained into the air may be inhaled by the public returning to the work area. It is noted that the proposal actually increases the allowed level to "25/10" from "10/6", which is a concession to the regulated community and is found to be a reasonable proposal. The proposed rule is found to be needed and reasonable because to give the regulated community unfettered discretion over the use of glove bagging may compromise the Department's goal of public safety.

Mini-Containment Procedures

74. In response to comments suggesting that, for consistency, the Department make the same quantity allowances for mini-containment procedures as the Department is proposing for glove bag procedures, the MDH proposes to modify Part 4620.3581, subpart 1 to allow mini-containment in areas of less than 25 linear feet (instead of 10) or less than 10 square feet (instead of 6) of asbestos-containing material per room. The Department proposes adding also the same paragraph that is proposed, as modified, as the second paragraph of Part 4620.3580, subpart 1, regarding areas of facilities not accessible to the general public. These modifications are found to be not substantial changes, because it relaxes standards applicable to the regulated community without compromising public safety, and provides consistency with the proposal for glove bag procedures. Part 4620.3581, subpart 1, as proposed for modification, is found to be necessary and reasonable.

Indoor Air Monitoring

75. Commentators Brian Blesi and Joseph Schwartzbauer requested that the requirements for air sampling outside the containment be clarified, particularly in light of the fact that many asbestos-related work projects have 10 hour work days. As a result, Part 4620.3592, subpart 2, item A is proposed for modification to read:

"For each containment, two air samples must be collected simultaneously no less than once during every zero to five hour period ~~four hours~~ while abatement personnel are onsite performing asbestos-related work."

The proposed modification is found to be not a substantial change because it does not impose any additional burden on the regulated community and does not result in a fundamentally different rule. The proposed item, as modified, is found to be necessary and reasonable.

76. At Part 4620.3592, subpart 2, item D, the rule as published originally required that not more than 3000 liters of air be drawn through each sample cassette. The Department's purpose was to adopt a maximum air volume that could be drawn to prevent sample filter overloading due to excessive sampling periods. This proposal was objected to by commentators Prescher and Dickson because the limit conflicts with the National Institute for Occupational Safety and Health's (NIOSH) 7400 method, entitled "fibers", the method required in the proposed rule for sample analysis. The NIOSH 7400 method has been incorporated into the proposed rule by reference, and the Department agrees that it should depend on the proposed training requirements for persons performing air monitoring to prevent overloaded samples.

After reviewing the NIOSH 7400 method and finding that the 3000 liter limit does conflict with that methodology, the Department proposes to modify item D by deleting the sentence "Not more than 300 liters of air must be drawn through each sample cassette." at the beginning of the item. This modification is found not to be a substantial change because it provides consistency with other, controlling requirements. The modified item is found to be necessary and reasonable.

77. Commentator Joseph Schwartzbauer requested the option to analyze by transmission electron microscopy samples taken during a glove bag or mini-enclosure operation that exceed the indoor air standard or the alternative indoor air standard. The Department agrees such an option is appropriate, and proposes to add item F to Part 4620.3592, subpart . The proposed subpart reads

F. When elevated fiber concentrations in the asbestos work area are suspected to be from nonasbestos dust in the air, the asbestos work area may be reoccupied if the actions in this item are taken.

(1) The actions required in part 4620.3592, subpart 4, item A must be performed immediately.

(2) If the analysis results obtained according to part 4620.3592, subpart 4, item A indicate the concentration of asbestos fibers in the air

exceeds 0.01 fibers per cubic centimeter of air or if any indoor air sample is too heavily loaded to be quantitatively analyzed, the asbestos work area must be evacuated and the actions required in item E must be taken immediately."

The subpart and item referred to at proposed subitem F. (1) refers to the application of transmission electron microscopic analysis. The proposed modification is found not to be a substantial change because it responds to comment raised by the originally-published rules and does not impose any additional burden on the regulated community. The modified Part 4620.3592, subpart 5, is found to be necessary and reasonable.

Clearance Air Sampling

78. The Department proposes to modify Part 4620.3594, subpart 2, subitems F (1) and F (2) to clarify the proposed rule concerning aggressive air sampling techniques. As proposed originally, the subitems required that only floors, ceilings and walls within the containment be blown with a leaf blower. The Department notes asbestos fibers could potentially be on any surface within the containment. The Department also wants to clarify how many fans are required during clearance air sampling. It is found that the modification to subitems F (1) and F (2) and subpart 2 are not substantial changes, but are clarifying in nature. The subitems, as modified, are found to be necessary and reasonable.

General Requirements for Air Monitoring Sample Collection

79. Several commentators requested clarification on which individuals are allowed to collect air samples. In response, the Department proposes to modify Part 4620.3596, item A, by adding subitem (3), which will allow air sample collection to be performed by individuals who have completed the National Institute for Occupational Safety and Health (NIOSH) course number 582 or an equivalent before the effective date of the rule. The proposed new subitem is similar to existing Part 4620.3500, subpart 3, item A. No additional burden is imposed on the regulated community, and the modification is proposed in response to comment by those persons, so the additional language is found not to constitute a substantial change. Item A as modified, is found to be needed and reasonable.

80. Commentators Gary Ashley and Jay Hagstrom, noted that the requirements of Part 4620.3596, item C place an unreasonable burden on asbestos contractors by requiring the contractor to control the operation of the laboratory to which they submit samples. In response, the Department modifies item C to require only that contractors enter into agreements with laboratories specifying that results must be available orally or in writing no later than 48 hours after submission. This modification of the proposed rule is found not to be a substantial change because it eases the burden on the regulated community, was made in response to proposals in the rules as published, and does not result in a fundamentally different rule. The modified item C is found to be necessary and reasonable.

Phase Contrast Microscopy

81. Twenty persons commented on the requirement to have an independent party analyze air samples. In response, the Department believes it is necessary to return to the existing practice of allowing laboratories to perform both air sampling and analysis of those samples. The MDH is persuaded that a laboratory's quality assurance/quality control program and the training and experience of the person performing the analysis determines the quality of the analysis and that laboratory accreditations and analyst registry programs are important in ensuring accurate sampling.

82. The proposed changes to Part 4620.3597, subpart 4 are nearly identical to existing rule Part 4620.3500, subpart 3, item B, subitem (4). The Department also proposes adding a new subpart to provide for a phase-in for laboratories and environmental consultants who do not currently participate in recognized quality assurance/quality control programs, this at the suggestion of Charles Tye of Angstrom Analytical and Environmental Services. The modified subpart 4 and new subpart 5 are proposed to read as follows:

Subp. 4. **Transitional Air Sample Analysis.** Between the effective date of this part and one year after the effective date, air monitoring samples must be analyzed by ~~a person not affiliated with the person who collected the air samples and must be:~~

A. a laboratory that is accredited by the American Industrial Hygiene Association; or

B. an analyst ~~participating in~~ considered proficient by the American Industrial Hygiene Association's asbestos analyst registry program; or

C. A laboratory considered proficient in asbestos analysis by the American Industrial Hygiene Association (AIHA) Proficiency Analytical Testing (PAT) Program for phase contrast microscopy.

Subp. 5. **Air Sampling Analysis.** Beginning one year after the effective date of this part, air monitoring samples must be analyzed by:

A. a laboratory that is accredited by the American Industrial Hygiene Association; or

B. An analyst considered proficient by the American Industrial Hygiene Association's asbestos analyst registry program.

The modifications to subpart 4 and the additional subpart 5 of Part 4620.3597 are found not to constitute substantial changes and are found to be necessary and reasonable, as modified.

Transmission Electron Microscopy

83. In response to a comment from Mr. Prescher, the Department proposes to modify Part 4620.3598, subpart 1, item B (Use of alternative clearance standard) to recognize the current practice of allowing contractors the option of analyzing clearance air samples by transmission electron microscopy to distinguish between asbestos and

non-asbestos fibers, after the samples have first been analyzed by phase contrast microscopy and have a concentration greater than the clearance standard of 0.01 fibers per cubic centimeter. The proposed modification also recognizes the common practice of collecting air samples on filters with a pore size of 0.8 microns. To accomplish this, the MDH proposes to add the sentence "Both types of filter cassettes must contain a sample filter that has a pore size of 0.8 microns or smaller." at the end of item B. It is found that this modification of the proposed rule is not a substantial change because it is consistent with common practice and imposes no additional burden on the regulated community. The modified item is found to be necessary and reasonable.

Advance Notice and Amendments

84. Commentators Jim Viskocil and Dave Gutterud noted that no provision exists in the rules as published originally for changing instructors for a training course at the last minute due to an emergency. The Department intended such changes could be allowed for by an amendment to item B of Part 4620.3710, but that no provisions have been made in item A of the same part for training course providers to notify the Department regarding which instructors are to conduct a training course. Including such a requirement would allow an amendment of instructors at any point before the course begins under item B of the same part. The Department also notes that the reference in item D in this part is not correct and should refer to course curriculum or course material submitted with the original course permit application, so item D is proposed to be clarified to allow for an amendment of the date, time, location or course instructor, at any point before the course begins. The Department also proposes to modify item E to allow for an amendment of a course instructor, as long as information on the instructor is included in the training course provider's application for a training course permit. The proposed modifications and clarifications of Part 4620.3710 are found not to constitute substantial changes because they are made in response to comments elicited from the regulated community and impose no additional burdens on the regulated community. Part 4620.3710, as proposed for modification, is found to be necessary and reasonable.

Training Course Conditions

85. Commentators Viskocil and Gutterud noted that Part 4620.3716, subpart 4, item D, subitem 4 was, in their opinion, unnecessary. The Department agrees, and the language "ensure that there is an empty chair or at least three feet between participants" is proposed for deletion from the requirements for training courses. The proposed modification is found not to be a substantial change because it was made in response to comment from the regulated public, imposes no additional burden on it and does not result in a fundamentally different rule. Part 4620.3716, item D, as modified, is found to be necessary and reasonable.

Modifications Proposed In Response to Final Public Comments

86. In its final response on March 13, 1996, the Department noted that the modification it proposed for Part 4620.3200, subpart 1, item F on page 21 of its March 6, 1996 Memorandum should be deleted. The modification noted there was made correctly to Part 4620.3200, subpart 2, item F on page 22 of the same Memorandum.

87. With respect to Part 4620.3415, item D (Amendment of notice) the Department proposes to clarify the item by adding the term "delivery" to note that the Department currently accepts and will accept an amendment if delivered in person to the Department. The proposed modification is found not to constitute a substantial change, and item D of Part 4620.3415, as modified, is found to be necessary and reasonable.

88. Commentators Brian Haynack, Dave Horn and John O'Brien of Potlatch Corporation suggested that the Department allow the use of a non-recording manometer in the event of the failure of a recording manometer. The Department believes the suggestion is reasonable and proposes to modify subpart 4, item C of Part 4610.3570 (HEPA-filtered negative pressure) by adding the following subitem (6):

(6) In the event of a failure of a recording manometer during a project, the action in this subitem must be taken.

(i) An operating recording manometer must be placed in service within 24 hours of the failure of the initial recording manometer.

(ii) Until an operating recording manometer is placed in service, hourly pressure readings must be documented for all work shifts.

(iii) Documentation must be available at the work site for each failure of the recording manometer.

It is found that the addition of subitem (6) is not a substantial change because it is made in response to comment elicited by the publication of proposed rules in the State Register and does not impose an additional burden on the regulated community. It is found that Part 4620.3570, subpart 4, item C, as modified, is necessary and reasonable.

89. In response to a concern raised by Susan Will of the St. Paul Public Schools, who commented that Part 4620.3580, subpart 6, item E implied that using glove bag procedures was allowed only on piping, the Department proposes to modify the item by inserting the words "or other facility component" after the word "pipe". The Department states it was never its intention to limit glove bag procedures only to piping. As stated at 4620.3580, subpart 1, a glove bag can be used to remove square footage as well as linear footage of asbestos-containing material. The modification of the proposed item is found not to be a substantial change because it is a clarification made in response to comment, is consistent with common practice, does not impose an additional burden on the regulated community and does not result in a fundamentally different rule. Item E, as modified, is found to be necessary and reasonable.

90. In response to a comment from Jeffrey Prescher regarding Part 4620.3594, subpart 2, item F, subitems (1) and (2) (Clearance air sampling procedures), the Department notes that clearance air sampling is not required at the end of a mini-containment procedure if the mini-containment is removed by sealing the door and collapsing the containment using a HEPA-filter equipped vacuum. If the mini-containment is to be torn down, it must be cleared and air sampling is required. This is in response to Prescher's concern that mini-containments are not likely to withstand the force created by a one-horse leaf blower and that they are often designed to be

collapsed at the end of the procedure. He added that the cost to clear a mini-containment is not reasonable.

The Department agrees that aggressive air sampling techniques and the placement of fans necessary to ensure adequate air movement for air sampling in large containments is inappropriate for mini-containments. Therefore, the Department modifies item F, subitems (1) and (2). The new language is quoted below:

F. Clearance air sampling must be conducted as specified in subitems (1) to (3)

(1) Except for clearance air sampling specified in part 4620.3581, subpart 6, item G, subitem (2), before clearance air sampling, ~~floors, ceilings, and walls~~ all surfaces must be blown with the air from a one horsepower leaf blower to agitate the air and reentrain loose fibers in the air within the containment.

~~(2) Stationary fans must be used within the containment to agitate containment air during clearance air sampling. The stationary fans must be placed in locations that do not interfere with clearance air sampling.~~ Except for clearance air sampling specified in part 4620.3581, subpart 6, item G, subitem (2), stationary fans must be placed in locations that do not interfere with air monitoring equipment. Fan air must be directed toward the ceiling. One fan must be used for each 10,000 cubic foot of containment area.

(3) [no change].

Modification of the rule as proposed by the Department is not a substantial change because it is a clarification in response to comment and places no additional burden on the regulated community. The item, as modified, is found to be necessary and reasonable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department of Health gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).
4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.
6. That any Findings which might properly be termed Conclusions are hereby adopted as such.
7. That a Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 12th day of April 1996.

RICHARD C. LUIS

Administrative Law Judge

Reported: Janet Shaddix & Associates

Angie Threlkeld, Court Reporter

Transcript Prepared