

# SPECIAL Report



NATIONAL ROOFING CONTRACTORS ASSOCIATION

Dear Member,

September 8, 1997

On July 24, 1997, the U.S. Fifth Circuit Court of Appeals vacated the Occupational Safety and Health Administration's (OSHA's) shipyard and construction standards insofar as they regulate asphalt roof coatings and sealants that contain asbestos. Enclosed is a copy of the court's opinion.

As a result of this ruling, the installation, removal, repair and maintenance of asbestos-containing roof cements, coatings, and mastics are not regulated in any way by OSHA. The Environmental Protection Agency's (EPA's) regulations also generally are not applicable to the handling (i.e., installation or removal) of these products, unless they are in a friable condition. (EPA defines friable as, "any material containing more than 1 percent asbestos...that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.") These products are expected to be non-friable in virtually every situation.

In addition, the court's findings clarified that there is, "no evidence in the record that asbestos fibers can ever escape from roofing sealants and become airborne; in fact, the evidence in that record indicates that they cannot."

Although asbestos-containing cements, coatings and mastics no longer are regulated (in almost all cases), there still are a number of issues to consider. These include:

- Some insurance policies exclude coverage for asbestos-related claims. (This is not the case for workers' compensation insurance.) Contractors handling any ACRM should make sure they have liability insurance coverage for handling asbestos. This typically can be obtained through a pollution liability endorsement.
- A contract may include language that prohibits the installation of any asbestos materials. Contractors need to examine contract documents closely for such language, and if it exists, either use asbestos-free products or reach agreement to delete the contract language. In addition, contract documents should include hold-harmless language to limit the contractor's liability for third-party claims.
- Contractors should contact landfills and inquire about restrictions and costs for disposing ACRM. Even if a particular material is not regulated, a landfill may not accept it. And many landfills who will accept ACRM (even when it's not regulated) will charge a premium for handling it.
- NRCA previously has recommended that contractors discuss with building owners the use of asbestos-containing products, and obtain the building owner's consent (preferably in writing), prior to installing such products. The purpose of this recommendation was to minimize the risk that contractors might be sued for money damages, or even forced to

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replace newly installed roofing materials, by building owners who discover after the job that asbestos-containing materials have been installed without their knowledge or consent. NRCA is aware of instances in which building owners have brought such suits against roofing contractors in such circumstances. The Fifth Circuit decision reduces the likelihood of such suits in at least two ways. First, by eliminating the previous OSHA requirements applicable to the repair and removal of asbestos-containing roof cements, coatings and mastics, the Court's ruling creates an obstacle to potential claims that the installation of these products will lead to significantly higher regulatory costs to the building owner (e.g., when the materials are removed or repaired). Second, the Court's findings that asbestos fibers are not likely to be released from these products under any foreseeable circumstances undercuts allegations that these products present a health hazard to anyone. Nonetheless, some potential for such suits continues to exist. Even after the Fifth Circuit's decision, building owners may still bring claims based on increased regulatory and other costs, and state or local regulations (which can be more stringent than federal requirements).

In addition, despite the absence of any rational or scientific basis for fears about health hazards from the presence or use of asbestos-containing roof cements, coatings and mastics, some building owners simply do not want asbestos-containing materials in their buildings, period. Accordingly, NRCA continues to recommend, as a matter of prudent business judgement only (i.e., to minimize the potential for litigation, *not* on account of any federal regulatory requirement), that roofing contractors inform building owners -- and obtain their consent, in writing if possible -- prior to installing asbestos-containing products.

Contractors who choose to follow this recommendation should first ascertain whether any products they install contain asbestos. This may involve more than just examining the product labeling, because some asbestos-containing roof cements, coatings and mastics are *not* labeled as asbestos-containing. (OSHA's requirement for a hazard warning on the label of such products does not apply if the manufacturer has "objective data" that show asbestos fibers will not be released under reasonably foreseeable conditions.) Therefore, unless the product labeling states that it is asbestos-free, the contractor should contact the manufacturer or distributor to determine whether asbestos is an ingredient in the product.

- OSHA is expected to amend the asbestos regulation so that the "intact incidental" category for certain roofing materials will only include intact flashings. The installation, removal, repair and maintenance of cements, coatings and mastics no longer are regulated by OSHA.

It is possible that OSHA will appeal the court's decision, but it is not anticipated -- the ruling was definitive. Also, this was the only remaining legal challenge to OSHA's revised asbestos standards. However, state and local developments may be inconsistent with federal regulations. NRCA needs to be kept informed of these developments, and will assist wherever possible.