State of California
California Environmental Protection Agency
AIR RESOURCES BOARD

Supplement to the
Final Statement of Reasons for Rulemaking
Including Summary of Comments and Agency Response

PUBLIC HEARING TO CONSIDER THE PROPOSED AMENDMENTS TO THE ASBESTOS AIRBORNE TOXIC CONTROL MEASURE FOR SURFACING APPLICATIONS

Public Hearing Date: July 20, 2000
Agenda Item No: 00-7-4

Supplement Prepared July 13, 2001

(1) Set forth below is supplemental material which explains in greater detail the ARB's purpose and rationale for the necessity of the following subsections of the Asbestos Airborne Toxic Control Measure for Surfacing Applications (the "Asbestos ATCM;" section 93106, title 17, California Code of Regulations):

Subsection (d)(1)(A)-(D): The purpose of these requirements is to provide an aggregate purchaser with documentation that the material being purchased has no detectable asbestos content, and can thus be used for surfacing applications. These provisions came directly from section 93106(b)(3) of the1990 Asbestos ATCM, which states:

> "No person shall sell, supply, or offer for sale serpentine material for surfacing in California unless the serpentine material has been tested using ARB Test Method 435 and determined to have an asbestos content of five percent (5.0%) or less. Any person who sells, supplies, or offers for sale serpentine material that he or she represents, either orally or in writing, to be suitable for surfacing or to have an asbestos content that is five percent (5.0%) or less, shall provide to each purchaser or person receiving the serpentine material a written receipt which specifies the following information: the amount of serpentine material sold or supplied; the dates that the serpentine material was produced, sampled, tested, and supplied or sold; and the asbestos content of the serpentine material as measured by ARB Test Method 435. A copy of the receipt must, at all times, remain with the serpentine material during transit and surfacing."

Since these notice provisions have worked well since 1990, they were retained in the 2000 amendments to the ATCM. Modifications were made to the 1990 language to improve clarity and make it work with the structure of the 2000 amendments. The new subsection (d)(1)(A) corresponds to “the amount of serpentine material sold or supplied” in the 1990 ATCM; subsection (d)(1)(B) and (C) to “the dates that the serpentine material was produced, sampled, tested, and supplied or sold;” and subsection (d)(1)(D) to “the asbestos content of the serpentine material as measured by ARB Test Method 435.” Under subsection (d)(1)(C), the phrase “verification that the material is exempt under subsection (f)(7)” was added to address situations where material has been exempted from the ATCM requirements because a geologic evaluation of the property has been performed, and the results of the evaluation indicate that ultramafic rock or serpentine is not likely to be found on the property.

Subsections (d)(2)(A)-(C): Like the provisions of subsection (d)(1), these provisions came directly from section 93106(b)(3) of the1990 Asbestos ATCM, and were retained for the same reasons described above. For clarity, the 2000 amendments separate these requirements into two categories: the (d)(1) requirements for "producers of restricted material" (i.e., quarries), and the (d)(2) requirements for "persons--other than producers--who sell or supply restricted material" (i.e., "downstream" wholesalers and retailers of aggregate). With the requirements separated by category, clarity is improved because a person need only look at the subsection that is applicable to him or her. Also, subsection (d)(2) does not include the requirement of (d)(1)(C) that the receipt must include the dates that the restricted material was sampled and tested, or verification that the material is exempt because a geologic evaluation pursuant to (f)(7) was performed. This particular notice requirement was not included in (d)(2) because unlike producers of aggregate, "downstream" non-producers do not have ready access to or ability to verify this information.

Subsection (e)(2): This provision was taken directly from a provision in section 93106(b)(3) of the 1990 Asbestos ATCM, which states “A copy of the receipt must, at all times, remain with the serpentine material during transit and surfacing.” The 1990 language was slightly modified to improve clarity and to conform to the structure of the 2000 amendments. The basic purpose of this requirement is to allow an inspector at a job site to quickly verify that a truckload of material can legally be used for surfacing applications.

Subsection (e)(3): This provision was taken from section 93106(b)(4) of the 1990 Asbestos ATCM, which states:

> “Any person who sells, supplies, or offers for sale serpentine material, shall retain for a period of at least seven years from the date of sale or supply, copies of all receipts and copies of any analytical test results from asbestos testing of the serpentine material. All receipts and test results shall be provided to the Air Pollution Control Officer or his designee for review upon request.”

Since these provisions have worked well since 1990, they were retained in the 2000 amendments to the ATCM. Modifications were made to the 1990 language to improve clarity and make it work with the structure of the 2000 amendments. The basic purpose of subsection (e)(3) is to allow an inspector to check records for a surfacing job and determine if the regulation was complied with. The seven-year period for retaining records was the time period chosen in 1990 based on all of the evidence in the record, and it was retained in 2000 because it has been an effective requirement and there was no reason to change it.

Subsection (f)(3): This exemption existed in section 93106(c)(3) of the 1990 Asbestos ATCM. The exemption was dropped from the amendments that were initially proposed in 2000, but was reinstated after the ARB received a request to do so in a 45-day comment letter from the California Department of Transportation (CalTrans). The CalTrans comment and the ARB response are set forth in the FSOR under Comment No. 12.4.

Subsection (f)(4): This exemption existed in section 93106(c)(4) of the 1990 Asbestos ATCM and was retained in the 2000 amendments. The exemption is an obvious, common sense way to address emergencies. Modifications were made to the 1990 language to make it work with the structure of the 2000 amendments. One additional change made in the 2000 amendments was to shorten the duration of the exemption from six months to 90 days, because on reflection it was difficult for ARB staff to envision a true "emergency" (such as a landslide or a flood) that would last longer than 90 days. Shortening the exemption period to 90 days should prevent possible abuses, while providing an adequate margin of safety to deal with emergencies. In the unlikely event that an emergency lasts longer than 90 days, an applicant can simply reapply to the Air Pollution Control Officer for a new exemption.

Subsection (f)(7)(A) - (D): The provisions of subsection (f)(7)(A) for the geologic evaluation were developed through consultation with the staff of the Department of Conservation, Division of Mines and Geology (DMG). In their capacity as experts in geology matters, the DMG staff recommended these provisions as the minimum ones necessary to conduct a competent geologic evaluation for the presence of ultramafic rock or serpentine rock. Subsection (f)(7)(B) was added to ensure that the district responds to an application for an exemption in a timely manner, with 90 days being a generally accepted time period for these type of applications. Subsection (f)(7)(C) was also included to ensure the district provide written explanation for a denial of an exemption application, since it is only fair that an applicant be provided with explicit reasons why an application has been denied. Subsection (f)(7)(D) was included to ensure that the proponent understands that the exemption becomes null and void if ultramafic rock, serpentine rock, or asbestos is discovered on the exempted property. Discovery of any of these materials voids the very basis of the exemption, which is a determination by a geologist that "serpentine or ultramafic rock is not likely to be found on the property." Additional rationale regarding the geologic exemption can be found in the responses to Comments No. 9.1 through 9.8 in the FSOR.

Subsection (f)(8)(A) - (D): The basic provisions of subsection (f)(8)(A) – (D) appeared in the 2000 proposal under the heading of "Non-wearing surface", and are explained on page IV-6 of the Initial Statement of Reasons. The only significant changes made to the initial proposal are the nonsubstantial change to the title, and the addition of paragraphs (C) and (D). Paragraphs (C) and (D) are the same ones that are discussed above in the discussion on the Geologic Exemption, and were included for the same reasons. The basic purpose of the Limited Access Surface exemption is to address surfaces where material is needed for stabilization, such as slope cuts along highways and waterways or shorelines. The surface must have an incline of 20 percent or more (which is so steep that vehicular traffic is unlikely), and be in an area that is not zoned for residential, recreational, or commercial use (which means that pedestrian access is also unlikely).

Subsection (f)(9)(B) 1. - 4.: These provisions are contained in the exemption for remote locations. Subsections (f)(9)(B)1. - 3. were addressed in the Initial Statement of Reasons on page IV-6. Subsection (f)(9)(B)4. was included to address the potential for development in the area that could change the remote location status of the area. This provision places upon the proponent the responsibility of demonstrating that the area has remained a remote location over time.

Subsection (f)(9)(C) 1. - 6.: These provisions were added as part of the modifications that were made available for a 15-day comment period, and are explained in the 15-day notice. Additional description and rationale for this exemption can be found in the responses to Comments No. 11.1 to 11.6 in the FSOR. Basically, these provisions allow the use of material that has an asbestos content of one percent or greater in sparely populated areas, under very limited conditions. These conditions include requirements that specify that any potential receptor cannot be live or work in that location for more than six months in any year, the road or surface be located on private property, and whenever the traffic exceeds or is expected to exceed 20 vehicle passes per day, dust mitigation measures must be employed. Such conditions are intended to minimize public exposure to asbestos in areas where the public might be present temporarily, while also allowing an exemption for areas that are generally remote. The specific conditions listed in paragraph (C) were staff's attempt to identify situations where significant public exposure is most likely to occur based on risk calculations made by ARB staff and discussions with timber industry representatives. Timber industry representatives were consulted because logging operations often occur on private lands in remote or sparely populated locations.

Subsection (f)(9)(D): This provision was added to ensure that the district responds to an application for an exemption in a timely manner. Ninety days is a generally accepted time period to respond to these type of applications

Subsection (f)(9)(E): This provision was included to ensure that the district provide written explanation for a denial of an exemption application, since it is only fair that an applicant be provided explicit reasons why an application has been denied.

Subsection (g): Subsection (g) works in concert with the applicability section of the Asbestos ATCM, and addresses the potential for ultramafic rock, serpentine, or asbestos to be found outside of the geographic ultramafic rock units (GURUs), which are identified on the maps referenced in Appendix A to the ATCM. This subsection was added to provide the districts and the ARB Executive Officer with explicit authority to take appropriate action in situations where asbestos or asbestos-bearing materials may exist beyond the boundaries of the GURUs.

During the development of the amended ATCM before the start of the 45-day comment period, industry was concerned about the potential for testing to be required for essentially all aggregate-producing operations in the State, because of the broad definitions of ultramafic rock and serpentine that staff had drafted at that time. Under these earlier draft definitions of ultramafic rock and serpentine, the language was broad enough to include other rock types such as mafic and other igneous and metamorphic rocks. Because of the concerns expressed by industry, the proposed draft ATCM was modified to focus the main regulatory requirements of the ATCM upon the geographic areas of California where asbestos is most likely to found (i.e., GURUs). These geographic areas are indicated on geologic maps produced by the DMG, as referenced in Appendix A to the ATCM.

However, there exists the potential for asbestos to occur outside of the GURUs indicated on the maps. Subsection (g) addresses this potential, and is necessary because: (1) the maps referenced in Appendix A, while the best maps currently available statewide, are not detailed enough to indicate all of the ultramafic rock units that may exist throughout the State; (2) ultramafic rock is not the only rock with the potential for asbestos mineralization; other rock types such as dolomitic limestone and talc schist may also contain asbestos and are not addressed by ATCM requirements applicable to GURUs; (3) once information regarding the potential for the presence of asbestos outside of the GURUs is discovered by the district or the ARB Executive Officer, the district and the ARB need explicit authority to act on the information. Examples of such information might include geologic reports or evaluations that have been performed, the availability of more detailed geologic maps in the future, the discovery of asbestos in aggregate that has originated from a particular parcel of property, or information that the property is located in alluvial fans directly downstream from ultramafic rock deposits and may be contaminated with asbestos.

The ARB staff considered establishing criteria that would identify (and therefore limit) the circumstances under which a geologic evaluation or testing could be required by the district air pollution control officer (APCO) or the ARB Executive Officer. However, staff concluded that it was not possible to comprehensively list each potential situation under which asbestos might be located beyond the GURUs, or the types of information that may warrant further investigation. While the situations described in the previous paragraph are some of the ones in which asbestos may exist outside of GURUs, it is not possible to exhaustively list all such situations for the simple reason that geology in California is extremely variable. There are just too many unique situations to identify all the possible scenarios that could indicate that asbestos might be present. We believe it

is appropriate to make such decisions on a case-by-case basis, and not risk compromising public health by setting forth limiting criteria in subsection (g). Decisions to require testing or a geologic evaluation should be left to the reasonable discretion of the APCOs and the ARB Executive Officer.

At the suggestion of the Office of Administrative Law (OAL), however, the ARB has made one nonsubstantial modification to the language of section 93106(g). As suggested by OAL, the phrase "Pursuant to the requirements of Health and Safety Code section 41511" was added to the beginning of the first sentence in subsection (g). This is a nonsubstantial clarification that references the underlying statutory authority authorizing the APCO and the ARB Executive Officer to require a geologic evaluation or testing and clarifies, consistent with Health and Safety Code section 41511, that the determination to require these actions must be "reasonable" under the circumstances. This clarification should help to alleviate industry concerns that subsection (g) could be construed to authorize arbitrary or unreasonable actions by the APCOs or the ARB Executive Officer.

Subsection (h)(1): This subsection was added to ensure that there is a consistent method to identify ultramafic rock, because historically some degree of subjectivity has been involved in its identification. The specific language of this subsection was arrived at through consultation with DMG staff, who are the State's experts on geology matters. Further discussion of these provisions can be found in the response to Comment No. 18 in the 15-day comment section of the FSOR.

Subsection (h)(4)(A) - (C): These subsections allow the district to reduce the frequency that aggregate material used for surfacing must be tested, if it can be determined that a reduction in the frequency of testing is warranted. This subsection also includes a safeguard that requires the resumption of the original testing frequency if asbestos is detected in any of the samples tested. An indication that a reduction in the frequency of testing is warranted is an established history of analytical test results showing non-detection of asbestos, together with a geologic evaluation of the property which has determined that no asbestos is likely to present. In making the determination to allow a reduction in the frequency of testing, it is important for the district to have complete information. The specific information required to be submitted under this subsection is the minimum necessary for a district to make this determination.

Subsection (i)(20)(C): This inclusion of this subsection reflects a similar provision in the 1990 Asbestos ATCM (section 93106 (a)(10); the definition for "serpentine material"). The rationale for this provision is discussed in the FSOR under Comment No. 4.4.

The last sentence of subsection (i)(26): This sentence was added for clarity, to ensure that it is understood that the amended ATCM applies only to unpaved surfacing, and that the use asphalt and concrete paving is not considered to be "surfacing" for the purposes of the ATCM. This language is consistent with the exemption for asphalt and concrete materials that is contained in subsection (f)(5). The rationale for exempting these materials is that the chance of asbestos dust emissions is minimal from aggregate encapsulated in asphalt or concrete paving.

(2) Following is the determination required to be included in the Final Statement of Reasons by Government Code section 11346.9(a)(2):

The ARB has determined that the adoption of the amendments to the Asbestos ATCM will not impose a mandate upon or create costs or savings, as defined in Government Code section 11346.5(a)(6), to any school district. However, the ARB has determined that the adopted regulatory action will impose a mandate upon and create costs to local agencies (i.e., the local air pollution control and air quality management districts; the "districts"). The costs to the districts can be fully recovered by fees that are within the districts' authority to assess under Health and Safety Code sections 42311 and 40510. In other words, the districts have the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service within the meaning of section 17556 of the Government Code. Therefore, the Executive Officer has determined that the adoption of this regulatory action imposes no costs on local agencies that are required to be reimbursed by the State pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code, and does not impose a mandate on local agencies that is required to be reimbursed pursuant to Section 6 of Article XIII B of the California Constitution.

(3) Following is the determination required to be included in the Final Statement of Reasons by Government Code section 11346.9(a)(4):

The Air Resources Board (ARB) has determined that no alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the regulatory action was proposed, or would be as effective and less burdensome to affected private persons or businesses, than the action taken by the ARB.