

LEED NC & CS credit SSc3 Brownfield Remediation

Asbestos Abatement Compliance Path - NYC

The following CIR and subsequent ruling set a precedent for compliance to LEED NC & CS credit SSc3 Brownfield Remediation through asbestos abatement.

Credit Interpretation Request

Previous Credit Rulings assert that project with asbestos contamination remediated according to referenced codes can earn the Brownfield Redevelopment Credit only if the asbestos contamination is documented by means of an ASTM E1903-11 Phase II Environmental Site Assessment (ESA).

Our project performed a Phase II Subsurface Investigation; however, the asbestos contamination above the surface was documented in a separate assessment. This [Comprehensive Asbestos Survey assessment was performed in accordance with the EPA Reg. 40CFR Part 763 as regulated by and in accordance with the Toxic Substances Control Act \(TSCA\), New York State Industrial Code Rule 56, and the New York City Department of Health Title 15.](#)

According to the ASTM website, the ASTM E1903-97(2002) Standard Guide for Environmental Site Assessments: Phase II Environmental Site Assessment Process "covers a framework for employing good commercial and customary practices in conducting a Phase II environmental site assessment (ESA) of a parcel of commercial property with respect to the potential presence of a range of contaminants which are within the scope of CERCLA as well as petroleum products". Asbestos is not a petroleum product and it is not within the scope of the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA) Priority List of 275 Hazardous Substances.

The ASTM website further states that Phase II ESA's are "intended to provide assistance to users in satisfying the appropriate inquiry element of CERCLA's innocent purchaser defense, as defined in 42 U.S.C. § 9601(35)(B), where a previous assessment satisfying that element identified recognized environmental conditions". This illustrates that one of the principle reasons for performing a Phase II ESA is to protect purchasers from hidden liabilities due to contamination of a site. In our case, the property is not changing hands, and therefore a Phase II ESA was not required or appropriate for the assessment of asbestos.

[Because our property has been documented as contaminated by a standard equivalent to the referenced ASTM standard, and because our actions meet the intent to "rehabilitate damaged sites where development is complicated by real or perceived environmental contamination" above or below ground, we respectfully ask the USGBC to consider an asbestos assessment performed in accordance with the EPA Reg. 40CFR Part 763 to be considered equivalent to a Phase II ESA \(ASTM E1903-9\).](#) We can provide copies of the comprehensive asbestos investigation, which was performed by a certified asbestos investigator along with a copy of the remediation specification upon request or with our LEED Application.

Ruling

[EPA Reg. 40CFR Part 763 \(http://www.epa.gov/asbestos/2003pt763.txt\)](#) is acceptable for proving contamination of the site for purposes of this credit. Your LEED application must include executive summary-level content from the investigation's report, explaining the extent of contamination and required action. Follow an accepted standard for remediation, such as RCRA and NESHAPS, and summarize in a narrative, as requested in the LEED-NC Letter Template.

The scope and purpose of EPA Reg. 40CFR Part 763 is outlined below:

(a) This rule requires local education agencies to [identify friable and nonfriable asbestos-containing material \(ACM\)](#) in public and private elementary and secondary schools [by visually inspecting school buildings for such materials, sampling such materials if they are not assumed to be ACM,](#)

and having samples analyzed by appropriate techniques referred to in this rule. The rule requires local education agencies to submit management plans to the Governor of their State by October 12, 1988, begin to implement the plans by July 9, 1989, and complete implementation of the plans in a timely fashion. In addition, local education agencies are required to use persons who have been accredited to conduct inspections, reinspections, develop management plans, or perform response actions. The rule also includes recordkeeping requirements. Local education agencies may contractually delegate their duties under this rule, but they remain responsible for the proper performance of those duties. Local education agencies are encouraged to consult with EPA Regional Asbestos Coordinators, or if applicable, a State's lead agency designated by the State Governor, for assistance in complying with this rule.

(b) Local education agencies must provide for the transportation and disposal of asbestos in accordance with EPA's "Asbestos Waste Management Guidance." For convenience, applicable sections of this guidance are reprinted as Appendix D of this subpart. There are regulations in place, however, that affect transportation and disposal of asbestos waste generated by this rule. The transportation of asbestos waste is covered by the Department of Transportation (49 CFR part 173, subpart J) and disposal is covered by the National Emissions Standards for Hazardous Air Pollutants (NESHAP) (40 CFR part 61, subpart M).

Project Name

In the case of **Project Name** an asbestos survey was conducted in accordance with New York City Department of Environmental Protection Title 15 Chapter 1 – Asbestos Control Program and New York State Industrial Code Rule 56. To show compliance for LEED credit SSc3 the project must demonstrate equivalency between EPA Reg 40CFR Part 763 and the New York City and State regulations noted above.

From the paragraph above, EPA Reg 40CFR Part 763 requires the following:

1. The asbestos survey must be conducted persons who have been accredited to conduct inspections, reinspections, develop management plans, or perform response actions.
2. Identify friable and nonfriable asbestos-containing material (ACM) by visually inspecting school buildings for such materials, sampling such materials if they are not assumed to be ACM, and having samples analyzed by appropriate techniques referred to in this rule.
3. The rule includes recordkeeping requirements.

By comparison NYC DEP Title 15 and New York State Industrial Code Rule 56 require the following:

1. NYC DEP Title 15 Part 2, 1-36 states, "Sampling and analysis shall be performed by a third party who is contracted by the building owner and completely independent of all parties involved in the asbestos project." Also, per New York State Industrial Code Rule 56, "Any person who performs the limited tasks involved in the asbestos survey, identification and assessment of asbestos... shall possess a valid inspector certificate."
2. New York State Industrial Code Rule 56 subpart 5-e states, "The asbestos survey shall include a thorough inspection for and identification of all...asbestos material throughout the building/structure." That survey shall include "A visual inspection for PACM and suspect miscellaneous ACM throughout the building/structure." Also, NYC DEP Title 15 1-44(c) states "Bulk samples shall be analyzed and reported in accordance with Interim Method for

- the Determination of Asbestiform Materials in Bulk Insulation Samples found in 40 CFR Part 763, subpart F, Appendix A ... or other methods approved by the National Institute of Standards and Technology.”
3. NYC DEP Title 15 Par 1, 1-27 state, “The asbestos investigator shall maintain a permanent record as required under this section for every building survey/hazard assessment for asbestos that is conducted pursuant to or submitted in accordance with 1-22 through 1-27 of this chapter.”

The above comparison demonstrates that the NYC DEP Title 15 and New York State Industrial Code Rule 56 are equivalent to EPA Reg. 40 CFR Part 763 and thus are valid standards with which to demonstrate a site as contaminated.

The asbestos survey conducted at [Project Name](#) was conducted in accordance with NYC DEP Title 15 and New York State Industrial Code Rule 56. That survey established the presence asbestos and therefore contamination of the site.

LEED Compliance / Documentation

The asbestos survey at [Project Name](#) was conducted in accordance with standards shown to be equivalent to established LEED standards. That survey proves site contamination. The asbestos survey includes the extent of the contamination and required action.

The Developer will need to confirm that subsequent remediation followed an accepted standard, such as RCRA and NESHAPS.

A narrative outlining the above information will be required to complete the LEED template.