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LIKE A NEEDLE IN A HAYSTACK
IDENTIFYING AND MANAGING ASBESTOS CONTAMINATION

THE COLORADO BAR ASSOCIATION
REAL ESTATE SECTION
OCTOBER 4, 2018

A LexMundi Member



"On the plus side there's no evidence of asbestos."

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IS IT TRASH OR REGULATED ASBESTOS?

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PRESENTATION OVERVIEW

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- History of Asbestos in Soil (ACS) Regulations
- Overview of Regulatory Requirements
- ACS Management During Development
- ACS Remediation – the Voluntary Cleanup Program (VCUP)
- Practical Considerations
- The Stanley Marketplace
- Asbestos Abatement in Buildings

HISTORY OF ACS REGULATIONS

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- Regulations largely a result of ACS discovered at the Lowry Air Force Base redevelopment in 2005
- Air Force buried dormitories and other buildings as part of decommissioning
- Historic information did not alert the site developer (Lowry Redevelopment Authority) or homebuilders
- Residents already living on lots with ACS
- Colorado Department of Public Health and Environment (CDPHE) required homebuilders to remove ACS contaminated soil
 - Extensive soil sampling and removal of any detectable asbestos down to 2 feet
 - Cost to LRA and homebuilders--\$15 million

THE LOWRY AIR FORCE BASE

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NEWS

Judge says military should pay cost of cleaning up closed bases

By THE ASSOCIATED PRESS
March 6, 2007 at 9:43 am

DENVER-

The military must pay to clean up environmental contamination it caused at former installations that are closed and then sold for private development, a federal judge has ruled.

The ruling came in a lawsuit filed over the former Lowry Air Force Base in Denver but sets a precedent for similar cases at other closed bases, said attorney Michelle Kales.

Kales represented five housing developers who sued the Air Force over asbestos cleanup at Lowry. She said this was the first time a court had



ACS – REGULATORY OVERVIEW

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- **This is different than asbestos abatement in buildings!**
 - Solid Waste Regulations v. Air Quality Regulations
 - Regulation by CDPHE Waste Management Division v. Air Quality Division
 - Other regulations cover asbestos abatement in buildings
 - Air Quality Regulations -- “Regulation 8, Part B”
 - Federal NESHAPs

■ **ACS Regulation—6 CCR 1007-2, Part B, Section 5.5**

Who should care? Regulations apply to the Owner/Operator of any property with “Regulated Asbestos-Contaminated Soil” or “RACS” at which soil-disturbing activities are occurring or planned

- Requirements are triggered by disturbance of “Debris” during a soil disturbing activity
- If Debris is found, must: (a) determine if it is asbestos containing material (“ACM”) and (b) if ACM, whether it is RACS

■ The Alphabet Soup – Key Definitions:

- **Debris** – Any discarded material that contains or consists of any of the following: construction, renovation and demolition debris, building or facility components, components of building systems, components of pavement or drainage systems, industrial or machinery components, and/or mechanical components from motorized vehicles.
- **ACM – Asbestos Containing Material:** Any material that contains more than 1% asbestos
- **RACS – Regulated Asbestos Containing Material:** Soil, ash or debris (plus 6 inches in all directions of surrounding soil or other matrix material) containing (1) friable ACM, (2) various forms of non-friable ACM that has either become or has the a high probability of becoming friable, or (3) specifically identified broke, resized or damaged ACM such as asbestos cement, plaster, drywall, etc.

■ Key Definitions (cont.)

- **Non-RACS** – Soil or debris that contains only (1) intact non-damaged, non-friable ACM or (2) damaged non-friable ACM that does not have a high probability to release fibers as determined in the field by a CABI. Also includes a list of pre-determined Non-RACS.
- **CABI – Certified Asbestos Building Inspector:** Person certified in accordance with Regulation 8
- **QPM – Qualified Project Manager:** An individual who has the training and experience necessary to identify materials suspected of containing asbestos and who has the authority to make prompt decisions relating to management of such material, and who meets the training requirements of Regulation 5.5.3.

ACS – REGULATORY OVERVIEW (CONTINUED)

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- **Two different paths for addressing RACS on a Site:**
 - Management of RACS during development activities pursuant to Regulation 5.5
 - Sitewide remediation of RACS through the State Voluntary Cleanup Program
- **The “right” choice for a site largely depends on whether you need a cleanup assurance letter called a “no action determination.”**
- **Either way, the standards for management or remediation are driven by Regulation 5.5**

ACS – REGULATORY OVERVIEW (CONTINUED)

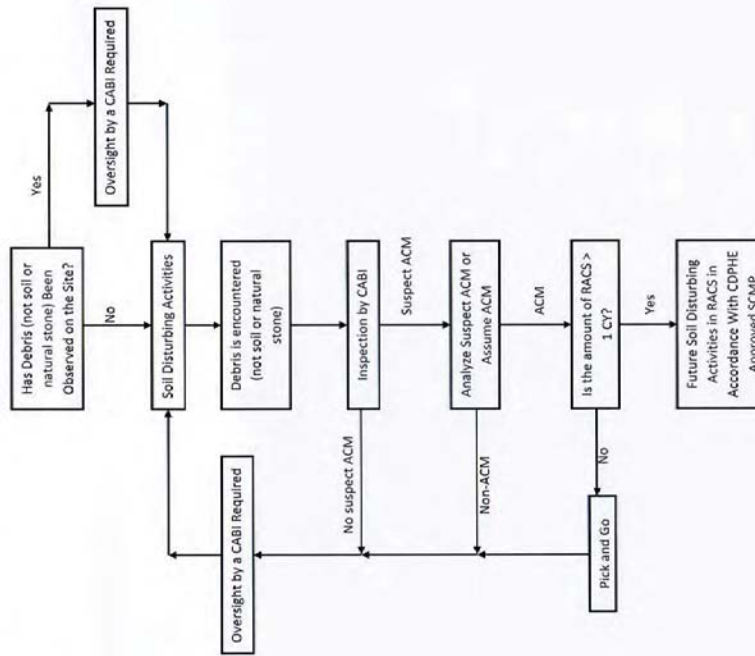
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■ **Planned RACS Management – Key Decision Points**

- Debris Discovered
 - Hire either a CABI or a QPM
 - Make ACM determination
 - If ACM, make RACS determination
- If RACS, future soil disturbing activities must be done in accordance with Regulation 5.5 or remediation plan
- Some exceptions including:
 - De minimis (less than 1 cubic yard)
 - Part of a building facility or covered by Air Quality Control Regulation 8
 - Homeowner projects (*i.e.*, landscaping, tree planting, installing a fence) on their own residence

DISCOVERY OF DEBRIS PRIOR TO OR DURING SOIL DISTURBING ACTIVITIES

FLOW CHART



■ **Planned RACS Management Approaches**

- Must follow one of three defined management strategies
 - Project specific RACS management plan (PSRMP)
 - Previously-approved standard operating procedures (SOPs)
 - Follow technical requirements of Section 5.5.7

ACS – REGULATORY OVERVIEW (CONTINUED)

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■ Must notify CDPHE prior to soil disturbing activities

COLORADO
Department of Public Health & Environment
Dedicated to protecting and improving the health and environment of the people of Colorado.

NOTIFICATION OF REGULATED ASBESTOS CONTAMINATED SOIL (RACS) DISTURBANCE

A map, figure, or drawing, to a registered engineering scale, depicting the project area(s) must be submitted with this form. The form, plan, or attachment, and description of the project area, can be emailed to asbestos@cdphe.gov, or mailed to: Colorado Department of Public Health and Environment, 160010-02 20th Street Long, State Waste Compliance Institute (SWI), see address below.

<p>Plan and area required:</p> <p><input type="checkbox"/> Planned management plan date: Description of planned soil-disturbing activities:</p>	<p><input type="checkbox"/> Unplanned discovery (within 24 hours of discovery): Discovery date and time: Description of activities resulting in RACS discovery/disturbance:</p>
<p>Description of any source and/or emission control measures already implemented at the site:</p>	<p>Description of type and quantity of RACS discovered/disturbance:</p>
<p><input type="checkbox"/> This is an EMERGENCY management event (submit this form within 24 hours of RACS discovery, and comply with the minimum standards to the extent possible during initial management, and fully comply within 48 hours). Detail the nature of the emergency (e.g., report to an active duty line).</p>	
<p>Check the box to indicate which management approach will be utilized on this project:</p>	
<p><input type="checkbox"/> Submit RACS Remediation Plan Submit RASP for Division review and approval with this form at least 10 working days prior to commencing RACS disturbing activities. RACS disturbance shall not commence until the RASP is approved. However, the 10 working days requirement from Section 5.2.7 of the Solid Waste Regulation may be used to the extent when the required notice.</p>	<p><input type="checkbox"/> Standard Remediation The standard requirements of RACS management are found in Section 5.2.7 of the Solid Waste Regulation. Notification shall be submitted to the Division prior to commencing RACS disturbing activities.</p>
<p><input type="checkbox"/> Standard Remediation The standard requirements of RACS management are found in Section 5.2.7 of the Solid Waste Regulation. Notification shall be submitted to the Division prior to commencing RACS disturbing activities.</p>	<p><input type="checkbox"/> Standard Remediation The standard requirements of RACS management are found in Section 5.2.7 of the Solid Waste Regulation. Notification shall be submitted to the Division prior to commencing RACS disturbing activities.</p>
<p>Please indicate which program this project will take place under: <input type="checkbox"/> Solid Waste (general) / <input type="checkbox"/> Voluntary Cleanup Program (VCLUP) / <input type="checkbox"/> Hazardous Waste Cleanup Action (HCWA) / <input type="checkbox"/> Federal Facilities or CERCLA / <input type="checkbox"/> Other (specify):</p>	
<p>Contact person for activity performing soil-disturbing activity:</p> <p>Organization, company or agency: Name: Email: Phone: Fax:</p>	
<p>Name of property owner/lessee: Email: Phone: Fax:</p>	
<p>Location of property (Street address or other location description): County: City: Zip:</p>	
<p>General site description: Received by: Date:</p>	

4000 Cherry Creek Drive S., Denver, CO 80246-1520 P 303-692-3000 www.colorado.gov/cdphe
John W. Wolkstein, Director
Larry Wash, JD, DPHM, Executive Director and Chief Medical Officer

ACS – REGULATORY OVERVIEW (CONTINUED)

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- **Heightened soil management, disposal and record-keeping –**
 - Establishing an identified “Regulated Work Area” and keeping area secure (*i.e.*, fencing)
 - Wetting or covering of soil
 - Wind speed monitoring
 - Air monitoring (in certain circumstances)
 - Work practice requirements
 - Soil loading and transportation requirements
 - Staging, stockpiling and storage requirements
 - Decontamination of equipment
 - Spill response
 - Requirements for RACS left in place
 - Documentation and record-keeping
 - Specific disposal requirements
- **Worker safety considerations**
 - Personal protective gear

- **Response to Unplanned RACS Discovery** – *What happens if you come across unexpected debris?*
 - Stop work, stabilize and secure site
 - CDPHE notification within 24 hours (notification form)
 - Follow one of the above-referenced RACS management plans

■ Contractor Selection

- Selecting the right contractor is key!
- Unless you have a QPM on staff, must be a certified asbestos contractor approved by CDPHE.
- Failure of the contractor to manage ACS correctly is your client's liability.
- List of certified individuals on State website:
 - <https://www.colorado.gov/pacific/cdphe/certified-individuals-consulting-firms-laboratories-and-disposal-sites-asbestos>

ACS – PRACTICAL CONSIDERATIONS

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- **ACS Considerations in Due Diligence**
 - Always better to know about asbestos risk before you start digging.
 - Phase 1/Site History—Previous building demolished, debris piles at site, evidence of historic landfill, old utility corridors?
 - What are use plans? Redevelopment? Significant soil disturbance?
 - Risk if discovered later—Significantly slow down development timeline and increase soil handling costs (e.g., Lowry neighborhood)

ACS – PRACTICAL CONSIDERATIONS (CONTINUED)

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- **If ACS is a known/likely risk, consider addressing in Purchase and Sale Contract**
 - Indemnity
 - Purchase price reduction
 - Environmental insurance for ACS
 - Factor increased costs into development proforma

REMEDIATING ACS—THE COLORADO VCUP

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- **What if you need a NAD Letter?**
 - Lender requirement
 - Comfort for a future purchaser
 - Ease tenant concerns
- **Remediation of ACS**
 - Must submit a remediation plan
 - Typically done in conjunction with VCUP when NAD is desired
 - Confirmation sampling likely
 - Section 5.5.7 or risk based approach

VOLUNTARY CLEANUP PROGRAM

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- **Statutory Authority—CRS 25-16-301, *et. seq.***

. . . to provide for the protection of human health and the environment and to foster the transfer, redevelopment, and reuse of facilities and sites that have been previously contaminated with hazardous substances or petroleum products.

VOLUNTARY CLEANUP PROGRAM (CONTINUED)

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■ **Key Features**

- Defined path for cleanup
- More certain and expedited timeframes
- State assurance letter at the end of cleanup—“no further action”
- Eligibility for tax credits

VCUP PROCESS

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■ Steps

- Identify past and future land uses
- Identify data gaps/sampling needs
- **Initial meeting with state**
- Fill in data gaps
- Submit plan (\$2,000 fee)
- Approval of plan within 45 days of complete application
- Initiate VCUP (i.e., start work) *within 12 months* and complete VCUP *within 24 months* after approval by the State
- Completion report
- No action determination (NAD) letter upon certification of completion report

■ **The NAD Letter**

- The State has 45 days to respond to a request for an NAD
- The NAD shall contain the basis for the determination and the following statement:

“Based upon the information provided by [insert name(s) of property owner(s)] concerning property located at [insert address], it is the opinion of the Colorado department of public health and environment that no further action is required to assure that this property, *when used for the purposes identified in the no action petition*, is protective of existing and proposed uses and does not pose an unacceptable risk to human health or the environment at the site.”

VCUP AND ENVIRONMENTAL COVENANTS

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- If you manage RACS on site, the site will need an environmental covenant.
- Subject to Certain Exceptions:
 - an environmental covenant... *shall be required* for any environmental remediation project in which the relevant regulatory authority makes a remedial decision on or after July 1, 2001, that would result in either or both of the following:
 - (a) Residual contamination at levels that have been determined to be safe for one or more specific uses, but not all uses; *or*
 - (b) Incorporation of an engineered feature or structure that requires monitoring, maintenance, or operation or that will not function as intended if it is disturbed.

THE STANLEY MARKETPLACE

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- Before:



THE STANLEY MARKETPLACE (CONTINUED)

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- Site of former military aircraft ejection seat design and testing facility and municipal landfill
 - Asbestos in soil from landfill operations
- VCUP and environmental covenant facilitated cleanup to commercial and residential use
- Challenges included a tight development timeframe to accommodate tenants
- VCUP and environmental covenant facilitated a more streamlined cleanup schedule

THE STANLEY MARKETPLACE (CONTINUED)

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- After:



ABATEMENT ASBESTOS IN BUILDINGS

--BRIEF OVERVIEW

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- Air Quality Control Commission Regulation 8
 - Complex and highly technical set of requirements
 - Certification and training requirements asbestos abatement contractors
 - Specific asbestos building inspection and reporting requirements
 - Abatement, renovation and demolition requirements
- Compliance and enforcement handled by CDPHE's Air Division
- Regulates abatement of ACM—material containing more than 1% asbestos
- Regulations designed to ensure asbestos does not become airborne
- Friable Asbestos is the Concern
 - “Friable means that the material, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.” *Regulation 8, I.B.50*

ABATEMENT ASBESTOS IN BUILDINGS

--BRIEF OVERVIEW (CONTINUED)

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- Like ACS, Regulation 8 requires a certified asbestos abatement contractor for inspection, abatement and demolition of ACM
- Notice to CDPHE required before abatement or demolition of a facility containing ACM greater than trigger levels
 - Single-family residential dwellings -- 50 linear feet on pipes, 32 square feet on other surfaces, or the volume equivalent of a 55-gallon drum.
 - All areas other than single-family residential dwellings -- 260 linear feet on pipes, 160 square feet on other surfaces, or the volume equivalent of a 55-gallon drum.
- **Asbestos survey before any building demolition is a good idea! The age of the building does not guarantee no ACM present.**

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