New PCB Regulations: What Contractors Should Know


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Risk of Hefty Penalties for Companies that Fail to Comply on Northern CA Projects; Southern CA May Soon Follow

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Contractors working on commercial renovation projects will soon be responsible for determining whether a building has polychlorinated biphenyls (PCBs) before they begin work.

PCBs are manmade chemicals that were used in building materials though the early 1980s. Considered an environmental contaminant, their disposal is increasingly regulated by federal and local laws. Indeed, several counties and cities in Northern California recently enacted rules, effective July of 2019, requiring that contractors test for PCBs prior to demolition activities.

Similar rules may be enacted in counties and cities in Southern California as they confront similar PCB issues. Unless contractors understand and anticipate the various types of PCB-containing building products they may encounter, and the requirements for testing, handling and disposal, they could face hefty penalties, injunctions and/or criminal sanctions.

What are PCBs?

PCBs are non-flammable, chemically resistant, stable compounds comprised of carbon, hydrogen, and chlorine atoms. The physical and chemical properties of PCBs made them highly desirable for use in hundreds of commercial and industrial applications. For example, PCBs were commonly used in electrical equipment such as transformers, capacitors, and fluorescent light ballasts. Because of PCBs' thermal stability, they were added to hydraulic oils and heat transfer fluids and utilized in thermal (pipe) and fiberglass insulation. Finally, because PCBs imparted weather resistance and plasticity, they were added to building products, including caulks, adhesives, and sealants.

These desirable physical and chemical characteristics also made PCBs an environmental contaminant. Once released into the environment, PCBs' chemical stability prevents them from naturally breaking down and allows them to persist indefinitely. PCBs attach to fine soil particles, where they can cycle through air, soil, and water, and bioaccumulate in the food chain.

Federal Regulations

In 1976, Congress passed the Toxic Substance Control Act (TSCA), which banned the manufacture of PCBs and granted the EPA authority to regulate any product containing 50 ppm (parts per million) or more PCBs. The EPA created two categories of PCB waste: PCB remediation waste and PCB bulk product waste. PCB remediation waste includes material contaminated with PCBs as a result of a spill, release, or other unauthorized disposal. PCB bulk product waste covers materials purposefully manufactured with PCBs.

Contractors are required to properly dispose of PCB-contaminated materials. In the past, contractors were required to separate PCB bulk product waste from PCB remediation waste, separately label the waste containers, and separately dispose of them at different landfills. As a practical matter, this meant that PCB-containing caulk, a PCB bulk product waste, had to be disposed separately from the other building materials which it contaminated, because the latter were considered PCB remediation waste. Separating the caulk from the attached building materials was an onerous, time-consuming, and costly task.

In 2012 the EPA streamlined the process, allowing certain PCB remediation waste to be disposed as bulk product waste, so long as the contaminated building materials were still attached to the original PCB-containing product. This allowed contractors to dispose of caulk and its adjoining substrates (for example, masonry and concrete) together.

In addition, the EPA guidelines recommend contractors utilize dust control measures, such as placing the containment area under negative air pressure, using high-efficiency particulate air (HEPA) machines, and employing tools that minimize dust generation and heat.

California Regulations

California's Department of Toxic Substances Control (DTSC), a part of Cal/EPA, regulates PCBs in our state. DTSC recommends similar best management practices as the EPA, such as wearing protective clothing, keeping work areas well ventilated, and using respirators.

However, California has a stricter threshold for the disposal of PCB-containing building materials. Any product containing more than

5 ppm PCBs (as opposed to 50 ppm at the federal level) is subject to California's hazardous waste regulations. DTSC regulations similarly govern the transport and disposal of PCB-contaminated products, but do not distinguish between remediation waste versus bulk product waste for disposal purposes.

Recent Focus on PCBs in Demolition Activities

In 2015, the EPA spearheaded a growing concern that PCBs might enter the environment through demolition or renovation activities. Indeed, unhealthy quantities of PCBs exist in the San Francisco Bay and runoff from building demolition activities was identified as a potential source.

PCBs are odorless and invisible to the naked eye, and thus cannot be detected without testing. However, EPA guidelines do not require that owners or contractors test for PCBs. This leaves a loophole where many owners claim ignorance that their construction project could be contaminating the environment, or that they need to pay the higher costs to comply with PCB regulations.

New PCB Rules in the Bay Area

To address this loophole, several counties and cities in the Bay area are now requiring contractors to test for PCBs as part of their demolition permit application.

Effective July 1, 2019, new rules will be implemented in the counties of Alameda, Contra Costa, Santa Clara, and the cities of Fairfield, Suisun, and Vallejo. These new rules are designed to prevent PCBs from entering the storm water system, focusing on the following building materials: caulking, sealants, rubber gaskets, adhesive/mastics, thermal insulation, and fiberglass insulation.

Under these new rules, contractors must perform an additional PCB Screening Assessment as part of their demolition permit application. The PCB Screening Assessment is analogous to the process for identifying asbestos-containing materials prior to demolition. First, the applicant must determine whether the building may have PCB-containing materials based on the building's age, use, and construction type.

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Representative Sampling Required

The PCB Screening Assessment focuses specifically on buildings constructed or renovated between 1950 and 1980. If the building could contain PCBs, then the applicant must take a representative sampling of priority building materials to determine whether PCB concentrations exceed 50 ppm.

The representative sampling must follow the Bay Area Stormwater Management Agencies Association's protocols for evaluating priority PCBs-containing materials before building demolition. These protocols require the representative samples be analyzed by a certified analytical laboratory. If PCBs are detected, the applicant must submit a report of all PCB concentrations in priority building materials. The applicant must then comply with all federal and state PCB disposal requirements during demolition.

In light of these new demolition permit application requirements, contractors bidding on Bay Area projects should ask project owners whether prior PCB sampling reports exist. If not, contractors should carefully review the bid documents to determine whether the building's type, age, and prior use make it a likely candidate for PCB-containing building materials.

Contractors bidding on projects that may contain PCBs should factor in additional costs for the PCB screening assessment as part of the demolition permit application, and costs for PCB disposal.

PCB Penalties

The TSCA is a strict liability statute. This means that violations are determined without regard to the violator's intent or knowledge. Failure to comply with federal PCB disposal regulations may result in a notice of noncompliance, civil fines, and/or criminal sanctions.

California penalties are even harsher. Failure to follow DTSC's hazardous waste regulations can result in fines up to $70,000 per day.

Takeaways

PCBs in storm water systems are not limited to the Bay Area. Los Angeles County recently discovered PCBs in its storm water system and in May filed a lawsuit against Monsanto to recover damages. Similar lawsuits have been filed by the City of San Diego, San Diego Unified Port District, and the City of Oakland.

Given the trend towards expanding environmental regulations and lawsuits addressing PCBs, contractors should develop best practices for the testing, handling, and disposal of construction debris to avoid liability for this environmental contaminant.

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