

# Coal Plant Shutdowns: Operators Should Implement Their Document Retention Policies And Protect Against Future Asbestos Claims

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As far as contamination concerns go, asbestos-containing materials (ACM) are generally way down the list of issues at a shutdown coal plant. You hire certified contractors, bag the ACM and dispose of it in approved landfills. Now you are good to go, right? Maybe not.

The larger significance of needing an asbestos removal contractor as you take down the plant is the confirmation that the plant used asbestos. Asbestos, as everyone knows, is the subject of thousands and thousands of lawsuits that have bankrupted scores and scores of companies. What may be less well known is that asbestos injury (and therefore litigation) is expected to be with us through 2050. Indeed, although the incidence of mesothelioma in the general population peaked almost 20 years ago, today's incidence still remains at half that level. Thus, your consultant's report of the proper disposal of plant ACM at an approved landfill is likely not to be the last time you hear the word "asbestos" in the same breath as the name of the plant.

What can you – a prudent operator – do to mitigate exposure to future asbestos claims? At a minimum, do three things. First, keep track of where asbestos was found, and where it was not, and retain those records. An asbestos claim will be proved by an injured employee or contractor by asserting exposure during a particular task or in a specific place. The records generated and reviewed by the asbestos removal contractor will precisely locate all asbestos in the plant at the time of demolition and thus may be able to disprove a claimant's allegations.

Second, recognize that a worker cannot be exposed if the worker arrived before the asbestos was placed, arrived after it was encapsulated, or never worked in an asbestos area (leaving aside claims based on ventilation or clothing transport). Therefore, employment records and contractor documents may be essential to limiting the scope or viability of a claim.

Third, while asbestos is virtually uninsurable today, during the heyday of asbestos use, general liability insurance policies carried no asbestos exclusions. Thus, policies issued 35, 40 and 50 years ago may provide a literal treasure trove should asbestos claims surface today or in the future.

Retention of these specific types of documents should not be addressed piecemeal. Rather, as you close down your plant, ensure that your document retention policy is implemented. Depending on the terms of the policy, it will capture – or not capture – these documents. Retention policies have been validated by the U.S. Supreme Court: “Under ordinary circumstances, it is not wrongful for a manager to instruct his employees to comply with a valid document retention policy, even though the policy, in part, is created to keep certain information from others, including the Government.” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005). As the Seventh Circuit so elegantly stated: “There is no legal duty to be a pack rat.” *Fidelity National Title v. Intercounty National Title*, 412 F.3d 745, 751 (7th Cir. 2005).

Management supervising the closure of a coal plant, however, should avoid applying a simple anti-pack-rat policy. Whether to retain certain records should be a business decision based on the future need for such documents. If that requires reevaluation of your document retention policy, then do so.