BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF TOXIC SUBSTANCES

In re ADVANCE NOTICE OF PROPOSED RULEMAKING ON ASBESTOS-CONTAINING MATERIALS IN SCHOOL BUILDINGS	Docket No. OTS 61004

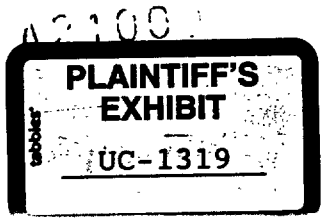
COMMENTS OF THE ASBESTOS INFORMATION ASSOCIATION OF NORTH AMERICA

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COMMENTS OF THE ASBESTOS INFORMATION ASSOCIATION OF NORTH AMERICA

INTRODUCTION

The Asbestos Information Association of North America ("AIA/NA")[1/] believes that the action contemplated by EPA's Advance Notice of Proposed Rulemaking on Asbestos-Containing Materials in School Buildings, 44 Fed. Reg. 54676 (September 20, 1979) (the "ANPRM"), is not an appropriate way to identify asbestos-containing school materials which warrant corrective action. Specifically, AIA/NA fears that initiation of formal rulemaking proceedings under the Toxic Substances Control Act ("TSCA") might unnecessarily disrupt and delay ongoing local efforts without significant countervailing benefits.

As discussed in Part I of these Comments, local programs for identifying and correcting major problems, with the aid of EPA's Technical Assistance Program, are already making progress. A formal TSCA rulemaking proceeding could all but halt these promising local programs. Because of the

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1/ AIA/NA is an incorporated, non-profit organization, founded in December 1970, whose members represent all phases of the manufacture, processing and use of products containing asbestos fiber, as well as the mining, milling and sale of asbestos fiber. AIA/NA's objectives include the provision and exchange of industry-wide information concerning the heath effects of asbestos, control methodologies, and the benefits of asbestos-containing products, as well as cooperation with government agencies in developing and implementing standards affecting asbestos.

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many novel legal and procedural questions involved, it might take years to accomplish what the voluntary Technical Assistance Program could accomplish much sooner and more efficiently to society as a whole.

For example, AIA/NA is particularly concerned about the extravagant proposals of the Environmental Defense Fund ("EDF") to impose the financial or regulatory burdens of any rule under Section 6(a) of TSCA on manufacturers or processors of asbestos-containing materials. Part II of these Comments shows that EDF's proposals (or any other provisions requiring manufacturers or processors to undertake compliance or to pay the costs of compliance by others) would present insuperable legal and practical obstacles that are likely only to delay accomplishing the result sought by both EPA and AIA/NA. Accordingly, even if EPA should decide to commence formal TSCA rulemaking proceedings, its proposed rule should definitively reject EDF's (or any other) proposal for saddling the asbestos industry with the financial or practical burdens of compliance.

EDF's proposal is only one of many troublesome obstacles to the swift adoption of a TSCA rule by EPA. The predicate for a TSCA rulemaking -- i.e., the existence of "an unreasonable risk of injury to health or the environment" -- has not and cannot be established here.[2/] Protracted rulemaking

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2/ Accordingly, there is no statutory basis for making any of the provisions of a proposed rule immediately effective. See 15 U.S.C. § 2605(d)(2)(A).

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proceedings and litigation may be needed to resolve these and other complex legal and practical issues. Accordingly, the better approach is for EPA to encourage and promote the cooperative efforts already underway in connection with EPA's Technical Assistance Program.

I. FORMAL RULEMAKING PROCEEDINGS UNDER TSCA ARE LIKELY TO DELAY AND DISRUPT ONGOING COOPERATIVE ACTIVITIES UNDER EPA'S TECHNICAL ASSISTANCE PROGRAM.

As EPA observes, a rulemaking which addresses asbestos-containing materials in schoolbuildings "will raise many complex issues which have not yet been decided under TSCA." 44 Fed. Reg. 54676 (September 20, 1979). But because EPA views the problem of asbestos exposure in schools as demanding immediate attention, it apparently hopes to promulgate a final rule as early as June 1980.

While EPA's desire to act quickly is laudable, AIA/NA believes that EPA may have assigned itself an impossible task. TSCA requires the Agency to have a substantial and detailed evidentiary basis before promulgating a final rule. For example, as EPA has acknowledged, there are a series of detailed "findings which EPA must make before a rule under section 6(a) of TSCA can be effective." 44 Fed. Reg. 20293 n.20 (April 4, 1979) (emphasis in original). Under Section 6(c) of TSCA, such "findings" include the following:

> (A) the effects of such substance or mixture on health and the magnitude of the exposure of human beings to such substance or mixture,

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> (B) the effects of such substance or mixture on the environment and the magnitude of the exposure of the environment to such substance or mixture,
>
> (C) the benefits of such substance or mixture for various uses and the availability of substitutes for such uses, and
>
> (D) the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.

15 U.S.C. § 2605(c)(1).

These findings, together with any other considerations relevant to the rulemaking, must be "supported by substantial evidence in the rulemaking record considered as a whole." 15 U.S.C. § 2618(c)(1)(i). This means that EPA must assemble a substantial evidentiary record on each pertinent issue -- a time-consuming task. For example, as EPA itself has observed, "[e]valuating the effects of a rule on the economy, small business, and technological innovation would be especially difficult," particularly since "[t]his evaluation would have to be made on a nationwide basis." 44 Fed. Reg. 20295 (April 4, 1979).

The time needed to assemble an adequate record and develop a rule which can survive judicial review may be even greater in this particular instance, for as noted above, many of the issues involved are complex and previously untested. As illustrated in Part II of these Comments,3/

3/ Apart from the legal and practical difficulties discussed in Part II, other issues which could generate

(Footnote 3 continued on next page)

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were it not for the fact that the mere existence of formal TSCA rulemaking proceedings is likely to inhibit ongoing local efforts to solve the problem.

As EPA has recognized, significant local programs were already in progress well before EPA formally initiated its Technical Assistance Program on March 23, 1979 (44 Fed. Reg. 17790).6/ This relatively-new Technical Assistance Program -- the purpose of which "is to encourage and instruct state and local officials in inspecting buildings, sampling for asbestos, evaluating the hazard posed by damaged or deteriorating asbestos-containing material, and taking appropriate remedial action" (44 Fed. Reg. 20292 (April 4, 1979)) -- is certain to expand, stimulate and improve the pre-exising local activity.7/ In fact, EPA has already predicted that this "non-regulatory program . . . will lead to broad-scale reduction in exposure to asbestos in schools," so that "any need for federal regulatory action will be eliminated in whole or in major part." 44 Fed. Reg. 20293 (April 4, 1979).

6/ As of October 1978, 31 states had programs to identify and correct serious asbestos-related risks in schools, and 21 of these state programs were considered "active." 44 Fed. Reg. 20293 (April 4, 1979).

7/ Indeed, informal EPA contacts with state officials prior to the official commencement of the Technical Assistance Program had already produced significant results even before March 1979. See 44 Fed. Reg. 20293 (April 4, 1979).

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Formal rulemaking proceedings under TSCA are likely to scuttle many of these local programs. In the first place, the broad preemptive provisions of Section 18 of TSCA[8/] would certainly create "a powerful disincentive to state or local statutory or regulatory action." 44 Fed. Reg. 20294 (April 4, 1979). Moreover, with the prospect of a TSCA rule, many states and school districts may decide to defer their current programs rather than run the risk that the rule EPA ultimately adopts will render previous activity largely wasted.[9/] And the uncertainties surrounding the availability of funding from asbestos manufacturers and processors could, as EPA has recognized, create still another "powerful financial disincentive to prompt, effective action on the state and local level." 44 Fed. Reg. 20294 (April 4, 1979).

EPA's decision to initiate rulemaking proceedings despite these acknowledged realities is based primarily on

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8/ With only very narrow exceptions, once EPA has promulgated a rule for asbestos under Section 6 of TSCA, "no state or political subdivision of a state may . . . establish or continue in effect, any requirement which is applicable to [asbestos] or an article containing [asbestos], and which is designed to protect against [asbestos-related] risk." 15 U.S.C. § 2617(a)(2)(B).

9/ Although the ANPRM expresses an expectation that "[a]ny rule implemented by EPA will adhere closely to the guidance published as part of the technical assistance program" (44 Fed. Reg. 54677 (September 20, 1979)), there is simply no guarantee that this will in fact happen after the numerous legal and practical issues involved are fully ventilated during hearings.

the "reason[ing]" that "if it began promptly to work on the rule, it could have a regulation in place if the technical assistance program failed to adequately reduce the risk from asbestos in schools." 44 Fed. Reg. 54677 (September 20, 1979).10/ This "reasoning," however, is misconceived in at least two respects.

First, as we have already pointed out, the mere existence of formal TSCA proceedings endangers the success of existing cooperative programs at local levels. Thus, far from assuring the swift implementation of an appropriate program for controlling school exposure to asbestos, a proposed rule (with the protracted rulemaking proceedings that would surely follow) would only serve to delay a solution.

Second, AIA/NA believes that the benefits and likely success of the ongoing voluntary program have been understated by EPA. The program should be given a chance to work. As the potential hazards posed by damaged and deteriorating asbestos-containing materials become more widely understood in local communities, appropriate corrective

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10/ Other reasons cited by EPA include (i) the resources it now has available for conducting the rulemaking, (ii) the additional technical knowledge it has acquired, and (iii) its confidence in its ability to develop criteria to trigger corrective requirements. 44 Fed. Reg. 54677 (September 20, 1979); 44 Fed. Reg. 40900-01 (July 13, 1979). These factors, of course, show only that EPA is capable of developing a rule. They have nothing to do with whether rulemaking proceedings are now necessary or appropriate.

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measures will inevitably follow. Certainly there is no reason to expect that the states and school districts (as well as politically influential parent and teacher groups) will decline to participate in a voluntary program.

In sum, AIA/NA believes that the formal proposal of a TSCA rule would be counterproductive. The sole result would be months or even years of unnecessary delay. Accordingly, the better course would be for EPA to emphasize voluntary local action through an expanded Technical Assistance Program.

II. SHOULD EPA DECIDE TO FORMALLY PROPOSE A RULE, IT SHOULD REJECT PROPOSALS FOR PLACING REGULATORY OR FINANCIAL RESPONSIBILITY ON MANUFACTURERS OR PROCESSORS OF ASBESTOS-CONTAINING MATERIALS.

Quite apart from the chilling effect that formal TSCA proceedings might have on promising local programs, AIA/NA is especially troubled by suggestions in the ANPRM that manufacturers and processors of asbestos-containing materials might be made responsible for paying for, or actually undertaking, the requirements ultimately imposed by a school-asbestos rule.

As discussed below, there are two compelling reasons why any formal proposal under TSCA should definitively rule out these suggestions. First, there is simply no scheme for placing the regulatory or financial burden of a school-asbestos rule on manufacturers or processors which is either workable

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school districts for the costs of complying with a school-asbestos rule are beyond EPA's statutory power under TSCA and, in any event, are impracticable. See 44 Fed. Reg. 54679 (September 20, 1979). Section 6(a)(7) of TSCA authorizes EPA to promulgate a rule requiring manufacturers or processors "to replace or repurchase" a substance found to present an unreasonable risk of injury, "as elected by the person to which the requirement is directed." 15 U.S.C. § 2605(a)(7)(C) (emphasis added). To extend the plain meaning of the words "replace" or "repurchase" to cover the entirely different concept of reimbursement for the costs of removal is contrary to both the statutory language[11/] and legislative history.[12/] A fortiori, EPA cannot require

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11/ The term "repurchase" plainly refers only to a refund of the original purchase price. Nothing in the legislative history, common usage of this term, or the administration of analagous statutory provisions, suggests that a "repurchase" requirement imposes liability even for transaction costs, much less for ancillary removal expenses.

Nor does the term "replace" authorize a removal requirement. For one thing, the term "replace" cannot reasonably be extended to cover "removal." See p.15, n.17, infra. And, even if "replace" and "removal" could somehow be equated, Section 6(a)(7)(C) gives manufacturers or processors the right to refuse "replacement" and to refund the original purchase price instead.

12/ EPA itself has noted that the legislative history of Section 6(a)(7)(C) "suggests that Congress was concerned about the small businessman who might otherwise be 'saddled with large inventories of otherwise unusable products.' S. Rep. No. 94-698, 94th Cong., 2d Sess. 12 (1976)." 44 Fed. Reg. 20294 (April 4, 1979) (emphasis added). The references to "inventories" and "usability" suggest that Congress was concerned with products that have not been consumed -- hardly the case with asbestos-containing materials in schools.

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manufacturers or processors to pay the costs of complying with other requirements of a school-asbestos rule, including surveys, sampling, exposure assessments, marking, encapsulation, enclosure, and periodic re-evaluations.

In any event, a requirement that manufacturers or processors reimburse states and school districts for the costs of compliance is simply not practicable. As both EDF and EPA have conceded, "it may be extremely difficult if not impossible to trace particular shipments of [asbestos-containing materials] to ultimate use . . . in individual buildings." 44 Fed. Reg. 20294 (April 4, 1979) (citing EDF Petition).

Indeed, materials in large-scale construction projects commonly change hands many times. In the case of asbestos-containing materials used in schools, these transactions generally occurred 10 to 40 years ago. A reimbursement program would necessarily require identification of the party that actually applied or installed the material (frequently a sub-contractor which has ceased business long ago), and then to accurately trace backwards through each link in the commercial chain. Such a task is nothing short of impossible in many, if not most cases.

EDF proposes to avoid these difficulties by assessing liability based on historical market shares. But this idea, too, is both beyond EPA's statutory authority and wholly impracticable. As discussed above, the terms "repurchase" and "replace" do not cover the costs of compliance with a

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school-asbestos rule. Nothing in the statutory language[13] or the legislative history contemplates the assessment of liability on a market share basis. Nor is there any precedent for such a plan -- termed "a novel approach" by EPA (44 Fed. Reg. 20294 (April 4, 1979)) -- under the analagous provisions of the Consumer Product Safety Act or the Federal Hazardous Substances Act.[14] Moreover, EDF's "novel" suggestion raises serious constitutional questions[15] as well as insurmountable practical obstacles.[16]

13/ The terms "repurchase" and "replace" suggest that Section 6(a)(7)(C) was not intended to impose vicarious liability on a person who was not responsible for the original manufacturing or processing of materials installed in a given school.

14/ See 44 Fed. Reg. 20294 n.26 (April 4, 1979).

15/ EDF's proposal may transgress a number of constitutional constraints on governmental action, including the prohibition on deprivation of property without due process or law. Cf. Allied Structural Steel Co. v. Spannus, 438 U.S. 234 (1978); Railroad Retirement Board v. Alton Ry. Co., 295 U.S. 330 (1935); Fornaris v. Ridge Tool Co., 423 F.2d 563 (1st Cir.), rev'd on other grounds, 400 U.S. 41 (1970).

16/ EDF's proposal would engender vigorous and probably unresolvable factual disputes concerning the accuracy of market share data, particularly in the case of dated information. In addition, it would be virtually impossible to determine which manufacturers and processors sold materials that were ultimately used in schools, rather than other buildings.

Even if accurate market-share information were available, other issues would generate great controversy. For example, EPA would have to decide how to apportion liability among the various mining, milling, manufacturing and processing steps that constitute the chain of production. Moreover, as suggested by analagous statutory schemes (e.g., the

(Footnote 16 continued on next page)

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closed from requiring manufacturers or processors to remove asbestos-containing materials, since paragraph (7)(C) allows "the person to which the requirement is directed" to refuse replacement and to "elect" to "repurchase" instead. 15 U.S.C. § 2605(a)(7)(C) (emphasis added).

Moreover, although paragraph (5) of subsection 6(a) allows EPA to "regulat[e] any manner or method of commercial use" of asbestos-containing materials posing an unreasonable risk in schools (15 U.S.C. § 2605(a)(5)), such a regulation could not apply to manufacturers or processors, which have discontinued "commercial use" of these materials pursuant to EPA regulations. See 44 Fed. Reg. 20291 & n.5 (April 4, 1979); 44 Fed. Reg. 17791 (March 23, 1979).

A similar result is reached when EPA's authority under TSCA to impose survey, sampling, marking, or periodic re-evaluation requirements on manufacturers or processors is considered. None of these requirements can be justified under any of the regulatory options available to EPA under subsection 6(a).[18/]

Finally, even assuming that EPA had statutory authority to impose some or all of these compliance obligations on

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18/ As discussed above, subparagraph (7)(C) does not authorize imposing these requirements on manufacturers or processors. In addition, Paragraphs (3) and (4) do not provide EPA with the power to impose survey, sampling, marking, or re-evaluation requirements on manufacturers or processors with respect to products which have left their control and entered the stream of commerce.

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manufacturers or processors, the same practical obstacles which render impracticable the financial reimbursement proposals discussed above would come into play. In short, it would be impossible to apportion these compliance obligations among manufacturers and processors in any sensible way.19/

B. Further Consideration or Adoption of any Scheme for Placing the Financial or Regulatory Burden of a School-Asbestos Rule on Manufacturers or Processors Would Indefinitely Delay the Implementation of an Appropriate Program.

Even more important than the legal and practical impediments discussed above is the inevitable delay that will result even from the formal publication of a proposal for passing the burden of a school-asbestos rule onto manufacturers and processors.

19/ Another practical roadblock, expressly acknowledged in the ANPRM, is the question of whether all manufacturers and processors have the financial resources, technical know-how and familiarity with local circumstances needed to expedite compliance. EPA correctly observes that:

> The states and school districts, as operators of the facilities in which asbestos may be found, would appear to be in the best position to carry out the necessary actions. State and school district officials have been the major participants in EPA's technical assistance program. Participation of the state officials would assist the administration of the program and may decrease variability in taking action.

44 Fed. Reg. 54679 (September 20, 1979).

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For one thing, the adoption of such a provision would surely produce vigorous and protracted disputes, including possible litigation. Such litigation could involve the validity of the rule itself and even embroil school districts and manufacturers or processors in localized disputes over liability, resulting, as EPA has recognized, in "significant delays to the rulemaking." 44 Fed. Reg. 54679 (September 20, 1979).

In the meantime, ongoing voluntary programs at the local level would likely grind to a halt pending final resolution of the funding issues. As discussed above, states and school districts might be inclined to defer action (involving the expenditure of scarce local funds) in the hope of financial relief through an EPA rule. Moreover, other sources of available funding -- including particularly the remedial legislation now pending before Congress[20/] -- might never be tapped if EPA proposed a rule raising the prospect of financial relief from manufacturers and processors of asbestos-containing materials. Accordingly, the inevitable result of even proposing to include manufacturers

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20/ Significantly, the House Committee on Education and Labor has reported a bill (H.R. 3282) which would provide federal funding to the states for the detection and removal of asbestos-containing materials from schoolbuildings. See H. Rep. No. 96-197, 96th Cong., 1st Sess. (1979). H.R. 3282 is now on the House Calendar scheduled for debate.

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and processors in a school-asbestos rule would be an unnecessary delay in the implementation of an appropriate program.

CONCLUSION

The discussion above makes it apparent that the formal commencement of rulemaking proceedings under TSCA is not warranted. Such action will only impede promising local programs and delay the identification of asbestos-containing school materials needing corrective action, particularly if the proposal does not definitively rule out provisions for passing the financial or regulatory burdens of the rule onto manfacturers and processors. Accordingly, the better course is for EPA to decline formal regulatory action, and, instead, to encourage and expand its existing cooperative program.

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