PLAINTIFF'S EXHIBIT

UC-3164

UNION CARBIDE CORPORATION 39 OLD RIDGEBURY ROAD, DANBURY, CT 06817-0001
Health, Safety and Environmental Affairs
Chemicals and Plastics Group

July 13, 1987

Mr. John A. Pendergrass
Assistant Secretary of Labor for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Request for Interpretation of Asbestos Construction Standard, 29 C.F.R. § 1926.58(e)

Dear Mr. Pendergrass:

On behalf of Union Carbide Corporation ("Union Carbide"), I am writing to request an interpretation of a provision of the asbestos construction standard, 29 C.F.R. § 1926.58(e), pertaining to requirements for the use of negative pressure enclosures for asbestos removal, demolition, and renovation operations. Specifically, the question is whether paragraph (e)(6) is subject to the limitations of paragraph (e)(1), which provides that regulated area procedures are only required in work areas where airborne concentrations of asbestos "exceed or can reasonably be expected to exceed the permissible exposure limit". Union Carbide believes that (e)(6) is subject to (e)(1), and accordingly that negative pressure enclosures are not required in work areas where airborne concentrations of asbestos cannot reasonably be expected to exceed the PEL because of alternative engineering and work practice controls. A related question is what kind of data and how much data will be sufficient to establish that airborne concentrations of asbestos cannot reasonably be expected to exceed the PEL.

As an example, consider a large-scale project to remove Transite, a building material which contains non-friable asbestos. The project would entail removal of bolts and intact Transite boards using wet methods. Objective data in the form of air monitoring results for asbestos from previous similar removal operations indicate that with the use of wet methods it can reasonably be expected that airborne concentrations of asbestos will be below the PEL. Even assuming that use of a negative pressure enclosure is feasible in that situation (a question in itself), such use should not be required under paragraph (e)(6) because of paragraph (e)(1).

The only natural interpretation of paragraph (e) is that (e)(1) applies to all subsequent provisions in paragraph (e), since its caption is "General". There is nothing in (e)(6) to indicate that it is somehow not subject to (e)(1).

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This interpretation is supported by the definition of the term "regulated area" which appears in paragraph (b):

> "Regulated area" means an area established by the employer to demarcate areas where airborne concentrations of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals exceed or can reasonably be expected to exceed the permissible exposure limit. The regulated area may take the form of (1) a temporary enclosure, as required by paragraph (e)(6) of this section, or (2) an area demarcated in any manner that minimizes the number of employees exposed to asbestos, tremolite, anthophyllite or actinolite.

(Emphasis added.) The definition clearly regards the negative- pressure enclosure requirement of (e)(6) as a kind of regulated area which need only be established where airborne concentrations reasonably may be expected to exceed the PEL.

In addition, OSHA has given several interpretations that (e)(6) is subject to (e)(1). In a letter of October 30, 1986 to Mr. Thomas A. Kupferer (item 46 in an OSHA printout of general correspondence regarding the asbestos standard), you stated:

> The intent of 1926.58(e) is to require a negative pressure enclosure only where a regulated area is required. Regulated areas are established only where asbestos concentrations exceed the permissible exposure limit . . . . Depending on the nature and extent of exposure, the requirement for a negative pressure enclosure may not be necessary in your case.

Similarly, in a letter of October 10, 1986 to Mr. Daniel E. Hoffman of National Steel Corporation (item 49 in the printout), Charles E. Adkins, Acting Director of Health Standards Programs, wrote:

> The intent of 1926.58(e) is to require a negative pressure enclosure and "competent person" only where a regulated area is established . . . . Regulated areas are established only where concentrations exceed the PEL . . . .
>
> Your second issue dealt with the type of operations that could qualify for exemption from the requirements of paragraph (e)(6). It should be noted that any operation can qualify for exemption provided airborne levels of asbestos are kept at or below 0.2 f/cc [TWA_8]. This can best be accomplished by means of engineering controls used in conjunction with appropriate work practices since these two methods, when used either singly or in combination can be employed effectively to reduce asbestos exposures to below 0.2 f/cc [TWA_8]. The exemption from paragraph (e)(6), therefore, does not depend on the length of time it takes to complete a job or the magnitude of the job.

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In addition, at a meeting of the CMA Health Programs Task Group in Washington on June 23, 1987, John Martonik, Deputy Director for Health Standards Programs, told me that:

(1) Removal, demolition, and renovation operations were not intended to be treated separately from installation, maintenance, or other handling operations, and would not require establishment of a regulated area if it can be shown that airborne concentrations will not exceed or reasonably be expected to exceed the PEL;

(2) For a specific job involving the removal of Transite, as long as it can be shown that concentrations will not exceed the PEL, establishment of a regulated area is not required and the job does not require a negative pressure enclosure;

(3) "Objective data" can be used to demonstrate that the PEL will not be exceeded. See 29 C.F.R. § 1926.58 (f)(2)(ii). This could include data from other similar previously completed jobs and does not need to be initial data from the current job.

An interpretation would be helpful because of ambiguous statements in the standard's preamble which could be construed (incorrectly, we believe) to establish an irrebutable presumption that by their very nature, removal, demolition, and renovation operations (other than small-scale, short-duration operations) will necessarily be expected to exceed the PEL. For example, the following statements appear at 51 Fed. Reg. 22612, 22706 (June 20, 1986):

> Paragraph (a)(2) includes in the scope operations involving the removal or encapsulation of asbestos-containing products. Such asbestos abatement projects are typically associated with the highest asbestos exposures occurring in construction . . . .
>
> The revised standard addresses the high hazard potential of work in the asbestos abatement portion of the construction industry by applying separate and stringent requirements to these operations. For example, employers engaged in such work are required to establish negative-pressure barriers enclosing the area where such work is taking place (paragraph (e)(6)) . . . .

Union Carbide believes that such statements may be true for certain asbestos abatement projects, but that they are not true for all such projects, given the use of appropriate engineering and work practice controls (other than negative-pressure enclosures).

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In addition, the preamble contains statements which could be construed (incorrectly, we believe) to regard the (e)(6) negative-pressure enclosure requirement as independent of the (e)(1) limitation that airborne exposures must reasonably be expected to exceed the PEL. For example, at 22707 the preamble states:

> The definition of "regulated area" in the revised asbestos standard covers two types of regulated areas: the negative-pressure enclosures mandated in paragraph (e)(6) for major asbestos abatement operations, and the restricted access required wherever airborne asbestos concentrations exceed or can reasonably be expected to exceed the PEL. The fact that the revised standard contains requirements for two types of regulated areas reflects both the wide differences in construction worksites and OSHA's approach in this standard to dealing with this wide range in exposure conditions.

(Emphasis added.) As noted above, the definition of "regulated area" explicitly makes the (e)(6) requirement subject to the (e)(1) limitation. Similarly, p. 22710 of the preamble states:

> Paragraph (e) of the revised construction standard contains provisions requiring employers to establish regulated areas when certain types of construction work are performed or when the PEL is exceeded.

(Emphasis added.) We believe these statements are best interpreted to refer to the two kinds of regulated areas, one which is solely triggered by a reasonable expectation of exceeding the PEL, and the other which has that trigger and, in addition, the requirement that certain types of construction work be engaged in.

Assuming that (e)(1) does apply to (e)(6), it would be helpful to receive guidance on what kind of data and how much may be used to establish in appropriate instances that airborne concentrations of asbestos cannot be reasonably expected to exceed the PEL due to the use of appropriate engineering and work practice controls. For example, would monitoring data from similar operations in the past be sufficient? If so, is it necessary to document the engineering and work practice controls in use while the monitoring was performed? Would data indicating that the material to be removed contains asbestos in a form where it is unlikely to be released upon removal be sufficient?

Thank you for your assistance in this matter.

Sincerely,

Robert E. Plevan

Robert E. Plevan
Assistant Director,
Occupational Health
Chemicals & Plastics Group

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cc: Mr. John Martonik