PLAINTIFF'S EXHIBIT

UC-3702

UC 149-2

UNION CARBIDE

INTERNAL CORRESPONDENCE

NOV

METALS DIVISION • P. O. BOX 579 · 4625 ROYAL AVE., NIAGARA FALLS, NEW YORK 14302

To (Name) Mr. J. L. Myers
Division UCC - Metals
Location Niagara Falls, New York

Date November 8, 1979

Originating Dept. "Calidria" Asbestos

Answering letter date

Subject AIA/NA Response to EPA's Advanced Notice of Proposed Rulemaking on Asbestos-Containing Materials in Schools

Copy to Messrs.
T. W. Carmody (w/attach.)
T. D. Finnigan "
R. F. X. Fusaro/J.J. Sibley "
R. W. Rebholz "
J. W. Whittlesey "

Attached is the AIA/NA response to the above-noted ANPRM. This response was largely developed by the law firm of Kirkland and Ellis, who have been retained by the AIA/NA as special counsel for regulatory matters.

As you are all aware, Union Carbide has never supplied product for the kind of friable, generally sprayed, products of primary concern in this rulemaking. Substantial amounts of our asbestos have, however, been used as a minor ingredient in certain types of mineral wool board used in ceilings and in sprayed, non-friable, decorative coatings.

Our principal concern in the present rulemaking is the introduction of the principle of retroactive industry guilt by association that has been proposed by the EDF petition. This principle has implications far beyond asbestos to any product which is judged to be toxic and could, therefore, if established have a massive impact on Union Carbide.

In my opinion, Kirkland and Ellis have done a very capable job in addressing this issue but there are some points regarding the tone and organization of the presentation that make me a little uneasy. Although it is too late to change this response, K&E will be very much involved over the next two months preparing responses to the EPA and CPSC ANPRM's regarding new general asbestos regulations. Any comments you feel worth making on the present document would be appreciated.

H. B. Rhodes

Harrison B. Rhodes

/rmm
Attachment

UCC 006241

ASBESTOS INFORMATION ASSOCIATION
NORTH AMERICA
1745 Jefferson Davis Highway, Crystal Square 4, Suite 509
Arlington, Virginia 22202 • (703) 979-1150

5 November 1979

COPY

Document Control Officer
Attn: Joni T. Repasch
Office of Toxic Substances, TS-793
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

RECEIVED
NOV 1979
UCC-CALIDRIA
NIAGARA

Re: Document Control Number 61004

Gentlemen:

By notice in the Federal Register of September 20, comments were invited on EPA's Advance Notice of Proposal Rulemakings (ANPRM), "Asbestos-Containing Materials in School Buildings." This Association has reviewed the ANPRM and desires to submit the enclosed comments for the record.

The Asbestos Information Association/North America (AIA/NA) is an incorporated, non-profit organization of 55 firms in the United States and Canada engaged in the mining/milling or sale of asbestos fiber and in the manufacture or processing of asbestos-containing products. A pamphlet describing the work of AIA/NA is enclosed.

Sincerely,

B. J. Pigg
Executive Director

Enclosure

bcc: Executive Committee
Standards Advisory Committee

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 2 of 22 asbestosclaims.law/library/18426/2

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

Edward W. Warren
L. Mark Wine
Arthur F. Sampson, III
Seth H. Tievsky

KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Counsel for the Asbestos
Information Association
of North America

November 5, 1979

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 3 of 22 **asbestosclaims.law/library/18426/3**

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. FORMAL RULEMAKING PROCEEDINGS UNDER TSCA ARE LIKELY TO DELAY AND DISRUPT ONGOING COOPERATIVE ACTIVITIES UNDER EPA'S TECHNICAL ASSISTANCE PROGRAM	3
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	9
A. Proposals to Place the Regulatory or Financial Burdens of Compliance on Manufacturers or Processors of Asbestos-Containing Materials Raise Overwhelming Legal and Practical Obstacles	10
1. Compliance cost reimbursement proposals are impractical and legally impermissible	10
2. EPA lacks authority under TSCA to require manufacturers or processors to undertake compliance with a school-asbestos rule	14
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	16
CONCLUSION	18

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 4 of 22 **asbestosclaims.law/library/18426/4**

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

---

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.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 5 of 22 asbestosclaims.law/library/18426/5

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

---

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).

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 6 of 22 asbestosclaims.law/library/18426/6

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,

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 7 of 22 asbestosclaims.law/library/18426/7

(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)

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 8 of 22 asbestosclaims.law/library/18426/8

some of these legal and factual questions could be the subject of considerable controversy which might result in further delay.4/ Even those states and school districts which now have active programs might have strong reservations about the intervention of inflexible federal regulations.5/

The time needed for EPA to develop and put into effect an enforceable TSCA rule would not be so serious a concern

---

(Footnote 3 continued from previous page)

substantial disagreement include: whether Section 6(a) of TSCA authorizes a rule which requires inspection, sampling and "periodic re-evaluation"; whether removal of asbestos-containing materials or the closing of school buildings constitute "the least burdensome requirements"; and whether the criteria EPA ultimately selects for corrective action are directed at risks that are "unreasonable" under TSCA.

4/ As EPA has previously observed:

> Some of the actions [involved] are not explicitly authorized by TSCA. This is not to say that the authority for the requested action does not exist. However, there are a number of interpretative problems, and substantive challenges to EPA action are a real possibility. Success by opponents of regulatory action could severely undermine the value of a section 6 rule or nullify it entirely.

44 Fed. Reg. 20294 (April 4, 1979).

5/ EPA has recognized that voluntary corrective action "can be more finely tailored than a broad-brush federal regulation would likley allow. The cooperative program is thus a more flexible approach, allowing faster remedial action in the short run . . ., but in a much less disruptive fashion" than a TSCA rule would involve. 44 Fed. Reg. 20293 (April 4, 1979).

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on Asb... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 9 of 22 asbestosclaims.law/library/18426/9

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).

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 10 of 22 asbestosclaims.law/library/18426/10

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

---

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.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 11 of 22 asbestosclaims.law/library/18426/11

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

---

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.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 12 of 22 asbestosclaims.law/library/18426/12

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

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 13 of 22 asbestosclaims.law/library/18426/13

or legally permissible under TSCA. And second, further consideration or adoption of such a scheme would likely result in indefinite delays in the implementation of an appropriate program.

A. Proposals to Place the Regulatory or Financial Burdens of Compliance on Manufacturers or Processors of Asbestos-Containing Materials Raise Overwhelming Legal and Practical Obstacles.

The ANPRM requests comment on two general approaches for passing the burden of a school-asbestos rule onto manufacturers and processors of asbestos-containing materials. One approach would require manufacturers or processors to reimburse the states and school districts for all or part of the costs of complying with the requirements of the rule, including inspection, sampling, exposure assessment, marking, corrective measures and periodic re-evaluation. The alternative would make manufacturers or processors directly responsible for complying with all or some of these requirements. 44 Fed. Reg. 54679 (September 20, 1979). As discussed below, the enormous legal and practical difficulties raised by both of these approaches underscores the wisdom of EPA's preliminary determination that they should not be included in the school-asbestos rule contemplated by the ANPRM.

1. Compliance cost reimbursement proposals are impractical and legally impermissible.

As EPA has already acknowledged, proposals for requiring manufacturers and processors to reimburse states and

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 14 of 22 asbestosclaims.law/library/18426/14

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

---

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.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 15 of 22 asbestosclaims.law/library/18426/15

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

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 16 of 22 asbestosclaims.law/library/18426/16

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)

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 17 of 22 asbestosclaims.law/library/18426/17

2. EPA lacks authority under TSCA to require manufacturers or processors to undertake compliance with a school-asbestos rule.

EPA would fare no better if it attempted to impose on manufacturers or processors the obligation of complying with any of the requirements which EPA is considering as part of a school-asbestos rule. EPA is without statutory power to require manufacturers or processors to undertake compliance with any of these requirements, and perhaps the best example is the contemplated removal provision.

EPA cites paragraphs (5) and (7)(C) of subsection 6(a) of TSCA as possible authority for requiring manufacturers and processors to remove (or, possibly, to encapsulate or enclose) asbestos-containing materials in schools. 44 Fed. Reg. 54680 (September 20, 1979). But, as detailed above, paragraph (7)(C) authorizes only "replacement" or "repurchase." Even if the term "replace" could somehow be stretched to cover "removal,"[17/] EPA would still be fore-

---

(Footnote 16 continued from previous page)

Consumer Product Safety Act, 15 U.S.C. § 2064(d)(3)) and the principles of common law equity, EPA would have to provide for an offset from the purchase price for depreciation of the value of the materials involved. Such a provision would surely create a tidal wave of individual disputes between school districts and manufacturers and processors of asbestos-containing materials.

17/ The term "replace" plainly refers only to the provision of a substitute material. Since manufacturers or processors were not responsible for the original installation of asbestos-containing materials in the schools, they cannot be held liable for removing these materials or installing substitute products.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 18 of 22 asbestosclaims.law/library/18426/18

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

---

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.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 19 of 22 asbestosclaims.law/library/18426/19

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).

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 20 of 22 asbestosclaims.law/library/18426/20

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

---

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.

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 21 of 22 asbestosclaims.law/library/18426/21

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.

Respectfully submitted,



Edward W. Warren
L. Mark Wine
Arthur F. Sampson, III
Seth H. Tievsky

KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Counsel for the Asbestos
Information Association
of North America

November 5, 1979

Union Carbide trial exhibit UC-3702: H. B. Rhodes to J. L. Myers Forwarding the AIA/NA Comments to EPA on As... Published by AsbestosClaims.Law
ACL Doc 18426 · Page 22 of 22 **asbestosclaims.law/library/18426/22**