

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Comments on Proposed Significant New Use Rule for Asbestos under Section 5(a)(2) of the Amended Toxic Substances Control Act

Submitted via Regulations.gov (August 10, 2018)

Docket ID EPA-HQ-OPPT-2018-0159

Safer Chemicals Healthy Families and the undersigned groups submit these comments on EPA's June 11, 2018 proposal to designate manufacture and importation of certain asbestos-containing products as "significant new uses" of asbestos requiring notification under section 5(a)(2) of the Toxic Substances Control Act (TSCA). 83 Federal Register 26922. The commenters are public health and environmental organizations committed to assuring the safety of chemicals used in our homes, workplaces and the many products to which our families and children are exposed each day. They took a leadership role during the TSCA legislative process, advocating the most protective and effective legislation possible to reduce the risks of toxic chemicals in use today.

These comments make three recommendations:

1. While a SNUR is one tool to track and potentially restrict or ban discontinued unsafe products before they re-enter commerce, the overwhelming evidence of asbestos' dangers to public health dictates that the best long-term course is to address such products in EPA's ongoing risk evaluation for asbestos. This would enable EPA to determine that current and former uses present an unreasonable risk of injury and then to ban them permanently under section 6 of TSCA, consistent with the extensive risk analysis supporting EPA's 1989 asbestos ban rule. For substances like asbestos, a SNUR will create needless uncertainty in the marketplace and fail to protect public health because it merely requires notice of the reintroduction of discontinued uses and offers no assurance that these uses will be prohibited despite their demonstrated risks to exposed populations. We believe that EPA's TSCA section 6 authority extends to discontinued uses of unsafe products in appropriate cases like this one.
2. EPA's SNUR should be finalized solely as a stopgap measure to prevent reintroduction of unsafe products while EPA completes its risk evaluation and subsequent risk management rulemaking. The scope of the SNUR should be broadened beyond the specific products identified in EPA's proposal to cover *all* asbestos uses except those that EPA has determined are ongoing in its asbestos problem formulation. Mining of asbestos in the US should be designated as a significant new use because there is no legal restriction on its resumption.
3. By failing to require export notification for asbestos-containing articles under section 12(b), the proposal would deprive countries receiving export shipments from the US of any meaningful information about the exposure of their citizens to asbestos. The final rule should

reverse this approach and provide that section 12(b) requirements apply to asbestos-containing articles.

I. PUBLIC HEALTH WILL BE BEST SERVED IF EPA INCLUDES PREVIOUSLY MANUFACTURED ASBESTOS PRODUCTS IN ITS ONGOING RISK EVALUATION AND DETERMINES THAT THEY PRESENT AN UNREASONABLE RISK RATHER THAN LEAVING THE DOOR OPEN TO THEIR RE-INTRODUCTION UNDER A SNUR

Along with nine other substances, asbestos is the subject of an ongoing risk evaluation under section 6(b) of TSCA. If EPA determines in that evaluation that asbestos presents an unreasonable risk of injury, the uses addressed by this determination would need to be banned or restricted through a rule under TSCA section 6(a).

For asbestos and other chemicals, EPA's recent problem formulations exclude all discontinued products and uses from the scope of the ongoing risk evaluations. This means that EPA will not address their risks under section 6(b) and will lack the immediate ability to regulate them under section 6(a). As a result, there will be no legal barriers to reintroduction of these products and uses in the future. Where EPA has determined that ongoing uses of a chemical present an unreasonable risk and should be restricted, the absence of equivalent restrictions on discontinued products and uses could pose a serious risk to public health should they re-enter commerce.

A significant new use rule (SNUR) under TSCA section 5(a)(2) is one vehicle for tracking and potentially restricting the resumption of chemical uses that have been phased out. However, SNURs have drawbacks compared to risk evaluations and rulemaking under section 6. SNURs do not include findings of unreasonable risk. They are also fundamentally notification requirements. The activities they define as "significant new uses" are not prohibited. Companies seeking to conduct these activities must notify EPA at least 90 days before initiating them. The Agency can then determine that the notified uses may or do present an unreasonable risk and should be restricted using EPA's authorities under section 5(e) or section 5(f). However, EPA has discretion under these provisions and may or may not take regulatory action. Importantly, EPA's review of significant new use notices (SNUNs) and decisions to invoke sections 5(e) and 5(f) lack the elements of openness and accountability that apply during section 6 risk evaluations and rulemakings. Decisions EPA makes to prohibit or allow particular uses under section 5 receive limited public and judicial review.

Contrary to EPA's understanding, discontinuance of a previously widespread use does not automatically place it beyond the reach of section 6 risk evaluation and management authorities. Under section 6(b)(4)(A), EPA risk evaluations must examine whether a chemical presents an unreasonable risk of injury under "the conditions of use." As defined in section 3(4), this term includes not simply intended or known uses but the "circumstances under which a chemical substance is . . . reasonably foreseen to be manufactured, processed, distributed in commerce, used or disposed of." In appropriate cases, it will be "reasonably foreseen" that long-standing and significant uses of a chemical that have been phased out may re-enter commerce if there is no legal bar against undertaking these activities.

Although the 2016 TSCA amendments removed the phrase “will present” from section 6(a), the statement of Democratic sponsors at the time of enactment makes clear that this change --

... does not reflect an intent on the part of Congressional negotiators to remove EPA’s authority to consider future or reasonably anticipated risks in evaluating whether a chemical substance or mixture presents an unreasonable risk to health or the environment. In fact, a new definition added to TSCA explicitly provides such authority and a mandate for EPA to consider conditions of use that are not currently known or intended but can be anticipated to occur . . .

Cong. Record – Senate 3515 (June 7, 2016). Whether future resumption of a discontinued use can be “reasonably anticipated” will depend on a number of factors, including the nature of the use, how significant and widespread the use was and the evidence documenting the level of exposure and risk anticipated if the use returns to the marketplace.

There are several compelling reasons why discontinued asbestos uses should be addressed through the section 6 risk evaluation and management process rather than solely through a SNUR.

As EPA emphasizes in its proposal, “[t]here is a strong causal association between asbestos exposure and lung cancer and mesothelioma” and “other cancers, as well as non-cancer effects, such as respiratory and immune effects, have been associated with asbestos exposure.” 83 FR 26925.

According to the Agency, “the greatest exposure to asbestos occurs when the substance is in a friable state” and “testing has shown that non-friable asbestos can become friable during use Similarly, non-friable asbestos-containing building materials can release fibers if disturbed during building repair or demolition.” Id.

There is overwhelming consensus in the scientific community that there is no safe level of exposure to asbestos.^{1,2,3} Thus, as noted by the World Health Organization:

Bearing in mind that there is no evidence for a threshold for the carcinogenic effect of asbestos, including chrysotile, and that increased cancer risks have been observed in populations exposed to very low levels, the most efficient way to eliminate asbestos-related diseases is to stop using all types of asbestos.⁴

Because of the high level of concern about asbestos, EPA in 1989 issued a rule under section 6(a) of TSCA prohibiting manufacture, importation, processing or distribution in commerce of asbestos in almost all products.⁵ However, despite the comprehensive risk analysis supporting the rule, the Fifth Circuit Court of Appeals overturned the ban in 1991 for reasons unrelated to the dangers of

¹ National Institute for Occupational Safety and Health. (2017) Current Intelligence Bulletin 68. NIOSH Chemical Carcinogen

² IARC (2012) IARC Monographs—Arsenic, Metals, Fibres, and Dusts, Volume 100 C. A Reviews of Human Carcinogens. IARC Monographs on the Evaluation of Carcinogenic Risks to Humans. International Agency for Research on Cancer, World Health Organization. <http://monographs.iarc.fr/ENG/Monographs/vol100C/mono100C.pdf>

³ Collegium Ramazzini. (2015). The Global Health Dimensions of Asbestos and Asbestos-related Diseases. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5356970/>

⁴ World Health Organization (2014). Chrysotile Asbestos.

http://www.who.int/ipcs/assessment/public_health/chrysotile_asbestos_summary.pdf

⁵ Asbestos: Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions (54 FR 29460, July 12, 1989) (FRL–3476–2),

asbestos.⁶ The court decision later became the poster child for TSCA's failings. Concern that TSCA's high bar for regulation, in part due to the Fifth Circuit's restrictive interpretation, left EPA unable to protect the public from even the most hazardous substances led Congress to strengthen the law's provisions for chemical risk evaluation and regulation, resulting in the 2016 Frank R. Lautenberg Chemical Safety for the 21st Century Act (LCSA).

Many observers expected that the new law would enable EPA to reinstate the comprehensive ban on asbestos use it had imposed in 1989. However, EPA's proposed exclusion of discontinued asbestos products from the risk evaluation will preclude near-term regulation of these products under TSCA section 6(a), and thus make it impossible to reinstate a comprehensive ban on asbestos use in order to prevent their reintroduction into commerce.

The greater uncertainty of a SNUR as opposed to an outright ban under section 6 is particularly unwarranted for asbestos. Further review of the safety of specific asbestos products under the case-by-case SNUR approach is unnecessary. The large body of data and scientific findings on the lethal effects of asbestos and the detailed product-by-product risk evaluations supporting the 1989 rule amply demonstrate that these products present an "unreasonable risk of injury" to human health under TSCA. To suggest through a SNUR that EPA could reach a contrary conclusion and allow the resumption of asbestos use in the US will send a confusing and mixed message to industry and the public and undermine the broad consensus that all asbestos use is unsafe and should be permanently eliminated. This would put the US at odds with the many countries around the world that have banned asbestos.

We thus believe the asbestos products targeted by the proposed SNUR should be addressed in EPA's ongoing asbestos risk evaluation and then banned under section 6. It would still be appropriate to promulgate the SNUR for the limited purpose of identifying and banning any new asbestos products introduced while the evaluation and follow-up rulemaking are underway.

II. THE SNUR SHOULD BE BROADENED TO APPLY TO ALL ASBESTOS USES THAT DO NOT CURRENTLY EXIST

As proposed, the SNUR only applies to the specific product classes identified by EPA. Other asbestos-containing products could thus be manufactured, imported, processed or distributed in commerce without any notification to EPA and no possibility of restriction. There is no justification for this gap in coverage. Toys and other consumer products have been found to contain asbestos in small quantities⁷ and these unsafe products should not escape scrutiny under a SNUR.

Other SNURs for discontinued chemicals have broadly applied to all new uses.⁸ This is essentially the approach followed in EPA's 1989 asbestos ban rule, which prohibits any "commercial uses" of asbestos not identified in the rule and initiated for the first time after August 25, 1989.⁹ EPA should frame its SNUR in the same manner, requiring notification for all asbestos uses except those

⁶ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

⁷ <http://bit.ly/2KxYali>

⁸ For example, EPA's SNUR for trichloroethylene (TCE) applied to all uses of this substance in consumer products, with a few specific exemptions for preexisting uses. 81 Federal Register 20535 (April 8, 2016).

⁹ 40 C.F.R. §763.165. This new use prohibition was not overturned by the 1991 court decision and thus remains in effect.

specifically identified as ongoing in its Problem Formulation. EPA should also designate mining of asbestos in the US as a significant new use since there is currently no legal bar to resuming domestic manufacture of raw asbestos.

III. EXPORT NOTIFICATION REQUIREMENTS UNDER SECTION 12(b) SHOULD APPLY TO ALL ASBESTOS-CONTAINING ARTICLES

The preamble to the proposal indicates that the Agency “is not proposing to require export notification for articles containing asbestos” under section 12(b) of TSCA. 83 FR 26923. No justification for this approach is provided. The purpose of section 12(b) notification is to alert foreign governments that they may be receiving export shipments from the US that contain unsafe chemicals. Since asbestos is no longer mined in the US, the only possible form in which it might be exported is as a component of a product and such products would almost certainly comprise “articles” as defined in TSCA. Given the risks of asbestos releases from these articles and the high level of asbestos regulation internationally, countries receiving export shipments from the US would have a strong interest in knowing that asbestos is entering their borders as an article component. Accordingly, EPA’s final rule should provide that asbestos-containing articles are subject to export notification under section 12(b).

We appreciate the opportunity to submit these comments. Please contact SCHF Director Liz Hitchcock (lizhitchcock@saferchemicals.org) with any questions.

Respectfully submitted,

Alaska Community Action on Toxics
Alliance of Nurses for Healthy Environments
Asbestos Disease Awareness Organization
Breast Cancer Prevention Partners
Center for Environmental Health
Citizens' Environmental Coalition
Clean and Healthy New York
Clean Water Action
Clean Water Action California
Clean Water Action Connecticut
Connecticut Nurses Association
Earthjustice
Ecology Center
Environmental Health Strategy Center
Environmental Working Group
Great Neck Breast Cancer Coalition
Green Inside and Out
GreenCAPE
Healthy Building Network
Huntington Breast Cancer Action Coalition, Inc.

League of Conservation Voters
Natural Resources Defense Council
New York League of Conservation Voters
New York Public Interest Research Group (NYPIRG)
New York Sustainable Business Council
NYS American Academy of Pediatrics
Oregon Environmental Council
Safer Chemicals Healthy Families
Savvy Women's Alliance
Science and Environmental Health Network
Second Look
Toxic-Free Future
Toxics Action Center
U.S. PIRG
Union of Concerned Scientists
Vermont Public Interest Research Group (VPIRG)
WE ACT for Environmental Justice
Women for a Healthy Environment