The EPA's March to Ban Asbestos: 2020 Draft Risk Evaluation

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IN MARCH 2020, the U.S. Environmental Protection Agency released a Draft Risk Evaluation for Asbestos, coinciding with the agency's fiftieth anniversary. This article looks at why the EPA was created and how the agency's work has evolved from policing against widespread environmental pollutants in its early years to devoting significant resources in 2020 on a reevaluation of asbestos, a mineral that is rarely used and highly regulated in the U.S.

EPA's Draft Risk Evaluation will be used by asbestos personal injury attorneys to bolster their chrysotile product cases and undermine the opinions of defense experts if the report is published in its current form. The draft report states, "EPA identified cancer risks from inhalation exposure to chrysotile asbestos."[1] Areas where EPA's draft report finds an "unreasonable risk to workers" from chrysotile asbestos exposure include "processing and industrial use of asbestos-containing diaphragms, processing and industrial use of asbestos-containing sheet gaskets and industrial use of asbestos-containing brake blocks, aftermarket automotive asbestos-containing brakes/linings, other vehicle friction products, and other asbestos containing gaskets."[2]

Since the draft report's publication, over seventy individuals or trade associations submitted comments to EPA, including defense experts Charlie Blake, John Spencer, and Drs. Michele Carbone, Bruce Case, David Garabrant, Bryan Hardin, Art Langer, Suresh Moolgavkar, Brooke Mossman, Dennis Paustenbach, Bertram Price, Coreen Robbins, Victor Roggli, Jennifer Sahmel, and Thomas Sporn. On June 8-10, 2020, EPA conducted a peer review meeting at which Drs. Garabrant, Paustenbach, Roggli, and Moolgavkar offered additional comments.

The draft report is controversial with respect to its conclusion as to the cancer risk of chrysotile asbestos products and because of the one-sided inclusion of paid experts for asbestos plaintiffs' law firms on key peer review committees that are reviewing the draft report: the Toxic Substances Control Act (TSCA) Science Advisory Committee on Chemicals (SACC) and TSCA SACC Ad Hoc Peer Reviewers. The peer reviewers include three testifying experts for asbestos plaintiffs: Drs. Henry Anderson, Steven Markowitz,

[1] UNITED STATES ENVTL. PROT. AGENCY, DRAFT RISK EVALUATION FOR ASBESTOS 20 (Mar. 2020), available at https://www.epa.gov/sites/production/files/2020-03/documents/1_draft_risk_evaluation_for_asbestos_pub.pdf [hereinafter "Draft Risk Evaluation for Asbestos"].

[2] *Id*. at 25.

and Marty Kanarek. There are no experts who testify for asbestos defendants or both defendants and plaintiffs on the peer review groups. The International Association of Defense Counsel joined a June 2020 comment submitted by the U.S. Chamber of Commerce, U.S. Chamber Institute for Legal Reform, National Federation of Independent Business Small Business Legal Center, American Property Casualty Insurance Association, Coalition for Litigation Justice, Inc., American Tort Reform Association, Aerospace Industries Association, Product Liability Advisory Council, Inc., and Washington Legal Foundation to object to the lack of balance on the EPA's peer review committees for the draft report.[3] The comment noted that EPA's decision to include experts who only testify on behalf of plaintiffs may lead the committee to stray from objective science and limit discussion on divergent opinions.

Experts who receive significant fees testifying on behalf of asbestos plaintiffs have been involved in the EPA's asbestos risk evaluation since at least 2017. For example, in March 2017, Dr. Arthur Frank, a frequent expert for asbestos plaintiffs, sent the EPA a 216-page document that he admittedly put together with the assistance of a plaintiff attorney with whom he works in asbestos litigation matters.[4] Dr. Frank regularly uses this same document as his report in asbestos litigation. In another instance, Dr. Frank and another asbestos plaintiffs' expert, Dr. Barry Castleman, met with an EPA deputy administrator to promote the selection of asbestos for this type of evaluation and share their view on the risks of asbestos.[5] The Asbestos Disease Awareness Organization (ADAO), a lobbying group that advocates for the "need for a global asbestos ban,"[6] and plaintiff experts Drs. John Dement, Richard Lemen, Jacqueline Moline, and Christine Oliver submitted

[3] *See* Letter from U.S. Chamber of Commerce et al. to United States Envtl. Prot. Agency Administrator Wheeler and Drs. Diana Wong (EPA Office of Science Coordination and Policy), Stanley Barone, Jr. (EPA Office of Pollution Prevention and Toxics), and Todd Peterson (EPA Office of Science Coordination and Policy) (June 2, 2020), available at https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0501-0070.

[4] Letter from Dr. Arthur Frank to United States Envtl. Prot. Agency Administrator Scott Pruitt (Mar. 13, 2017).

[5] Deposition transcript of Arthur Frank, May 12, 2020, in DeVries v. Allen Bradley Co., Nos. 5-13-cv-00474, 5-13-cv-06856, 2-01-md-00875, at 140-141 (E.D. Pa.); Deposition transcript of Barry Castleman, May 16, 2020, in Arditto v. Autozone, Inc., No. RG19034481 (Alameda Cty. Cal. Super Ct.).

[6] *See* Asbestos Disease Awareness Organization, *Who We Are*, available at https://www.asbestosdiseaseawareness.org/about-adao/leadership/.

written statements outlining these issues during the comment period. Drs. Frank, Moline, Castleman, Compton, and Lemen gave oral testimony at the EPA's June 2020 hearing.

EPA performed the asbestos risk evaluation in accordance with the Frank R. Lautenberg Chemical Safety for the 21st Century Act of 2016, which amended the Toxic Substances Control Act (TSCA). Prior to this amendment, the EPA performed a similar risk evaluation of asbestos under TSCA in the 1980s. The first risk evaluation resulted in a 1989 ban of many asbestos-containing products. That ban was largely overturned in the courts. Since the 1989 ban was overturned, the EPA has failed to regulate any existing chemicals using TSCA. When the Lautenberg Chemical Safety Act was signed into law, President Barack Obama remarked the legislation was necessary, saying, "The [old] system was so complex, it was so burdensome that our country hasn't even been able to uphold a ban on asbestos."[7]

The Lautenberg Chemical Safety Act requires the EPA to conduct risk evaluations "to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors."[8] This requirement is contrary to Congress's express intent that the EPA "shall consider the environmental, economic, and social impact of any action [it] takes or proposes" under TSCA.[9]

The Draft Risk Evaluation for Asbestos is EPA's first reassessment of the risks of asbestos in decades. A peer review meeting on the evaluation originally scheduled for April 2020 was temporarily postponed due to COVID-19 closures. The agency set a public comment deadline of June 2, 2020[10] and conducted a public meeting on June 8–10, 2020. Because the comment period and public meeting occurred during a "shutdown" phase of the COVID-19 pandemic, affected entities are operating at less than normal capacity and on strained budgets. The timing of the public comment and peer review periods has created due process issues, including the inability to obtain

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[7] The White House, *Remarks by the President at Bill Signing of the Frank R. Lautenberg Chemical Safety for the 21st Century Act*, June 22, 2016, available at https://obamawhitehouse.archives.gov/the-press-office/2016/06/22/remarks-president-bill-signing-frank-r-lautenberg-chemical-safety-2st.

[8] 15 U.S.C § 2605(b)(4)(a).

[9] 15 U.S.C. § 2601(c).

[10] Comments submitted to United States Envtl. Prot. Agency, available at https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=EPA-HQ-OPPT-2019-0501.

information and documents necessary to adequately comment because of long processing times for Freedom of Information Act requests and the denial of expedited processing on those requests.

The use of asbestos in the United States is very limited and highly regulated, so the utility of the new risk evaluation is questionable. The EPA admits that the risk evaluation only addresses "a handful of very limited, still ongoing uses of asbestos."[11] Asbestos has not been mined or otherwise produced in the U.S. since 2002, and asbestos consumption has decreased from a record high of 803,000 tons in 1973 to an estimated 100 tons in 2019.[12] From 2013-2018, U.S. asbestos consumption was "less than 0.1% of peak consumption in the 1970s."[13]

The chloralkali industry accounted for nearly 100% of the nation's asbestos mineral consumption in 2019.[14] Specifically, asbestos diaphragms are used in eleven chloralkali plants which account for about one-third of U.S. chlorine production.[15] In 2019, "a small, but unknown, quantity of asbestos was imported within manufactured products, including brake blocks for use in the oil industry, rubber sheets for gaskets used to create a chemical containment seal in the production of titanium dioxide, certain other types of preformed gaskets, and some vehicle friction products."[16] During the peer review hearing, the EPA discovered that some samples from the chlorine industry were double-counted, which may affect the EPA's final risk estimates.[17]

Asbestos is presently subject to extensive federal and state regulations and reporting requirements. The federal Occupational Safety and Health Administration (OSHA) oversees working conditions for United States workers by implementing and managing occupational safety and health standards, including regulations that pertain to handling asbestos in the workplace. In the consumer context, the Consumer Product Safety Commission (CPSC) protects consumers and families from consumer products that pose hazards. The CPSC has instituted

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[11] United States Envtl. Prot. Agency, *EPA Actions to Protect the Public from Exposure to Asbestos*, available at https://www.epa.gov/asbestos/epa-actions-protect-public-exposure-asbestos.

[12] United States Geological Survey, *Mineral Commodity Summaries 2020* 26 (Jan. 31, 2020), available at https://pubs.usgs.gov/periodicals/mcs2020/mcs2020.pdf.

[13] *Id*.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Pat Rizzuto, *EPA to Correct Error Made with Industry's Asbestos Data*, BLOOMBERG L. (June 8, 2020), available at https://news.bloomberglaw.com/environment-and-energy/epa-to-correct-error-it-made-using-industrys-asbestos-data.

bans and restrictions on asbestos-containing patching compounds, garments, and fireplace materials. The EPA has successfully banned new uses of asbestos in products such as asbestos-containing insulation and fireproofing materials.

The EPA has also addressed all asbestos-products not currently in use in the United States, sometimes described as "legacy uses." In April 2019, the EPA finalized an Asbestos Significant New Use Rule (SNUR) under TSCA. The Asbestos SNUR prohibits the future manufacture (including import) or processing of discontinued uses of asbestos before the EPA has the opportunity to evaluate each intended use for risks to health and the environment and to take any necessary regulatory action, which may include a prohibition.

I. EPA's 2020 Draft Risk Evaluation for Asbestos

In stark contrast to the purposes for which the EPA was created, the EPA's 2020 Draft Risk Evaluation for Asbestos does not evaluate hazards or exposures to the general population. General population exposures to chrysotile asbestos may occur from industrial or commercial uses, industrial releases to air, water, or land, and other conditions of use. The EPA acknowledges that those types of exposures are already covered by environmental statutes administered by the agency.[18] Instead, the current risk evaluation may affect only 10 to 100 persons annually.[19]

Although there are several types of asbestos, the only form of asbestos currently known to be imported, processed, or distributed for use in the U.S. is chrysotile. Thus, the EPA only evaluated the following conditions of use of chrysotile asbestos in its risk evaluation: use of diaphragms in the chloralkali industry, sheet gaskets in chemical production facilities, oilfield brake blocks, aftermarket automotive brakes/linings, other vehicle friction products, and other gaskets.[20] As pointed out by defense

[18] EPA Draft Risk Evaluation for Asbestos, *supra* note 1, at 2.

[19] Dennis Paustenbach, *Comments to the United States Envtl. Prot. Agency Regarding March 2020 Draft Risk Evaluation for Asbestos,* 3 (May 22, 2020), available at https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0501-0095 [hereinafter "Paustenbach May 22 EPA Comment"].

[20] EPA Draft Risk Evaluation for Asbestos, *supra* note 1, at 18.

expert Dennis Paustenbach, "the available data presented by the Agency does not seem to identify any cohorts which might be routinely exposed above about 1/10 to 1/2 the current OSHA Permissible Exposure Limit for asbestos (and the number of plausible workers is low)."[21] Moreover, "if chrysotile could produce mesothelioma (which remains in dispute), it may do so only at doses that are in the vicinity that cause asbestosis. . . ."[22] The EPA nonetheless concluded that the processing and use of these products presents an unreasonable risk to workers, regardless of the nature, duration, or frequency of the exposure.[23]

Public comments identified other issues with the draft risk evaluation, including:

- The draft failed to cite EPA peer review panels convened in the past which concluded that chrysotile may not cause mesothelioma or lung cancer unless very high cumulative doses and/or long fibers are involved.[24]
- The drafters missed more than 90 crucial papers in their search.
- The draft incorrectly assumed that there is no background rate of pleural or peritoneal mesothelioma in persons not exposed to asbestos, but studies show that a significant percentage of mesotheliomas, particularly peritoneal mesotheliomas, are unrelated to asbestos exposure.
- The draft relied heavily on asbestos textile cohorts exposed to high levels of raw asbestos for a number of years in factories that

[21] Paustenbach May 22 EPA Comment, *supra* note 19, at 7.
[22] *Id.* at 5.
[23] EPA Draft Risk Evaluation for Asbestos, *supra* note 1, at 26.
[24] *See* Letter from Dr. Agnes Kane, Chair of United States Envtl. Prot. Agency Science Advisory Board Asbestos Comm., to United States Envtl. Prot. Agency Administrator Stephen Johnson regarding SAB Consultation on EPA's *Proposed Approach for Estimation of Bin-Specific Cancer Potency Factors for Inhalation Exposure to Asbestos* (Nov. 14, 2008), available at https://nepis.epa.gov/Exe/ZyNET.exe/P1002EAG.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2006+Thru+2010&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C06thru10%5CTxt%5C00000005%5CP1002EAG.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL.

utilized long-fiber chrysotile asbestos and amphibole asbestos. The findings based on those cohorts were extrapolated to the *de minimus* chrysotile-only exposures examined in the risk assessment. Relatedly, the draft failed to account for toxicological difference in long- and short-fiber chrysotile.

- The draft utilized an absolute risk model of mesothelioma mortality which assumes there is only no risk at zero exposure. This "no safe dose" claim is a theoretical concept unsupported by the literature.

The new risk evalulation for asbestos also lacks integrity, fairness, and legality because some peer reviewers have financial conflicts of interest, appear to lack impartiality and independence, and demonstrate a bias that should result in their disqualification.[25] Specifically, as stated, Drs. Steven Markowitz, Marty Kanarek, and Henry Anderson testify regularly on behalf of asbestos plaintiffs and have made a lot of money doing so.

Drs. Markowitz and Anderson have documented ties to the ADAO. Many sponsors of the ADAO's annual conferences are asbestos plaintiffs' law firms. The ADAO's comment to EPA on the 2020 Draft Risk Evaluation on Asbestos are in line with ADAO's strong advocacy towards a comprehensive ban on asbestos.

Dr. Markowitz is a member of the ADAO's Science Advisory Board.[26] His position at ADAO is prominently displayed on ADAO's cover letter to its comments to the Draft Risk Evaluation. Dr. Markowitz is also recognized on the ADAO website as a 2019 and 2020 Emerald Donor.[27] He has signed on

[25] *See* UNITED STATES ENVTL. PROT. AGENCY SCIENCE & TECH. POL'Y COUNCIL, PEER REVIEW HANDBOOK § 1.2.1 (4th ed. 2015) [hereinafter "EPA Peer Review Handbook"].

[26] *See* ADAO, *supra* note 6.

[27] *See* Asbestos Disease Awareness Organization, *2019 ADAO Conference Sponsors and Donors*, available at https://www.asbestosdiseaseawareness.org/newsroom/blogs/2019-adao-conference-sponsors/; https://www.asbestosdiseaseawareness.org/newsroom/blogs/2020-adao-conference-sponsors-and-donors/.

in support of ADAO's statements to Congress.[28]

Dr. Anderson is a signatory to a letter sent by the ADAO urging the EPA "to prioritize asbestos as one of the 2016 top ten high-risk chemicals for evaluation under TSCA, leading toward the prohibition of asbestos in manufacturing, processing, use, distribution in commerce, and disposal."[29]

The inclusion of Drs. Markowitz, Kanarek, and Anderson among the peer reviewer for the draft asbestos risk evaluation defies the EPA's own policies.[30]

II. The Birth of EPA: Controlling Air Pollution

The road to the EPA's 2020 Draft Asbestos Risk Evaluation started decades ago. The EPA was created in response to widespread public concern about decades of rampant and highly visible environmental pollution. The EPA's photodocumentary project, DOCUMERICA (1971-1977), resulted in an archived collection of more than 22,000 photographs documenting these environmental problems. The earliest assignments were closely aligned to the EPA's proposed areas of concern: air and water pollution, management of solid waste, radiation and pesticides, and noise abatement.[31]

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[28] Examining the Human Health Effects of Asbestos and the Methods of Mitigating Such Impacts: Hearing before the Committee on Environment & Public Works, U.S. Senate, 119th Cong. 170, 177, 192 (June 12, 2007).

[29] Letter to United States Envtl. Prot. Agency Administrator Gina McCarthy regarding EPA Prioritization of Asbestos (Nov. 9, 2016), available at https://www.asbestosdiseaseawareness.org/wp-content/uploads/2016/11/ADAO-Administrator-Gina-McCarthy-Sign-on-letter-FINAL.pdf.

[30] EPA Peer Review Handbook, *supra* note 25, at §§ 1.2.1, 5.1, 5.2.1, and 5.3.6.

[31] GISELA PARAK, PHOTOGRAPHS OF ENVIRONMENTAL PHENOMENA: SCIENTIFIC IMAGES IN THE WAKE OF ENVIRONMENTAL AWARENESS, USA 1860S-1970S, 146 (Transcript-Verlag, 2015).

Toxic asbestos tailings swirl through the western arm of Lake Superior.

Donald Emmerich/NARA

Cleveland obsured by industrial smog in July 1973.

Frank J. Alexsandrowice/NARA

Sulfur-dusting of grapevines, May 1972.

Gene Daniels/NARA

Heavy smog in Los Angeles, 1973.

Gene Daniels/NARA

Environmentalists credit Rachel Carlson's *Silent Spring* as the catalyst of the modern environmental movement.[32] Published in 1962, *Silent Spring* documents the adverse environmental effects of the indiscriminate use of pesticides – DDT was the prime example. After reading her book, President John F. Kennedy established a committee to investigate pesticides.[33] In 1972, the U.S. banned the domestic sale of DDT except where public health concerns warrant its use.[34] In the EPA Journal's November 1985 Special Anniversary Issue, Jack Lewis writes that the EPA is "without exaggeration to be the extended shadow of Rachel Carson."[35]

Beyond the impact of *Silent Spring,* a January 1969 oil leak from an offshore drilling site near Santa Barbara, California, "galvanized public awareness of the environment and support for a decade of profound change."[36] Before the *Exxon Valdez* oil spill off the coast of Alaska in 1989, the Santa Barbara event was the worst oil spill in the nation's history. Across the nation, households watched television images of "oil-drenched birds that couldn't fly, sea otters that couldn't swim, and tides that brought in the corpses of dead seals and dolphins."[37] President Richard Nixon remarked that the "incident has frankly touched the conscience of the American people."[38] In the aftermath of the spill, he signed the National Environmental Policy Act on New Year's Day of 1970, making the signing his first official act of the decade.

In his January 1970 State of the Union Address, President Nixon proclaimed the new decade a period of environmental

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[32] Current regulatory practices for chemical carcinogens were established when scientific understanding of the molecular mechanisms of chemical carcinogenesis was in its infancy. In *Silent Spring*, Carson presents a "no safe dose" argument about cancer. This zero-dose exposure argument is now known as the linear no-threshold theory. Despite scientific consensus that safe thresholds for carcinogens exist, the EPA remains closely wedded to Ms. Carson and the precautionary principle. *See* Cato Inst., Silent Spring *at 50: The False Crises of Rachel Carson* 260 (Roger Meiners et al. eds. Sept. 18, 2012).

[33] Eliza Griswold, *How 'Silent Spring' Ignited the Environmental Movement,* N.Y. TIMES (Sept. 21, 2012), available at https://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html.

[34] *Id.*

[35] Jack Lewis, *The Birth of EPA*, EPA J. (Nov. 1985), available at https://archive.epa.gov/epa/aboutepa/birth-epa.html.

[36] Martin Miller, *The Oil Spill That Sparked the Green Revolution*, L.A. TIMES (Nov. 3, 1999), available at https://www.latimes.com/archives/la-xpm-1999-nov-30-me-38862-story.html; *see also* United States Envtl. Prot. Agency, *The Origins of EPA*, available at https://www.epa.gov/history/origins-epa.

[37] Miller, *supra* note 36.

[38] *Id.*

transformation.[39] In February 1970, the President outlined a comprehensive, thirty-seven point program embracing twenty-three major legislative proposals and fourteen new measures to be taken by administrative action or Executive Order in five major categories (water pollution control, air pollution control, solid waste management, parklands and public recreation, and organizing for action).[40] In July 1970, President Nixon sent Reorganization Plan No. 3 to Congress to establish the EPA. Under the plan, "The principal roles and functions of the EPA would include:

- The establishment and enforcement of environmental protection standards consistent with national environmental goals.
- Research on the adverse effects of pollution and on methods and equipment for controlling it, the gathering of information on pollution, and the use of this information in strengthening environmental protection programs and recommending policy changes.
- Assisting others, through grants, technical assistance and other means in arresting pollution of the environment.
- Assisting the Council on Environmental Quality in developing and recommending to the President new policies for the protection of the environment."[41]

EPA opened its doors in December 1970 "to protect and enhance the environment."[42] To fulfill its mission, the EPA had "broad responsibility for research, standard-setting, monitoring and enforcement with regard to five environmental hazards: air and water pollution, solid waste disposal, radiation, and pesticides."[43]

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[39] Hon. Richard M. Nixon, *Annual Message to the Congress on the State of the Union*, Jan. 22, 1970, available at https://www.presidency.ucsb.edu/node/241063.

[40] Hon. Richard M. Nixon, *Special Message to the Congress on Environmental Quality.* Feb. 10, 1970, available at https://www.epaalumni.org/userdata/pdf/354_First_Presidential_Messag.pdf.

[41] Hon. Richard M. Nixon, "Message of the President" in *Reorganization Plan No. 3 of 1970*, 35 Fed. Reg. 15,623 (1970), available at https://www.govinfo.gov/content/pkg/USCODE-2017-title42/html/USCODE-2017-title42-chap55-sec4321.htm.

[42] William D. Ruckelshaus, *EPA's First Administrator on the Establishment of EPA* (Dec. 16, 1970), available at https://archive.epa.gov/epa/aboutepa/epas-first-administrator-establishment-epa.html.

[43] *Id.*

III. The EPA and Asbestos: Going Beyond the Environmental Pollution Problem

During the same time period that the Nixon Administration was constructing the EPA, the World Trade Center was being built in Lower Manhattan. Dr. William Nicholson of Mount Sinai's School of Medicine estimated that 1,000 tons of asbestos would be used in insulating the buildings, and that as much as 20% of that would escape into the air.[44] Drs. Nicholson and Arthur Rohl expressed particular concern with the fireproofing of high rise buildings by a fibrous spray mixture containing 12-30% asbestos.[45] They write that in the 1960s "it was not uncommon to see extensive snowfalls of asbestos-containing material over areas of New York and other metropolitan centers."[46] Called a "growing pollution danger," in April 1970, New York passed the first regulations in the nation requiring certain work practices to control and contain asbestos sprayed onto building structures.[47]

In December 1970, President Nixon signed amendments to the Clean Air Act ("CAA") which established National Emission Standards for Hazardous Air Pollutants (NESHAPs). The 1970 CAA required the EPA to publish a list of air pollutants that might increase either mortality, serious irreversible illness, or incapacitating illness.[48] On March 1971, the EPA's first Administrator, William Ruckelshaus, designated asbestos a hazardous air pollutant.[49] The EPA then proposed emission standards for listed air pollutants in December 1971 – three months behind schedule because of the "complexity" of the problem presented by the fact that there were no "standardized methods" for measuring emission levels of asbestos.[50] As a result, the Asbestos NESHAP the EPA promulgated in April 1973 is phrased "not in terms of numerical emission values" but in "control

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[44] David Bird, *Long Battle Seen to End Pollution*, N.Y. TIMES, at 55 (Feb. 1, 1970).
[45] William J. Nicholson, Arthur N. Rohl, and E.F. Ferrand, *Asbestos Air Pollution in New York City,* in H.M. Englund and W.T. Beery eds., PROCEEDINGS OF THE SECOND INTERNATIONAL CLEAN AIR CONGRESS (1971) 136-139.
[46] *Id.*
[47] *City Swears in Two to Act on Asbestos*, N.Y. TIMES, at 26 (Apr. 10, 1970).
[48] 42 U.S.C. § 7408(a)(1).
[49] E.W. Kenworthy. *Industrial Emission Standards For 3 Air Pollutants Proposed.* N.Y. TIMES, at 34 (Dec. 4, 1971), available at https://www.nytimes.com/1971/12/04/archives/industrial-emission-standards-for-3-air-pollutants-proposed.html; *see also* United States Envtl. Prot. Agency, Office of Air and Water Programs, *Standards Package for Hazardous Air Pollutants* (Dec. 1972).
[50] Kenworthy, *supra* note 49.

practices that will limit emissions to an acceptable level."[51]

The 1973 Asbestos NESHAP covered work practices related to asbestos insulation and fireproofing materials and prohibited spray applications of those materials if they contained more than 1% asbestos.[52] This was the EPA's first ban on the use of asbestos-containing products. Other bans pursuant to the Asbestos NESHAP followed:

- 1975: installation of asbestos pipe insulation and asbestos block insulation on facility components like boilers and hot water tanks, if the materials are either pre-formed (molded) and friable or wet-applied and friable after drying;[53]
- 1978: spray-applied surfacing materials for purposes not already banned;[54]
- 1990: spray-on application of materials containing more than 1% asbestos to buildings, structures, pipes, and conduits unless the material is encapsulated with a bituminous or resinous binder during spraying and the materials are not friable after drying.[55]

In October 1979, the EPA issued an advanced notice of proposed rulemaking announcing its intent to explore the use of TSCA to ban asbestos.[56] That year the total U.S. consumption of asbestos was 560,000 tons, 6.6% of which was highly toxic amosite asbestos and crocidolite asbestos.[57] An EPA-appointed panel reviewed over 100 studies of asbestos and conducted

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[51] *Id.*

[52] *See* National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 CFR Part 61, Subpart M.

[53] *See id*. at 40 C.F.R. § 61.148.

[54] *See id*. at 40 C.F.R. § 61.146.

[55] *See id*.

[56] United States Envtl. Prot. Agency, Advance Notice of Proposed Rulemaking: "Commercial and Industrial Use of Asbestos Fibers; Advance Notice of Proposed Rulemaking," 44 Fed. Reg. 60,061 (Oct. 17, 1979), available at https://books.google.com/books?id=cqvtMezJ11EC&pg=PA60061&lpg=PA60061&dq=United+States+Envtl.+Prot.+Agency,+Advance+Notice+of+Proposed+Rulemaking:+%E2%80%9CCommercial+and+Industrial+Use+of+Asbestos+Fibers;+Advance+Notice+of+Proposed+Rulemaking,%E2%80%9D+44+Fed.+Reg.+60,061+(Oct.+17,+1979&source=bl&ots=e2MUgWyD1e&sig=ACfU3U3nhGNjBOgWr_IHPR4fmoW5YDtI7g&hl=en&sa=X&ved=2ahUKEwjn8YDs4Z_qAhWqct8KHXJYCL8Q6AEwAHoECAIQAQ#v=onepage&q=United%20States%20Envtl.%20Prot.%20Agency%2C%20Advance%20Notice%20of%20Proposed%20Rulemaking%3A%20%E2%80%9CCommercial%20and%20Industrial%20Use%20of%20Asbestos%20Fibers%3B%20Advance%20Notice%20of%20Proposed%20Rulemaking%2C%E2%80%9D%2044%20Fed.%20Reg.%2060%2C061%20(Oct.%2017%2C%201979&f=false.

[57] Asbestos: Still Lethal/Still Legal: The Need to Better Protect the Health of American Workers and Their Families:

several public meetings. Based upon its studies and the public comments, the EPA concluded in 1986 that exposure to asbestos poses an "unreasonable risk to human health" and proposed at least four regulatory options for prohibiting or restricting its use.[58] Admittedly, prior to 1986, the "EPA [had] focused its attention primarily on asbestos in buildings, a major source of asbestos release into the ambient environment."[59]

The EPA's conclusion in 1986 that asbestos poses an "unreasonable risk to human health" was based on the linear non-threshold dose/response model (LNT model). This model assumes that any exposure increases risk.[60] The LNT model was developed in the 1970s based on studies of cancer induced by high doses of ionizing radiation and a relatively new understanding that chemicals cause cancer through interaction with DNA.[61] At that time, scientists had barely begun to discover the processes governing DNA damage, DNA repair, prevention of heritable mutations, and organism level responses to cancer.[62]

Interestingly, in February 1985, the EPA announced that it planned to transfer regulatory authority over asbestos to two other agencies after the budget office withheld approval of proposed EPA rules to ban asbestos. [63] The EPA interpreted the TSCA as requiring the agency to defer to OSHA and the CPSC because they were better able to assess and regulate the risks from hazardous substances. OSHA would be responsible for asbestos because the most exposed citizens are workers. Where consumers are directly affected, the CPSC would have jurisdiction.[64] The CPSC had banned the use of asbestos in artificial fireplace embers and wall patching compounds in 1977.[65] The EPA, however, pulled back from its

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Hearing Before the Subcomm. on Employment and Workplace Safety, United States Senate, 110th Cong., S. Hrg. 110-22, 17 (Mar. 1, 2007) (statement of Richard Wilson), available at https://www.govinfo.gov/content/pkg/CHRG-110shrg34334/pdf/CHRG-110shrg34334.pdf.

[58] United States Envtl. Prot. Agency, Proposed Rule: "Asbestos; Proposed Mining and Import Restrictions and Proposed Manufacturing, Importation, and Processing Prohibitions," 51 Fed. Reg. 3738, 3751 (Jan. 29, 1986), available at https://www.loc.gov/item/fr051019/.

[59] *Id.* at 3739.

[60] *Id.* at 3751.

[61] Rebecca A. Clewell et al., *Dose-dependence of Chemical Carcinogenicity: Biological Mechanisms for Thresholds and Implications for Risk Assessment*, 301 CHEM. BIOL. INTERACT. 112 (2019), available at https://www.sciencedirect.com/science/article/pii/S0009279718314467.

[62] *Id.*

[63] Phillip Shabecoff, *E.P.A. to Transfer Authority Over Asbestos to 2 Agencies,* N.Y. TIMES (Feb. 1, 1985) available at https://www.nytimes.com/1985/02/01/us/epa-to-transfer-authority-over-asbestos-to-2-agencies.html.

[64] *Id.*

[65] 16 C.F.R. Part 1305; 16 C.F.R. 1304.

decision to turn over the regulation of asbestos to OSHA and CSPC.[66]

Finally, in 1989 the EPA issued a final rule prohibiting most asbestos - containing products.[67] This is commonly known as the "Asbestos Ban and Phaseout Rule." By that time, the nation's consumption of asbestos had drastically declined, and exposure limits were much lower than when the rulemaking process began in 1979 (OSHA's permissible exposure limit for asbestos was lowered from 2 in 1976 to 0.2 in 1986). The EPA's action affected an estimated 84% of asbestos products made in the U.S., including brake linings, roofing, pipe, tile, and insulation.[68] The final rule did not affect asbestos materials in existing buildings. "This is pollution prevention," EPA Administrator William K. Reilly said at the time. He also said that the EPA's action "should not be seen as a signal to other nations, especially developing nations, that use of these products should be discontinued."[69] The EPA estimated that this rule would save either 202 or 148 lives, depending upon whether the benefits are discounted, at a cost of approximately $450-800 million, depending upon the price of substitutes.[70]

In 1991, the U.S. Court of Appeals for the Fifth Circuit overturned most elements of the ban on the manufacture, importation, processing, or distribution in commerce relating to the majority of the asbestos-containing products originally covered in the EPA's 1989 final rule.[71] The ruling upheld the provisions of the agency's 1989 phase-out of asbestos use that were already in effect, but sent provisions that would have taken effect in 1993 and 1996 back to the agency for more proceedings. As a result, the 1989 asbestos regulation only bans new uses of asbestos in products that would be initiated for the first time after 1989 and bans five other specific product types: corrugated paper, rollboard, commercial paper, specialty paper, and flooring felt.

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[66] *U.S. Agency Renews Its Request for Curbs on Use of Asbestos*, N.Y. TIMES (Dec. 25, 1985) available at https://www.nytimes.com/1985/12/25/us/us-agency-renews-its-request-for-curbs-on-use-of-asbestos.html.

[67] United States Envtl. Prot. Agency, Final Rule: "Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions", 54 Fed. Reg. 29460 (July 12, 1989), available at https://www.epa.gov/sites/production/files/documents/nps57f.pdf.

[68] Phillip Shabecoff, *E.P.A. to Ban Virtually All Asbestos Products by '96*, N.Y. TIMES, (July 7, 1989), available at https://www.nytimes.com/1989/07/07/us/epa-to-ban-virtually-all-asbestos-products-by-96.html.

[69] *Id.*

[70] Corrosion Proof Fittings v. U.S. Envtl. Prot. Agency, 947 F. 2d 1201, 1208 (5th Cir. 1991).

[71] *Id*. at 1207-1208.

The Fifth Circuit stated the EPA had violated procedures of the TSCA when it drafted the 1989 asbestos ban by failing to evaluate and reject less burdensome alternatives.[72] The court wrote, "the EPA, in its zeal to ban any and all asbestos products, basically ignored the cost side of the TSCA equation" it is required to consider pursuant to statue and prior court decisions. Specifically, the court also held in the OSHA context that until an agency "can provide substantial evidence that the benefits to be achieved by [a regulation] bear a reasonable relationship to the costs imposed by the reduction, it cannot show that the standard is reasonably necessary to provide safe or healthful workplaces."[73]

Since the overturning of the 1989 ban, the EPA has failed to regulate any existing chemicals using TSCA. In the decades following TSCA's passage, Congress found that "effective implementation of TSCA by [EPA] ha[d] been challenged by shortcomings in the statute itself, and by several key decisions of Federal Courts and the Agency's interpretation of those decisions."[74] There had "been persistent concerns about the pace of EPA's work under TSCA, the ability of the Agency to use its existing authority, and whether the statute prevent[ed] certain regulatory efforts."[75] Thus, Congress amended TSCA with the Lautenberg Chemical Safety Act in 2016.[76] Importantly, the 2016 amendments created a mandatory duty on the EPA to evaluate existing chemicals with clear and enforceable deadlines, and eliminated the costs considerations

[72] Warren A. Leary, *Appeals Court Strikes Down Major Parts of Federal Asbestos Ban*, N.Y TIMES, (Oct. 22, 1991) available at https://www.nytimes.com/1991/10/22/us/appeals-court-strikes-down-major-parts-of-federal-asbestos-ban.html.

[73] American Petroleum Inst. v. OSHA, 581 F.2d 493, 504 (5th Cir. 1978).

[74] Committee on Environment and Public Works. Frank R. Lautenberg Chemical Safety for the 21st Century Act Report, United States Senate, 114th Cong., S. Rept. 114-67, at 2 (June 18, 2015), available at https://www.congress.gov/congressional-report/114th-congress/senate-report/67/1.

[75] TSCA Modernization Act of 2015, H.R. Rep. No. 114-176, 12-13 (June 23, 2015), available at https://www.congress.gov/congressional-report/114th-congress/house-report/176/1.

[76] *See* Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified at 15 U.S.C. § 2601 et seq.), available at https://www.congress.gov/114/plaws/publ182/PLAW-114publ182.pdf.

in the evaluation of an "unreasonable risk."[77]

The EPA was required to select the first ten chemicals to undergo risk evaluations. These chemicals were announced in December 2016. Asbestos is one of those chemicals. By the end of 2019, the EPA was required to have at least twenty chemical risk evaluations ongoing for chemicals it designates High-Priority Substances. The EPA started releasing draft risk evaluations for the chemicals, beginning with pigment violet 29, in November 2018. In March 2020, asbestos became the ninth draft risk evaluation released by EPA.

In April 2019, the EPA issued a final Significant New Use Rule (SNUR) under TSCA to prevent certain discontinued uses of asbestos from re-entering the marketplace without EPA review. The SNUR covers a number of target uses for which the EPA "has found no information" indicating that they are ongoing: adhesives, sealants, and roof and non-roof coatings; arc chutes; beater-add gaskets; cement products; extruded sealant tape and other tape; filler for acetylene cylinders; certain friction materials; high-grade electrical paper; millboard; missile liner; packings; pipeline wrap; reinforced plastics; roofing felt; separators in fuel cells and batteries; vinyl-asbestos floor tile; woven products; any other building material; and "any other use of asbestos that is neither ongoing nor already prohibited under TSCA."[78]

While the SNUR does not actually prohibit these uses, none of them may return to the marketplace without EPA review of their potential risks to health and the environment. The SNUR essentially removed the uses from the EPA's risk evaluation of asbestos.

IV. Conclusion

In 1979 when the EPA performed its first risk evaluation for asbestos, asbestos pollution was a relatively significant issue. That is not the case anymore. But, if history repeats itself, we are near the beginning of another long and bumpy road that the last time took the EPA years to complete and spawned litigation. The Ninth Circuit has already weighed in, ruling in November 2019 that the EPA violated TSCA by excluding legacy uses of chemicals, like asbestos, from consideration in its current round of TSCA risk

[77] *See* Safer Chemicals, Healthy Families v. U.S. Envtl. Prot. Agency, 943 F.3d 397 (9th 2019).

[78] United States Envtl. Prot. Agency, "Restrictions on Discontinued Uses of Asbestos; Significant New Use Rule," 84 Fed. Reg. 17346 (Apr. 25, 2019), available at https://www.govinfo.gov/content/pkg FR-2019-04-25/pdf/2019-08154.pdf.

evaluations.[79] The ADAO, mentioned above, was a petitioner in that lawsuit. The March 2020 draft risk evaluation does not address legacy uses of asbestos at this time. This is just one early indication that the EPA's risk evaluation of asbestos will be fodder for many more articles (and much litigation) to come.

[79] *See Safer Chemicals, Healthy Families*, 943 F.3d at 425.