



STATE OF CONNECTICUT
DEPARTMENT OF HEALTH SERVICES

RECEIVED

NOV 20 1981

E.J.N.

OFFICE OF COMMISSIONER

November 17, 1981

Brandon Hickey, Esq.
Murtha, Cullina, Richter and Pinney
101 Pearl Street
Hartford, Connecticut 06103

RE: Declaratory Ruling on Asbestos-Cement Pipe

Dear Mr. Hickey:

This office is in receipt of your letter of August 27, 1981 notifying the Commissioner of the "withdrawal" of the application of Certain-Teed, Inc. and Johns-Mansville Sales Corporation for a declaratory ruling in the above-captioned matter.

An application for a declaratory ruling, once granted, may not be withdrawn at the whim of the applicant. This is particularly true when the proceedings have progressed beyond the point of issuance of a hearing panel's proposed memorandum of decision. Further, to allow the withdrawal of the application at this time would be akin to granting the request to defer ruling received from the applicants on July 30, 1981 and denied by this office on August 19, 1981. In addition, fairness dictates that the applicant not be allowed to render meaningless the considerable effort made in this case to gather data and engage in careful deliberation simply because the anticipated outcome may be objectionable.

Conn. Gen. Stat. Section 4-176 authorizes a state agency to issue declaratory rulings concerning any statutory or regulatory provision within the purview of such agency. This authority exists even if the agency is not in receipt of a petition or application for declaratory ruling. In addition the specific language of Section 2 of Public Act 80-398 clearly imposes upon the Commissioner the responsibility to make a determination concerning the effect of asbestos-cement pipe used in water supply systems on the public health. The withdrawal of the application for declaratory ruling in no way lessens that responsibility.

In light of the above Tuesday, December 8, 1981 at 10 a.m. has been scheduled to provide you an opportunity to submit oral argument on the hearing panel's proposed memorandum of decision. Written exceptions and briefs must be filed with this office no later than two business days prior to this date.

Sincerely yours,

Douglas S. Lloyd, M.D., M.P.H.
Commissioner

cc: Daniel Millstone
Stephen Havas, M.D.
Dennis F. Kerrigan
Stan Peck

Telephone
79 ELM STREET • HARTFORD, CONNECTICUT 06115

An Equal Opportunity Employer

PLAINTIFF'S EXHIBIT

CAP-1661

CAPCO JEN 0013017

cc: A. Kahn, Esq. newsclips only
N. Rahn, Esq. newsclips only
Special Counsel
N. Battle
Asbestos International Association
Asbestos Information Association/NA

copies to:	<u>Public Affairs Committee</u>	<u>International Affairs Committee</u>
	H. Olson w/o enclosures	R. Dorner
	I. Adams	E. van der Rest
	W. Perrell	B. Giboin
	J. Woods	C. Walters
	J. Baker	R. Hobbs
	T. Dougherty	A. Saoulis
	D. Stinson	R. Jalan
	W. McCallie w/o enclosures	V. Pattabhi
	B. Collier	H. Hudson
	B. Cook	C. Barton
		S. Al-Tarkait

HEGA/4
Chrono

Ret. 4th Tuesday of December, 1981.

CERTAIN-TEED, INC.	)	SUPERIOR COURT
	)	
AND	)	
	)	
JOHNS-MANVILLE SALES CORPORATION	)	JUDICIAL DISTRICT OF
	)	HARTFORD/NEW BRITAIN
vs.	)	
	)	
DOUGLAS S. LLOYD,	)	AT HARTFORD
COMMISSIONER OF THE	)	
DEPARTMENT OF HEALTH SERVICES	)	DECEMBER , 1981

SUMMONS AND ORDER OF SERVICE

TO THE SHERIFF OF THE COUNTY OF HARTFORD, OR HIS DEPUTY,
GREETINGS:

By authority of the State of Connecticut, you are hereby commanded to summon Douglas S. Lloyd, the Commissioner of Health Services, State of Connecticut, to appear before the Superior Court, Judicial District of Hartford-New Britain, to be held at Hartford on the 4th day of December, 1981, which appearance is to be made by the Commissioner, or by his Attorney, by filing a written statement of appearance with the Clerk of that Court on or before the second day following the return date, then and there answer to the within Petition, by serving upon Douglas S. Lloyd, the Commissioner of the Department of Health Services and upon Carl R.

PETITION FOR JUDICIAL REVIEW

To the Superior Court, to be held at Hartford, within and for the Judicial District of Hartford-New Britain, to be held on the 4th Tuesday of December, 1981, come CERTAIN-TEED, INC., a corporation organized under the laws of the State of Maryland, and JOHNS-MANVILLE SALES CORPORATION, a corporation organized under the laws of the State of Delaware, seeking an immediate review by this Court of action taken, or a ruling made, by DOUGLAS S. LLOYD, Commissioner of the Department of Health Services, and complain and say:

1. As used in this Petition:

"Petitioners" refers to Certain-Teed, Inc., and Johns-Manville Sales Corporation;

"Commissioner" refers to Douglas S. Lloyd, the Commissioner of the Department of Health Services;

"DHS" refers to the Department of Health Services;

"Section" refers to a section of the Connecticut General Statutes, Rev. 1958, as amended; and

"Application" refers to the Application for Declaratory Ruling filed by the Petitioners with the DHS, as amended.

2. This Petition for Judicial Review is brought pursuant to the provisions of Section 4-183(a), which states, in relevant part: "A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

3. The Commissioner is, and at all times material hereto, was an officer of an agency of the State of Connecticut, as defined by Section 4-166(1).

4. On May 1, 1980, the Connecticut General Assembly enacted Public Act 80-398, later incorporated into Section 19-560, which states: "On or after October 1, 1980, no person, firm, corporation or municipality may stall any asbestos-cement pipe in any water supply system until the Commissioner of Health Services determines that the use of such pipe in water supply systems does not create a public health hazard."

5. Petitioners sold asbestos-cement pipe for installation within the State of Connecticut prior to October 1, 1980.

6. On August 5, 1980, pursuant to Section 4-176 and Section 19-560, Petitioners filed the Application with the DHS, a copy of which will be filed as Exhibit A.

7. On October 29 and 30, 1980, the DHS held a hearing on the Application before a hearing panel of three administrative officers.

8. Citizens for Clean Water was accorded Intervenor status at that hearing.

9. At the hearing the Petitioners introduced extensive scientific and medical evidence, including certain results of federal animal feeding experiments and studies, demonstrating that the use of asbestos-cement water pipe is not hazardous to the public health.

10. On January 19, 1981, the Petitioners filed with the DHS a brief in support of the Application.

11. On July 10, 1981, the DHS forwarded to the Petitioners the hearing panel's Memorandum of Decision, a copy of which will be filed as Exhibit B.

12. On July 30, 1981, the Petitioners requested the Commissioner to defer ruling on the Application until such time as the final results of the federal animal feeding experiments and studies could be reviewed and evaluated, a copy of which request will be filed as Exhibit C.

13. The Commissioner denied Petitioners' request for deferral on August 19, 1981, a copy of which denial will be filed as Exhibit D.

14. On August 27, 1981, the Petitioners withdrew the Application, a copy of which will be filed as Exhibit E.

15. By letter dated November 17, 1981, the Commissioner rejected Petitioners' withdrawal of the Application and, pursuant to Section 4-179, notified Petitioners of their opportunity to submit briefs and to make exceptions by December 4, 1981, and to submit oral argument on the hearing panel's proposed memorandum of decision on December 8, 1981, a copy of which letter will be filed as Exhibit F.

16. The ruling of the Commissioner in rejecting Petitioners' withdrawal of the Application and the action taken in scheduling further proceedings on the Application is illegal and void in that:

- (i) there is no case, controversy or matter before the Commissioner or DHS upon which he or it may rule;
- (ii) the Commissioner does not have the lawful authority to make a ruling on the Application because it is no longer before him;
- (iii) the Commissioner lacked the authority to reject the withdrawal of the Application;
- (iv) the Commissioner has not complied with the requirements of Section 4-168, and other provisions of the law, and hence his claim to have continuing authority in the matter is without merit;
- (v) the Commissioner's action is unreasonable and constitutes an abuse of discretion in view of the fact that the installation of the subject pipe remains prohibited by Public Act 80-398 and hence the public health could not be affected by the withdrawal of the Application; and
- (vi) since the Application has been withdrawn, Petitioners have no request for a ruling pending, and therefore there is no issue upon which to hold further proceedings.

17. The Petitioners' substantial rights have been prejudiced because the Commissioner's action in rejecting withdrawal of the Application is:

- (i) contrary to the law and inconsistent with the regulations of the DHS; and
- (ii) arbitrary or capricious and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

18. The Petitioners are aggrieved by the Commissioner's action because:

- (i) the Commissioner unlawfully attempts to expose and subject the Petitioners to the harm and damage of a decision based on less than all of the probative evidence; and
- (ii) the Commissioner unlawfully seeks to interfere with the exercise of the Petitioners' right to withdraw from proceedings before an administrative agent or agency.

19. Review of the final agency decision would not provide the Petitioners with an adequate remedy because:

- (i) the decision would be predicated on less than all of the facts available to the DHS and the Commissioner on the central issue of "public health hazard";

- (ii) the Petitioners would be put to the cost, expense and risk of the continuing administrative proceedings;
- (iii) a final decision, if unfavorable, would result in the necessity of an appeal by the Petitioners, with its attendant cost and expenses, in contravention of the interest in cessation of litigation;
- (iv) an unfavorable decision, albeit based upon an incomplete record, would or might have a harmful effect on the Petitioners' business, which could not be remedied by later judicial review and reversal; and
- (v) the Petitioners would be exposed to the risk of an unfavorable decision by the Commissioner, in contravention of its legal rights.

WHEREFORE, the Petitioners appeal from the Commissioner's decision and request that this Court:

- (i) issue an order staying any further proceedings on the Application by the Commissioner;
- (ii) schedule an immediate and expedited hearing upon this petition and appeal;
- (iii) issue a final order vacating and setting aside the Commissioner's action in rejecting withdrawal of the Application; and
- (iv) grant such other relief in law or equity as may be required or appropriate.

Susan M. Babcock of Suffield, Connecticut is recognized
in the sufficient sum of \$250 to prosecute, etc.

Dated at Hartford, Connecticut, this ____ day of December,
1981.

CERTAIN-TEED, INC. and
JOHNS-MANVILLE SALES CORPORATION

By _____
Brandon J. Hickey
Commissioner of Superior Court

Please enter our appearance
for the petitioners-appellants
in the above-entitled action.

MURTHA, CULLINA, RICHTER AND PINNEY
101 Pearl Street - P.O. Box 3197
Hartford, Connecticut 06103
Telephone: (203) 549-4500
Juris No. 40248

Ret. 4th Tuesday of December, 1981.

CERTAIN-TEED, INC.	)	SUPERIOR COURT
	)	
AND	)	
	)	
JOHNS-MANVILLE SALES CORPORATION)	)	JUDICIAL DISTRICT OF
	)	HARTFORD/NEW BRITAIN
vs.	)	
	)	
DOUGLAS S. LLOYD,	)	AT HARTFORD
COMMISSIONER OF THE	)	
DEPARTMENT OF HEALTH SERVICES	)	DECEMBER , 1981

APPLICATION TO STAY

Pursuant to Section* 4-183(c), the Petitioners apply to this Court for an Order staying the decision of the Commissioner, dated November 17, 1981, as annexed hereto, for the following reasons:

1. The Commissioner ruled and decided on November 17, 1981, that the Petitioners' withdrawal of its Application was ineffectual.

2. The Commissioner has ruled that the time within which the Petitioners must file a brief with the Commissioner, and taken exceptions, as contemplated by Section 4-179, is December 4, 1981, and the time within which the Petitioners must submit oral argument to the Commissioner, also as contemplated by Section 4-179, is December 8, 1981.

3. For the reasons set forth in the accompanying Petition for Judicial Review, the Commissioner's decision is illegal and void.

4. The Commissioner has the power to, and it may be assumed he will, issue a decision upon the Application on or after December 8, 1981.

5. If this Court does not stay the Commissioner from taking such action and making such a decision, then the Petitioners will be effectively deprived of their statutory right under Section 4-183 to have an immediate judicial review of the Commissioner's action since the issue will have become moot and the damage which the Petitioners seek to avoid may or will have been inflicted.

Respectfully,

THE PETITIONERS

By

Brandon J. Hickey of

Murtha, Cullina, Richter and
Pinney

101 Pearl Street - P.O. Box 3197
Hartford, Connecticut 06103
Telephone: 549-4500

Their Attorneys

*Certain of the capitalized terms used herein have been defined in the Petition for Judicial Review.

Ret. 4th Tuesday of December, 1981.

CERTAIN-TEED, INC.	)	SUPERIOR COURT
	)	
AND	)	
	)	
JOHNS-MANVILLE SALES CORPORATION)	)	JUDICIAL DISTRICT OF
	)	HARTFORD/NEW BRITAIN
vs.	)	
	)	
DOUGLAS S. LLOYD,	)	AT HARTFORD
COMMISSIONER OF THE	)	
DEPARTMENT OF HEALTH SERVICES	)	DECEMBER , 1981

TEMPORARY ORDER OF STAY AND ORDER TO SHOW CAUSE

TO: DOUGLAS S. LLOYD, COMMISSIONER OF THE DEPARTMENT OF
HEALTH SERVICES OF THE STATE OF CONNECTICUT

Whereas, an Application to Stay has been presented
to me, a Judge of the Superior Court, which Court is not
now in session, pursuant to Section 4-183(c); and

Whereas, it appears to the undersigned that a Stay
should issue and hereby is issued, in accordance with the
attached copy of an Order to Stay, pending a hearing on
the Application to Stay;

These are, therefore, to require you to appear before
the undersigned at the Superior Court, Judicial District
of Hartford-New Britain, 95 Washington Street, Hartford,
Connecticut, on the day of December, 1981,

Dated at Hartford, Connecticut, this day of December,
1981.

CAPCO JEN 0013030

Ret. 4th Tuesday of December, 1981.

CERTAIN-TEED, INC.	)	SUPERIOR COURT
	)	
AND	)	
	)	
JOHNS-MANVILLE SALES CORPORATION)	)	JUDICIAL DISTRICT OF
	)	HARTFORD/NEW BRITAIN
vs.	)	
	)	
DOUGLAS S. LLOYD,	)	AT HARTFORD
COMMISSIONER OF THE	)	
DEPARTMENT OF HEALTH SERVICES	)	DECEMBER , 1981

ORDER OF STAY

An Application to Stay, having been presented to me, and it appearing that such Stay should be ordered, it is hereby ordered that the Commissioner of Health Services not proceed to process the Petitioners' Application by receiving briefs and exceptions, hearing oral argument or making a decision thereon until further order of this Court.

By the Court

Judge

Ret. 4th Tuesday of December, 1981.

CERTAIN-TEED, INC.	)	SUPERIOR COURT
	)	
AND	)	
	)	
JOHNS-MANVILLE SALES CORPORATION	)	JUDICIAL DISTRICT OF
	)	HARTFORD/NEW BRITAIN
vs.	)	
	)	
DOUGLAS S. LLOYD,	)	AT HARTFORD
COMMISSIONER OF THE	)	
DEPARTMENT OF HEALTH SERVICES	)	DECEMBER , 1981

CERTIFICATION INTO COURT

The accompanying Application to Stay, together with related papers, made to me in the above-entitled action and proceedings thereon had before me are hereby certified to the Court.

Dated at Hartford, Connecticut, this day of December, 1981.

A Judge of the Superior Court

Ret. 4th Tuesday of December, 1981.

CERTAIN-TEED, INC.	)	SUPERIOR COURT
	)	
AND	)	
	)	
JOHNS-MANVILLE SALES CORPORATION	)	JUDICIAL DISTRICT OF
	)	HARTFORD/NEW BRITAIN
vs.	)	
	)	
DOUGLAS S. LLOYD,	)	AT HARTFORD
COMMISSIONER OF THE	)	
DEPARTMENT OF HEALTH SERVICES	)	DECEMBER 1981

SUMMONS AND ORDER OF SERVICE

TO THE SHERIFF OF THE COUNTY OF HARTFORD OR HIS DEPUTY,
GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby
commanded to give notice of the foregoing Order to Show
Cause to the Commissioner of the Department of Health Services
by serving the Petition, with accompanying Summons and Order
of Service, the Application to Stay, the Temporary Order
to Stay and Order to Show Cause, the Order of Stay, the
Certification and this Summons and Order of Service upon
the Commissioner of the Department of Health Services, State
of Connecticut and Carl R. Ajello, Attorney General of the
State of Connecticut, at their offices in Hartford in the
manner and time prescribed by law for such service.

You are further commanded to leave a true and attested copy thereof with Citizens for Clean Water, in the manner prescribed by law for such service.

Hereof fail not but due service and return make.

Dated at Hartford, Connecticut, this day of December, 1981.

Judge

Denver, CO--December 4, 1981--Johns-Manville Sales Corporation yesterday charged that the Connecticut Department of Health Services is excluding important evidence from federal government animal feeding studies on ingested asbestos.

Johns-Manville and Certain-teed, Inc. commenced a proceeding in Hartford Superior Court yesterday against the Commissioner of the Department of Health Services. The proceeding seeks to prevent any ruling on asbestos-cement pipe that excludes the results of the government's feeding studies.

The two studies, the largest ever run and costing \$4 million, have found no adverse health effects from ingested asbestos. In proceedings on whether asbestos-cement pipe creates any health hazard, the Department of Health Services refused to consider the studies because they were not then "peer-reviewed," a process of having outside experts confirm the results.

"We asked Commissioner of Health Services Douglas Lloyd to defer ruling until peer review was completed. When he refused, we withdrew our application for a ruling, but the commissioner is now seeking to issue the ruling anyway, in effect excluding the feeding study evidence," said Wyatt McCallie, senior counsel for Johns-Manville.

In April 1980, Commissioner Lloyd advised the legislature that the feeding studies "should provide us with important information" on ingested asbestos. "Peer review of one study has now been completed and confirms the absence of health effects. We can't understand how the commissioner can ignore this evidence," McCallie commented.

Asbestos Pipe Producers File Complaint

By L.A. CHUNG

Courant Staff Writer

Two manufacturers of asbestos-cement water pipes, banned in Connecticut since October 1980, filed a petition in Hartford Superior Court Thursday to prevent a state health commissioner from deciding whether to lift the ban without considering federal government studies on the effects of asbestos ingested by rodents.

The petition was filed by Johns-Manville Sales Corp. of Denver, and Certain-Teed Inc., of Valley Forge, Pa., against Health Services Commissioner Douglas S. Lloyd.

Wyatt McCallie, senior counsel for Johns-Manville, charged the state is

excluding evidence that shows ingested asbestos had no adverse effects on rodents in two studies by the National Institute of Environmental Health Services.

A three-member panel of state health experts recommended in July the statutory ban remain in force because "there is still sufficient question as to the effect of oral ingestion of asbestos that we cannot at this time say asbestos does not present a health hazard."

Studies have shown asbestos fibers are harmful when inhaled, but there is no conclusive evidence orally ingested fibers produce the same effect.

McCallie said the state Department

of Health Services refused to consider the federal studies in July because they were not reviewed by an independent group of experts to confirm the results or so-called peer reviews.

Nearly a year ago, the two manufacturers and the national Association for Asbestos-Cement Pipe Producers petitioned the state of Connecticut to lift the ban.

McCallie said "we asked the commissioner... to defer ruling until peer review was completed. When he refused (in July), we withdrew our application for a ruling."

Since then, one of the studies has been reviewed, confirming the findings that there are no adverse health

effects from ingesting asbestos.

However, McCallie said that Lloyd in a letter dated Nov. 17 stated that he will issue a ruling anyway, "in effect excluding the evidence." Lloyd will make the ruling based on recommendations from the three-member panel.

McCallie said the firms withdrew the application for a ruling and are planning to file a new application when the final government reports on the studies are published, which will happen after the second peer review is completed, he said.

The manufacturers' action to seek prevention of the ruling will not affect the ban that is currently in place, he said.

*The Fiber Taped Cement
Manufacturers 14 1981*

FARMINGTON VALLEY

Appeal To Delay Ruling on Asbestos Pipe Ban

By L.A. CHUNG

Courant Staff Writer

The appeal by two manufacturers of asbestos-cement pipe likely will delay for months any ruling on the year-old ban of those pipes, an assistant state attorney general said Friday.

Assistant State's Attorney General Stanley Peck said the court action will delay a ruling by the state health commissioner on the pipe ban.

Johns-Manville Sales Corp. of Denver, Colo., and Certain-Teed Inc. of Valley Forge, Pa., are appealing state Health Commissioner Douglas S. Lloyd's decision to rule on the pipe ban despite their withdrawal of the original petition for a ruling. The current ban will remain in effect without a ruling.

The two manufacturers and the National Association for Asbestos-Cement Pipe Producers petitioned the state health commissioner to lift the

ban last year, but a preliminary decision handed down by a three-member panel in July recommended that the statutory ban remain in effect because there was still "sufficient question" on the effects of oral ingestion of asbestos fibers.

The firms later withdrew their application for a ruling after the commissioner refused to consider two federal government studies that show ingested asbestos fibers had no adverse effects on rodents.

Studies have shown asbestos fibers can cause forms of cancer if inhaled, but there is no conclusive evidence yet on the effects of asbestos fibers if swallowed.

Peck, speaking on behalf of the commissioner, said the firms could not "simply withdraw the application for a ruling" once the hearings had been held and a preliminary decision issued. "There comes a point in the process

where it becomes the (state) agency's (own) application," he said. The statute empowers the commissioner to lift the ban, and he may rule on the ban without an outside application, he said.

The commissioner was to issue a ruling "fairly soon," he said, but the manufacturer's appeal changes the schedule. A hearing in Hartford Superior Court on the appeal will be Jan. 4, when the court will decide whether to stay any action on the ruling until it decides whether the manufacturers had the right to withdraw the application, which could be "a few months or longer," Peck said. If it rules in the firms' favor, the commissioner may have to begin again the whole process of hearing evidence from both sides to issue a ruling.

Wyatt McCallie, senior counsel for Johns-Manville, charged the state was going to issue a ruling despite evidence from two studies by the National Insti-

tute of Environmental Services that showed ingested asbestos had no adverse effects on rodents.

Peck said the commissioner felt "he had enough information gathered from the hearings upon which to make a decision."

The commissioner refused to consider the two studies because they were not reviewed by an independent group of experts to confirm the results. Peck said such so-called peer reviews are "an important part of the process" that confirms the soundness of the techniques used. Since then, one of the studies has been peer-reviewed but is not yet published.

McCallie said the firms plan to file a new application for a ruling to try to get the ban lifted when the final government reports on the studies are published, after the second peer review is completed, he said.