ASBESTOS

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELIZABETH DOLE, SECRETARY OF LABOR, Complainant, v. AMERICAN ASBESTOS CONTROL CO., Respondent.	OSHRC Docket No. 88-2268

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Union Carbide Chemicals and Plastics Company Inc. and The Dow Chemical Company (together the "Companies") hereby move the Commission for leave to file a brief in this proceeding as amici curiae on behalf of the Respondent.

This case involves the proper interpretation of OSHA's construction industry asbestos standard, 29 C.F.R. § 1926.58. The companies are major chemical manufacturers with facilities throughout much of the United States. Many of those facilities contain asbestos. From time to time the Companies engage in asbestos removal, demolition, and renovation operations, and are thus subject to the construction industry asbestos standard.

The interest of the Companies is limited to a single issue: whether 29 C.F.R. § 1926.58(e)(6)(i) limits the use of negative-pressure enclosures to situations where airborne concentrations of asbestos exceed or can reasonably be expected to exceed the standard's permissible limits.

ST0281026

PLAINTIFF'S EXHIBIT
DOW-947

379219

This issue affects all employers subject to the construction industry asbestos standard. It also raises significant considerations which affect all employers. Because the Respondent in this case plans to address other issues besides this one, and thus may be unable to present a full discussion of it, the Companies request leave to supplement Respondent's brief with their own, focussed solely on that issue.

Counsel for the Secretary and for the Respondent have indicated that they have no objection to this motion. [confirm]

Respectfully submitted,

Mark N. Duvall
Health and Safety Counsel
Union Carbide Chemicals and Plastics Company Inc.

Of Counsel:

Toby Alaska Threet
Attorney
The Dow Chemical Company

Date: August 9, 1990

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

No. 88-2268

ELIZABETH DOLE, SECRETARY OF LABOR,

Complainant,

AMERICAN ASBESTOS CONTROL CO.,

Respondent.

BRIEF OF AMICI CURIAE UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC. AND THE DOW CHEMICAL COMPANY

Of Counsel:

Toby Alaska Threet
Attorney
THE DOW CHEMICAL COMPANY
Legal Department
2030 Willard H. Dow Center
Midland, MI 48674

Mark N. Duvall
UNION CARBIDE CHEMICALS AND
PLASTICS COMMPANY INC.
39 Old Ridgebury Road, E3
Danbury, CT 06817-0001

Date: August 9, 1990

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELIZABETH DOLE, SECRETARY OF LABOR, Complainant, v. AMERICAN ASBESTOS CONTROL CO., Respondent.	OSHRC Docket No. 88-2268

AMICUS CURIAE UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC.'S DECLARATION OF PARENT, SUBSIDIARIES, AND AFFILIATES REQUIRED BY COMMISSION RULE 36(c)

Amicus curiae Union Carbide Chemicals and Plastics Company Inc. is a wholly-owned subsidiary of Union Carbide Corporation ("UCC"). Attached is a list of UCC's affiliates and subsidiaries.

This declaration is made in order to provide the Commissioners with the information they need to determine whether they have a financial interest in a party to this proceeding.

Mark N. Duvall
Health and Safety Counsel
Union Carbide Chemicals and Plastics Company Inc.

UCC AFFILIATED COMPANIES

(Subsidiary, Associated & Minority Interest Companies)

NOTE: Percent of ownership may reflect direct ownership through UCC or indirect ownership through its subsidiaries.

	Place of Incorporation	UCC % of Ownership
ACI S.p.A.	Italy	14%
ACM Services, Inc.	Texas	33.33%
Ace Polymer Co., Ltd.	Japan	10%
Administracion y Servicios Carmex, S.A. de C.V.	Mexico	48.5%
Advanced Silicon Materials Inc.	Delaware	100%
The African Manganese Company Limited	U.K.	100%
Agromore, Ltd.	India	25%
Amerchol Corporation	Delaware	100%
Amko Service Company	Ohio	100%
Andaluza De Gases S.A.	Spain	25%
Argon, S.A.	Spain	50%
Arlasa S.A.	Spain	13.49%
Australia and New Zealand Exploration Company	Delaware	100%
Beaucar Minerals, Inc.	Delaware	100%
Beaumaris Resources, Inc.	Canada	100%
Benefit Capital Management Corporation	Delaware	100%
Beralt Tin and Wolfram Limited	U.K.	25%
Beralt Tin and Wolfram (Portugal) S.A.	Portugal	20.14%
Blue Creek Coal Company, Inc.	Delaware	100%
Bridle Company Limited	Hong Kong	100%
British Acheson Electrodes Limited	U.K.	100%
Calida Gas B.V.	Netherlands	50%
Calidria Corporation	Delaware	100%
Callendar Limited	Bermuda	100%
Carbide Hashim Industrial Gases Company	Saudi Arabia	25%
Carbitalia S.p.A.	Italy	8.27%
Carbogas S.p.A.	Italy	10%
Carbographite Limited	Rep. So. Africa	50%
Carburo del Cinca S.A.	Spain	5%
Catalysts, Adsorbents and Process Systems, Inc.	Maryland	100%
Cellulosic Products, Inc.	Delaware	100%
Chemicals Marine Fleet, Inc.	Delaware	100%
Cia. National de Calcareos e Derivados	Brazil	50.14%
Clark Chemical Industry Co., Ltd.	Japan	2.5%
CGT S.p.A.	Italy	4.25%
Coast Composites, Inc.	California	100%
Codim Desenvolvimento de Industrias Minerais Ltda.	Brazil	100%
Companhia Nacional de Oxigenio, Lda.	Portugal	41.67%
Compania Navarra del Oxigeno S.A.	Spain	33.34%
Concal-Carbureto de Cálcio S.A.	Brazil	50.14%
Concoat Integrated Technologies Limited	England	30%
Dexter Realty Corporation	Ohio	100%

	Place of Incorporation	UCC % of Ownership
E G C Realty, Inc.	Minnesota	100%
Elarc - Equipamentos de Soldagem Eléctrica Ltda.	Brazil	25.58%
Electric Furnace Products Company Limited	Ontario	100%
Elektrode Maatskappy van Suid-Afrika (Eiendoms) Beperk	Rep. So. Africa	50%
Eletrometalurgica Saudade Ltda.	Brazil	50.14%
Empresa Brasileira de Reflorestamento e Agro-Pecuaria Ltda.	Brazil	45.13%
Empresa Brasileira de Cilindros Ltda.	Brazil	45.13%
Errany Limited	U.K.	100%
ESA	Italy	3.5%
Ferralloy (Glossop) Limited	England	100%
Ferrygas S.A.	Spain	25%
The Foundation for Social Justice in South Africa, Inc.	New York	*
Frao Fin	Italy	4.79%
Frao Ind	Italy	4.8%
Gacesa	Italy	2.8%
Gas Technics Gases and Equipment Centers of Eastern Pennsylvania, Inc.	Pennsylvania	100%
Gastronomia Baska	Spain	12.5%
Global Industrial Corporation	New York	100%
Greenwich Oil Corporation	Delaware	42.7%
Grupo Condumex, S.A. de C.V.	Mexico	3.5%
Hispano Sueca de Soldadura S.A.	Spain	5%
Hokuetsu Kasei (Chemical) Co., Ltd.	Japan	10%
Hokuetsu Kasei Shoji (Trading) Co., Ltd.	Japan	7.9%
IGI-Italiana Gas Industriali S.p.A.	Italy	37.5%
IGISUD Gas Industriale S.p.A.	Italy	37.5%
Incarmex, S.A. de C.V.	Mexico	48.5%
Indaver, N.V.	Belgium	0.9%
Indugas N.V.	Belgium	50%
Indugas Nederland B.V.	Netherlands	50%
Industrias Carlisil, S.A.	Mexico	100%
Innovative Membrane Systems, Inc.	Delaware	100%
Integrated Technologies, Inc.	Massachusetts	100%
International Cryogenic Equipment Corporation	Delaware	100%
International Diagnostic Systems Corp.	Michigan	30%
IPPO S.p.A.	Italy	2.8%
Italiana Gas Industriali Sud S.p.A.	Italy	34%
ITGC	Italy	10%
Iwatani Industrial Gases Corporation	Japan	11.1%
Jacksonville Welding Supply, Inc.	Florida	100%
Katalistiks Brasileiros Comercio Industrial e Participacoes Ltda.	Brazil	100%
KSC Liquidating, Inc.	Delaware	100%
KTI Chemicals G.m.b.H.	Germany	100%
KTI Chemicals Limited	United Kingdom	100%
KTI Chemicals, Inc.	Delaware	100%
Kyowa Shokai Co., Ltd.	Japan	6.3%

* Non-Profit Organization

	Place of Incorporation	UCC % of Ownership
Lincare Inc.	Connecticut	50%
Linde Comercio e Particpacoes Ltda.	Brazil	100%
Linde Gases of Florida, Inc.	Florida	100%
Linde Gases of the Great Lakes, Inc.	Ohio	100%
Linde Gases of the Mid-Atlantic, Inc.	New Jersey	100%
Linde Gases of the Midwest, Inc.	Illinois	100%
Linde Gases of New England, Inc.	Connecticut	100%
Linde Gases of the Northwest, Inc.	Oregon	100%
Linde Gases of the Southeast, Inc.	North Carolina	100%
Linde Gases of the South, Inc.	Delaware	100%
Linde Gases of Southern California, Inc.	California	100%
Linde Gases of the West, Inc.	Delaware	100%
Linde Puerto Rico, Inc.	Puerto Rico	100%
London Chemical Company, Inc.	Delaware	100%
Master Marble Finishing, Inc.	California	92%
Miami Welding Supply, Inc.	Florida	50%
Mimosa Mining Company (Private) Limited	Rhodesia	100%
Minbeau (Proprietary) Limited	South Africa	100%
Mineracao Liguria Ltda.	Brazil	100%
Mineracao Sao Damaso Ltda.	Brazil	100%
Mopane Mines (Private) Limited	Rhodesia	100%
National Carbon Company Pakistan (Private) Limited	Pakistan	100%
Nepal Battery Company Limited	India	39.44%
Nippon Unicar Company Limited	Japan	50%
Nitropet, S.A.	Mexico	48.5%
Nova Tran Corporation	Wisconsin	100%
Nova Tran Limited	England	100%
Operadora Perinote, S.A. de C.V.	Mexico	48.5%
Ore Sales & Services Limited	England	100%
Orship Incorporated	Panama	100%
Osaka Hokuetsu Kasei Co., Ltd.	Japan	7.5%
Oxigenio Edy, S.A.	Brazil	50.14%
Oxigeno Del Norte, S.A.	Spain	25%
Oxigenus S.A.	Spain	21.25%
Oximesa, S.A.	Spain	21.25%
Oxisud S.p.A.	Italy	3.85%
Phoenix Research Corporation	Delaware	100%
Poly Pack	Japan	8.25%
Polysar Limited	Canada	8.75%
Prentiss Glycol Company	Delaware	100%
S.A. Rapidox Rio Comercio e Particpacoes	Brazil	50.14%
Rapidox Gases Industriais Ltda.	Brazil	50.14%
RMF S.r.l.	Italy	0.96%
Rhee Beheer B.V.	Netherlands	25%
Rivoira S.p.A.	Italy	29.37%
Rivoira Sud S.p.A.	Italy	29.37%
Ruighoek Chrome Mines (Proprietary) Limited	South Africa	100%
SACI S.p.A.	Italy	1.6%
Sankyo Plastics Co., Ltd.	Japan	27.5%
Seadrift Pipeline Corporation	Delaware	100%
SEO	Italy	3%

	Place of Incorporation	UCC % of Ownership
Servicios Administrativos Carmex, S.A. de C.V.	Mexico	48.5%
Servicios de Quimicos Agricolas, S.A.	Mexico	100%
Servicios DYC, S.A. de C.V.	Mexico	48.5%
Shakins Limited	United Kingdom	100%
SIAD Austria	Austria	10%
SIAD-Societa Italiana Acetilene e Derivate S.p.A.	Italy	10%
SMI	Italy	10%
South Charleston Sewage Treatment Company	West Virginia	100%
Tecnoproject	Italy	4%
Tenngasco Gas Gathering Company	Delaware	13.78%
Three Rivers Realty Company	Michigan	100%
TRI	Italy	6%
Tsuda Wire & Cable	Japan	1.50%
UCAR Carbon Canada Inc.	Canada	100%
UCAR Carbon Company Inc.	Delaware	100%
UCAR Carbon (Europe) S.A.	Switzerland	100%
UCAR Carbon Foreign Sales Corporation	U.S. Virgin Islands	100%
UCAR Carbon France S.A.	France	100%
UCAR Carbon Italia S.r.l.	Italy	100%
UCAR Carbon Limited	United Kingdom	100%
UCAR Carbon S.A.	Brazil	50.14%
UCAR Carbon Spain S.A.	Spain	100%
UCAR Carbon Technology Corporation	Delaware	100%
UCAR Coatings Resinas, C.A.	Ecuador	100%
UCAR Energy Services Corporation	Delaware	100%
UCAR Industrial Gases N.V.	Belgium	100%
UCAR Industrial Services B.V.	Netherlands	100%
UCAR Interam, Inc.	Delaware	100%
UCAR Limited	England	100%
UCAR Louisiana Pipeline Copany	Delaware	100%
UCAR Pipeline Incorporated	Delaware	100%
UCAR, Polimeros y Quimicos C.A.	Ecuador	100%
UCAR Specialty Gases N.V.	Belgium	100%
UCAR Specialty Gases Nederland B.V.	Netherlands	100%
UCAR Vanor (Proprietary) Limited	South Africa	100%
UCFC, Inc.	Delaware	100%
U.C. Carbon Products Limited	England	100%
U.C. Investment Limited	British Virgin Islands	48.5%
Ucex (U.K.) Limited	England	100%
UCORE Limited	Delaware	100%
Umetco Minerals Corporation	Delaware	100%
Umetco Minerals Exploration Corporation	Delaware	100%
Unicarb Comercio e Participacoes Ltda.	Brazil	100%
Unicarb Industrial, S.A. de C.V.	Mexico	48.5%
Unicarb International, Inc.	British Virgin Islands	48.5%
Unicarbon Comercial Ltda.	Brazil	100%
Unigas, Inc.	New York	100%
Unigas S.p.A.	Italy	100%
Unigases Comercial Ltda.	Brazil	100%

		Place of Incorporation	UCC % of Ownership
	Union Carbide Argentina S.A.I.C.S.	Argentina	100%
	Union Carbide Asia Limited	Hong Kong	100%
	Union Carbide Asia Pacific, Inc.	Delaware	100%
	Union Carbide Austria G.m.b.H.	Austria	100%
	Union Carbide Benelux N.V.	Belgium	100%
	Union Carbide do Brasil Limitada	Brazil	100%
	Union Carbide Canada Limited	Canada	74.39%
	Union Carbide Caribe Inc.	Delaware	100%
	Union Carbide Chemicals (Australia) Pty. Ltd.	Australia	100%
	Union Carbide Chemicals France S.A.	France	100%
	Union Carbide Chemicals S.p.A.	Italy	100%
	Union Carbide Chemicals G.m.b.H.	Germany	100%
N	Union Carbide Chemicals Iberica S.A.	Spain	100%
	Union Carbide Chemicals (New Zealand) Limited	Australia	100%
	Union Carbide Chemicals and Plastics (Europe) S.A.	Switzerland	100%
	Union Carbide Chemicals and Plastics Company Inc.	New York	100%
	Union Carbide Chemicals & Plastics Technology Corporation	Delaware	100%
	Union Carbide Coatings Service Corporation	Delaware	100%
	Union Carbide Coatings Service (Europe) S.A.	Switzerland	100%
	Union Carbide Coatings Service G.m.b.H.	Germany	98%
	Union Carbide Coatings Service Ltd.	United Kingdom	100%
	Union Carbide Coatings Service S.A.	France	100%
	Union Carbide Coatings Service S.p.A.	Italy	100%
	Union Carbide Coatings Service Technology Corporation	Delaware	100%
	Union Carbide Comercial, C.A.	Venezuela	100%
	Union Carbide Comercial Chile Ltda.	Chile	100%
	Union Carbide Comercial Nicaragua, S.A.	Nicaragua	100%
	Union Carbide Communications Company, Inc.	Delaware	100%
D			
	Union Carbide Diagnostics Inc.	(Unknown)	100%
	Union Carbide Eastern, Inc.	Delaware	100%
	Union Carbide Engineering and Hydrocarbons Service Company, Inc.	Delaware	100%
	Union Carbide Ethylene Oxide/Glycol Company	Delaware	100%
	Union Carbide Eurofinance B.V.	Netherlands	100%
	Union Carbide Finance Corporation	Delaware	100%
	Union Carbide Foreign Sales Corporation	U.S. Virgin Islands	100%
	Union Carbide Formosa Co., Ltd.	Taiwan	100%
	Union Carbide Grafito, Inc.	New York	100%
	Union Carbide Hellas Ltd.	Greece	100%
	Union Carbide Iberica, S.A.	Spain	100%
	Union Carbide Imaging Systems, Inc.	Delaware	100%
	Union Carbide India Limited	India	50.9%
	P.T. Union Carbide Indonesia	Indonesia	100%
	Union Carbide Industrial Gases Asia Inc.	Delaware	100%
	Union Carbide Industrial Gases (Europe) S.A.	Switzerland	100%
N	Union Carbide Industrial Gases G.m.b.H.	Germany	100%
	Union Carbide Industrial Gases Inc.	Delaware	100%
	Union Carbide Industrial Gases K.K.	Japan	100%
	Union Carbide Industrial Gases Ltd.	United Kingdom	100%
	Union Carbide Industrial Gases N.V.	Belgium	100%
N	Union Carbide Industrial Gases S.A.	France	100%
	Union Carbide Industrial Gases S.p.A.	Italy	100%
	Union Carbide Industrial Gases Technology Corporation	Delaware	100%
	Union Carbide Industrial Services Company	Texas	100%

	Place of Incorporation	UCC % of Ownership
Union Carbide Inter-America, Inc.	Delaware	100%
Union Carbide Inter-America, Inc.	New Jersey	100%
Union Carbide International Capital Corporation	New York	100%
Union Carbide International Sales Corporation	Delaware	100%
Union Carbide Japan K.K.	Japan	100%
Union Carbide Korea Limited	Rep. of Korea	100%
Union Carbide Land and Investments (Private) Limited	Zimbabwe	100%
R Union Carbide Lanka Limited	Sri Lanka	49%
Union Carbide Management Services (Private) Limited	Zimbabwe	100%
Union Carbide Marble Care, Inc.	Delaware	92%
Union Carbide Metals G.m.b.H.	Germany	100%
Union Carbide Mexicana, S.A. de C.V.	Mexico	48.5%
Union Carbide Middle East Limited	Delaware	100%
Union Carbide Navarra, S.A.	Spain	100%
Union Carbide Pakistan Limited	Pakistan	60%
Union Carbide Pan America, Inc.	Delaware	100%
Union Carbide Philippines (Far East), Inc.	Philippines	100%
Union Carbide Polyolefins Development Company, Inc.	Delaware	100%
Union Carbide Puerto Rico, Inc.	Puerto Rico	100%
Union Carbide Ranches (Private) Limited	Zimbabwe	100%
Union Carbide S.A.	Switzerland	100%
Union Carbide Services K.K.	Japan	100%
Union Carbide Services Eastern Limited	Hong Kong	100%
Union Carbide South Africa (Proprietary) Limited	South Africa	100%
Union Carbide Southern Africa (USA), Inc.	Delaware	100%
Union Carbide Subsidiary C, Inc.	Delaware	100%
Union Carbide Thailand Limited	Thailand	100%
Union Carbide Turkey, Inc.	Delaware	100%
Union Carbide U.K. Limited	U.K.	100%
Union Carbide Zimbabwe (Private) Limited	Zimbabwe	100%
Union Gas Company Limited	Rep. of So. Korea	86.15%
Union Polymers Sdn. Bhd.	Malaysia	60%
Union Technology Company, Limited	Korea	100%
UNISON Caribe Transformer Services, Inc.	Delaware	100%
UNISON Transformer Services, Inc.	Delaware	100%
United States Welding, Inc.	Colorado	50%
Vitaphore Corporation	California	100%
Wako Jushi Co., Ltd.	Japan	25%
S.A. White Martins	Brazil	50.14%
White Martins Administracao e Investimentos Ltda.	Brazil	50.14%
White Martins Comercial Ltda.	Brazil	50.14%
White Martins Gases Industriais S.A.	Brazil	50.14%
White Martins Gases Industriais do Nordeste S.A.	Brazil	50.14%
White Martins Gases Industriais do Norte S.A.	Brazil	50.14%
White Martins Productos de Carbono S.A.	Brazil	50.14%
White Martins Soldagem Ltda.	Brazil	50.14%
White Martins Trading S.A.	Brazil	50.14%
Zimbabwe Mining and Smelting Company (Private) Limited	Zimbabwe	100%

UNION CARBIDE CANADA LIMITED SUBSIDIARIES

	Place of Incorporation	UCC % of Ownership
Acetogen Welding Supplies (1985) Ltd.	British Columbia	74.39%
Ampro Oxygen Ltd.	Quebec	74.39%
Atlantic Oxygen Ltd.	Nova Scotia	74.39%
B. C. Welding Supplies Ltd.	British Columbia	74.39%
Borstad Welding Supplies Ltd.	Canada	74.39%
Borstad Welding Supplies (1985) Ltd.	Canada	74.39%
Brouillette Oxygene Ltee	Quebec	74.39%
Brunswick Oxygen & Welding Supply Co. Ltd.	New Brunswick	74.39%
Buckwold Welding Supplies Ltd.	Manitoba	74.39%
Cane Associates Limited	Ontario	37.20%
Canadian Welding Gases Limited	Ontario	59.48%
Coastal Plastics Limited	Nova Scotia	74.39%
Commercial Alcohols Reg'd**	Canada	37.20%
Commercial Alcohols Limited	Canada	37.20%
Consumers Welders Supplies Inc.	Alberta	74.39%
CSI Carbonation Service Inc.	Ontario	74.39%
Ernest Gilbert Inc.	Quebec	74.39%
Essex Welders Supply Limited	Ontario	74.39%
Island Welding Supplies Ltd.	British Columbia	74.39%
L. & L. Equipment Ltd.	British Columbia	74.39%
Linde Marketing & Distribution Inc.	Canada	74.39%
Linde Technologies Inc.	Ontario	74.39%
M & M Supplies Ltd.	New Brunswick	74.39%
Medigas Canada Inc.	Canada	52.33%
Medigas Homecare Service Lakehead Ltd.	Ontario	37.20%
Medigas Inc.	Canada	74.39%
Medigas (New Brunswick) Limited	New Brunswick	74.39%
Medigas (P.E.I.) Ltd.	Prince Edward Island	74.39%
Medigas (Saskatchewan) Limited	Saskatchewan	74.39%
Medigas (Territories) Limited	North West Territory	74.39%
Metalwelding Supply Company Limited	Ontario	74.39%
Morgan Industries Inc.	Ontario	74.39%
Niagara Welders Supply Limited	Ontario	74.39%
North Shore Oxygen (1969) Inc.	Quebec	74.39%
Petromont Inc.	Quebec	37.20%
Richelieu Welding Supplies Ltd.	Quebec	74.39%
Rioux Oxygen Inc.	Quebec	37.20%
Rocky Mountain Welding Supplies (1985) Ltd.	British Columbia	74.39%
Saguenay Oxygene (1968) Ltee.	Quebec	37.93%
Shawinigan Pipeline Reg'd**	Canada	37.20%
Supreme Welding Supplies Limited	Ontario	74.39%
Tri-Valley Welding Products Inc.	Ontario	74.39%
Trillium Respiratory Care and Services Inc.	Ontario	70.42%
Union Carbide Performance Plastics Ltd.	Canada	74.39%
Vandry Gas & Welding Products Ltd.	Quebec	74.39%
Welders Supply Company	Ontario	37.20%
Wetmore Welding Supplies Limited	Ontario	37.20%

** Partnership

Joint Ventures and Partnerships

	Name	Business Group/Division and/or Company	% of Participation
	AHBC Associates	BC Chesapeake Corporation (Armada/Hoffler-Greenleaf Associates L.P.)	50%
	Agri-Diagnostics Associates	C&P-UC Diagnostics Inc. (Koppers Agri-Research Co.)	60%
	Alestra Energy Company	Umetco-Dexter Realty (National Production Corp.)	50%
	American Acetyls	C&P-Solvents & Coatings (BP Chemicals International)	50%
	Baker Cummins Dermatologicals, Inc.	UCC&P-Specialty Chemicals (Baker Cummins Pharmaceuticals)	50%
	DCS Capital Corporation	C&P-Prentiss Glycol Co. (Dow Chemical) (Shell Oil)	33.33%
	Elocar Company	C&P-Solvents & Coatings (Swiss Polymer)	50%
	Gas & Equipment Limited	UCUKL-Specialty Gases (Gas & Equipment Group)	50%
	Catesby House Antiques Ltd.	U.K. (100% G&E Ltd.)	50%
	Cylinder Gases Ltd.	U.K. (100% G&E Ltd.)	50%
	Gas & Equipment A/S	Norway (100% G&E Ltd.)	50%
	Gas & Equipment Inc., USA	USA (100% G&E Ltd.)	50%
	Gas & Equipment International B.V.	Netherlands (100% G&E Ltd.)	50%
	Dive Products Sdn. Bhd.	Brunei (100% G&E Int'l)	50%
	Koehler Inc.	USA (100% G&E Int'l)	50%
	Gas & Equipment Ltd.	Hong Kong (100% G&E Int'l)	50%
	Gas & Equipment Pte. Ltd.	Singapore (100% G&E Int'l)	50%
	Gas & Equipment Willemstad B.V.	Netherlands Antilles (100% G&E Ltd.)	50%
	GenEx, Ltd.	UC Industrial Gases Inc.	83.5%
	Genesis, Ltd.	(100% GenEx)	83.5%
	Genesis Systems Group, Ltd.	(40% Genesis, Ltd.)	33.4%
	Hill Equipment Company	(100% Genesis, Ltd.)	83.5%
	Illini Tec Systems, Inc.	(100% Genesis, Ltd.)	83.5%
	Welders Supply Company	(100% Genesis, Ltd.)	83.5%
	Gopher Welding Supply Co.	Minnesota (100% GenEx)	83.5%
	Gopher Medical Co., Inc.	Minnesota (100% Gopher Weld)	83.5%
N	Golden Quarry	Mimosa Mining & Smelting [Falcon (U.K.)]	56%

Joint Ventures and Partnerships
(Continued)

Name	Business Group/Division and/or Company	% of Participation
Hecla	Umetco	50%
Hexatech Polymers	C&P (Sekisui America Corp.)	50%
Iwatani-UCISCO Corp.	UCIG (Iwatani International Corp.)	50%
KEMET Electronics Corporation	C&P-Solvents & Coatings (General Electric Credit Corp.)	52.77%
KEMET Electronics Asia Limited	Hong Kong (100% KEMET Elec.)	52.77%
KEMET Electronics Marketing (S) Pte. Ltd.	Singapore (100% KEMET E. Asia)	52.77%
KEMET Electronics S.A.	Switzerland (100% KEMET Elec.)	52.77%
KEMET Electronics G.m.b.H.	Germany (100% KEMET E. SA)	52.77%
KEMET Electronics Limited	U.K. (100% KEMET E. SA)	52.77%
KEMET Electronics SARL	France (100% KEMET E. SA)	52.77%
KEMET International, Inc.	U.S.V.I. (100% KEMET Elec.)	52.77%
KEMET de Mexico, S.A. de C.V.	Mexico (100% KEMET Elec.)	52.77%
Keren Limited	UCC/General Services	25%
Niject Service Company	Linde/UCAR Energy Svs. Corp. (Ingersoll-Rand)	50%
Petromont and Company Limited (Limited Partnership)	Union Carbide Canada Limited	49.95% (UCCL Ownshp)
Polypropylene Partnership (CUA/Tax Partnership)	C&P-UNIPOL Systems Dept. (Shell Oil)	50%
RC Development Associates Limited Partnership	UCC/General Services (Related Danbury Associates L.P.)	33.33%
Seadrift Polypropylene Company	C&P-UNIPOL Systems Dept. (Shell Oil)	50%
Seoul Cold Air Products Co., Ltd.	Union Gas Co., Ltd (Korea Industrial Gas) (Korea Gas Corp.) (Daesung Sanso) (Jung Woo Development)	22.37% (UGC Ownshp)

Joint Ventures and Partnerships
(Continued)

Name	Business Group/Division and/or Company		% of Participation
UOP	C&P-Catalysts, Adsorbents and Process Systems, Inc. (Allied Signal Inc.)		50%
Cataleasco, Inc.		(100% UOP)	50%
Nikki-Universal Co., Ltd.	Japan	(50% UOP)	25%
Shanghai UCC-UOP Molecular Sieve Co.	Shanghai	(70% UOP)	35%
UOP B.V.	The Netherlands	(100% UOP)	50%
UOP Equitec Service, Inc.		(100% UOP)	50%
UOP G.m.b.H.	Germany	(100% UOP)	50%
UOP International Services Ltd.	United Kingdom	(100% UOP)	50%
UOP K.K.	Japan	(100% UOP)	50%
UOP Limited	United Kingdom	(100% UOP)	50%
UOP France S.A.	France	(100% UOPL)	50%
UOP S.p.A.	Italy	(100% UOPL)	50%
UOP Management Services, Inc.		(100% UOP)	50%
UOP Management Services (Saudi Arabia) Ltd.	Saudi Arabia	(49% UOPMSI)	24.5%
UOP N.V.	Belgium	(100% UOP)	50%
UOP Processes Industrials de Brasil Ltda.	Brazil	(100% UOP)	50%
UOP Spain, S.A.	Spain	(100% UOP)	50%
Union Carbide Engineering & Technology Services (Africa & Middle East), Inc.	Delaware	(100% UOP)	50%
UOP M.S. S.p.A.	Italy	(100% UOP)	50%
Union Showa K.K.	Japan	(50% UOP)	25%
Universal Oil Products Company Ltd.		(100% UOP)	50%
Umetco/H-B Limited Partnership	Umetco (Hanksville-Blanding Limited Partnership)		75%
Union Carbide-Atlas	Umetco (Atlas Corporation)		50%
Union Carbide-Rajah	Umetco (Rajah Ventures, Ltd.)		50%
Union Carbide-Taminco	Umetco (Taminco, Inc.)		50%
Union Marine Transport Co.	C&P-Solvents & Coatings (CMF) (Marine Transport Lines, Inc.)		50%
Wellnite Services	Linde (Halliburton Company)		50%
World Ethanol Company	C&P-Solvents & Coatings (Archer Daniels Midland Co.)		50%

Associations

Name	Business Group/Division and/or Company	% of Participation
Union Carbide/Bechtel Association	UCC&P (Bechtel Corporation)	---

July 23, 1990
amy506-4a

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

29 C.F.R. § 1910.1001 .....

29 C.F.R. § 1926.58 .....

29 C.F.R. § 1926.58(b) .....

29 C.F.R. § 1926.58(c) .....

29 C.F.R. § 1926.58(e)(1) .....

29 C.F.R. § 1926.58(e)(6) .....

29 C.F.R. § 1926.58(e)(6)(i) .....

29 C.F.R. § 1926.58 (e)(6)(ii) .....

29 C.F.R. § 1926.58(e)(6)(iv) .....

29 C.F.R. § 1926.58(f)(3) .....

29 C.F.R. § 1926.58(i)(4) .....

29 C.F.R. § 1926.58(j)(2) .....

29 C.F.R. § 1926.58, Appendix F .....

29 C.F.R. § 1926.58, Appendix G .....

FEDERAL REGISTER:

as [

48 Fed. Reg. 51085 (Nov. 4, 1983) .....

49 Fed. Reg. 14116 (Apr. 10, 1984) .....

51 Fed. Reg. 22612 (June 20, 1986) .....

53 Fed. Reg. 35610 (Sept. 14, 1988) .....

54 Fed. Reg. 52024 (Dec. 20, 1989) .....

55 Fed. Reg. 29712 (July 20, 1990) .....

MISCELLANEOUS:

Letter from Charles A. Adkins to Daniel Hoffman (Oct. 10, 1986) .....

ST0201045

DRAFT 8/2/90 WP+ 53

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELIZABETH DOLE, SECRETARY OF LABOR, Complainant, v. AMERICAN ASBESTOS CONTROL CO., Respondent.	OSHRC Docket No. 88-2268

BRIEF OF AMICI CURIAE
UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC.
AND THE DOW CHEMICAL COMPANY

STATEMENT OF INTEREST

This case involves the proper interpretation of OSHA's construction industry asbestos standard. Amici Curiae Union Carbide Chemicals and Plastics Company Inc. and The Dow Chemical Company (together "amici") are major chemical manufacturers with facilities throughout much of the United States. Many of those facilities contain asbestos. From time to time amici and/or their contractors engage in asbestos removal, demolition, or renovation operations, and are thus subject to the construction industry asbestos standard. As determined by industrial hygiene monitoring, many of those operations are conducted with airborne concentrations of asbestos well below the permissible exposure limits ("PEL") of OSHA's construction industry asbestos standard, due to the use of wet methods and other techniques.

The interest of amici in this case concerns a single issue raised, argued, and decided in the proceedings below: whether 29 C.F.R. § 1926.58(e)(6)(i) limits the use of negative-pressure enclosures to situations where airborne concentrations of asbestos exceed or reasonably can be expected to exceed the PEL prescribed in 29 C.F.R. § 1926.58(c). Amici believe that the requirement is so limited. The Secretary argued, and Judge Salyers held, that that requirement applies regardless of the potential for overexposure. Amici urge the Commission to reverse the Administrative Law Judge's decision on this point.

PROCEEDINGS BELOW

Respondent American Asbestos Control Company ("AACC") was issued several citations. The item of interest here is the citation for an alleged willful violation of 29 C.F.R. § 1926.58(e)(6)(i) stating:

> 29 CFR 1926.58(e)(6)(i): The employer did not establish negative pressure enclosures where feasible, before commencing removal, demolition and renovation operations: (a) On August 11, 1988, employeyees [sic] removed asbestos containing material from the interior of pot A at door 661 at Armco, Inc.'s Middletown Works and a negative pressure enclosure was not constructed around the removal operation.

AACC timely contested the citation.

On September 18, 1989 Judge Salyers issued a decision and order affirming this item as a serious violation and assessed a penalty of $1,000. The decision noted that:

> The Secretary does not challenge the results obtained in the air sampling performed by respondent during the removal procedures at "pot A" which reflect a range (.003 to .004 fibers per cubic centimeter) well below the PEL.

American Asbestos Control Co. ("AACC"), 1989 CCH OSHD ¶ 28,704 (No. 88-2268, 1989), slip op. at 7. But the Judge deferred to the Secretary's interpretation that 29 C.F.R. § 1926.58(e)(6)(i) requires use of negative-pressure enclosures where feasible in asbestos removal, demolition, and renovation operations, regardless of the level of airborne concentration of asbestos.

Respondent timely filed a petition for discretionary review with the Commission. Acting Chairman Arey granted the petition on October 25, 1989 with respect to four issues. The second issue stated:

> Did the Judge err in concluding that the Secretary did not have the burden of proving that the Respondent's employees were working in "an area . . . where airborne concentrations of asbestos . . . exceed or can reasonably be expected to exceed the permissible exposure limit"?

SUMMARY OF ARGUMENT

The Commission has the opportunity to resolve a conflict between Administrative Law Judges concerning an important issue arising under the asbestos standard for construction: whether the Secretary must prove that it is at least reasonable to expect that airborne concentrations of asbestos will exceed the PEL before requiring employers engaging in asbestos removal, demolition, and renovation operations to implement negative-pressure enclosures and related procedures. Judge Salyers decided below that the Secretary has no obligation to prove reasonable likelihood of overexposure before requiring a

negative-pressure enclosure. Subsequently, in a different case Judge Barkley came to precisely the opposite conclusion. Reviewing the express terms of the standard, the standard's purpose, and the Secretary's "graduated response" strategy, Judge Barkley concluded that the Secretary must prove that it is at least reasonable to expect overexposures. Under the facts of that case, he found that the Secretary had proven that overexposures were reasonable to expect. Expert Environmental Control, Inc. ("EEC"), 14 BNA OSHC 1666 (No. 88-1956, May 10, 1990). The Commission should endorse Judge Barkley's resolution of the issue.

By its own terms, the construction industry standard for asbestos limits the application of the negative-pressure enclosure requirement, paragraph (e)(6)(i), to those asbestos removal, demolition, and renovation operations for which airborne concentrations exceed or can reasonably be expected to exceed the PEL. Paragraph (b) defines "regulated area" to include a negative-pressure enclosure and states that a regulated area, whether of a traditional nature or a negative-pressure enclosure, is an area established "to demarcate areas where airborne concentrations of asbestos . . . exceed or can reasonably be expected to exceed the [PEL]". Similarly, paragraph (e)(1), entitled "General", repeats that limitation on the scope of the "regulated area" requirement.

If the Secretary believes that the negative-pressure enclosure requirement should say something it does not now say,

she should amend the standard through rulemaking. She has just proposed to do exactly that. The Commission should not interfere in this belated effort to effect a policy change through the appropriate mechanism, rulemaking, rather than through interpretation in an enforcement proceeding.

The Secretary's interpretation in this case is not entitled to deference. It is the Commission's interpretation, not that of the Secretary, to which deference is due. Even if the Secretary's interpretation of OSHA regulations were generally entitled to deference, however, deference is not appropriate in this case. Here the Secretary's interpretation is inconsistent with the text of the standard and with prior authoritative interpretations. It would require use of a negative-pressure enclosure even in the absence of significant risk. The interpretation is unsupported by reasoning, and it was not thoroughly considered.

Construing the negative-pressure enclosure requirement in accordance with the language of the standard would be consistent with the purpose of the requirement, to protect employees from overexposure to asbestos. It is perfectly consistent with that purpose to limit the application of the requirement to situations where overexposure is at least reasonably likely.

ARGUMENT

I. The Standard Expressly Limits the Negative-Pressure Enclosure Requirement to Situations in Which Airborne Concentrations Above the PEL Are at Least Reasonably Likely.

A. Overview of the Negative-Pressure Enclosure Requirement

Like employers, the Secretary is bound by the terms of the asbestos standard for construction as it is written. Those terms are unambiguous, because in two separate places they limit the negative-pressure enclosure requirement to situations in which it is at least reasonably likely that airborne concentrations above the PEL will occur.

In his decision, Judge Salyers deferred to the Secretary's interpretation as reasonable without rigorously considering whether in fact it is reasonable. The Judge noted the employer's arguments based upon the language of the standard, but relied upon the Secretary's quotations from the preamble and the compliance directive. In sharp contrast, Judge Barkley scrutinized the text of the standard, quoting key provisions at length. Then he stated:

> I find that the requirement of a negative-pressure enclosure is not applicable until the Secretary establishes evidence of actual overexposure, or that overexposure can reasonably be expected from the cited activity.

EEC, slip op. at 7.

In another case involving the appropriate interpretation of a regulated area provision, the Commission has stated the criteria to be applied in resolving questions of regulatory construction:

> In construing the standard, we are mindful of several principles. We must look first to the language of the standard. See Bunge Corp., 86 OSAHRC __/__, 12 BNA OSHC 1785, 1789, 1986 CCH OSHD ¶27,565 p. 35,804 (No. 77-1622, 1986), and cases cited. Second, although legislative history and other extrinsic aids to interpretation may be

used to determine the intent of the drafter, standards should be construed in a way that does not deprive employers of fair notice of the requirements of the law. See id., 12 BNA OSHC at 1790-91, 1986 CCH OSHD at p. 35,806, and cases cited. See also Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1119 [6 OSHC 1197, 1200] (10th Cir. 1977); Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157, 161-62 [6 OSHC 1440, 1443-44] (3d Cir. 1978); Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 650 [4 OSHC 1001, 1005] (5th Cir. 1976); Lisbon Contractors, Inc., 84 OSAHRC 19/A2, 11 BNA OSHC 1971, 1973-74, 1984 CCH OSHD ¶26,924, p. 34,500 (No. 80-97, 1984).

CF&I Steel Corp., 12 BNA OSHC 2067, 2073 (No. 79-4786, 1986), affirmed sub nom. Dole v. OSHRC (CF&I Steel Corp.), 891 F.2d 1495, 14 BNA OSHC 1388 (10th Cir. 1989), petition for cert. granted, 58 U.S.L.W. 3811 (U.S. June 25, 1990). Both criteria must be applied to resolving this issue, as Judge Barkley found. EEC, slip op. at 9-10.

As amended in 1988, the construction industry asbestos standard establishes two permissible exposure limits: an 8-hour time-weighted average ("TWA") of 0.2 fibers per cubic centimeter of air ("f/cc"), and an excursion limit of 1 f/cc averaged over 30 minutes. 29 C.F.R. § 1926.58(c). The action level is 0.1 f/cc (8-hour TWA). Id. § 1926.58(b). Another provision requires establishment of regulated areas "where airborne concentrations of asbestos . . . exceed or can reasonably be expected to exceed the TWA and/or excursion limit prescribed by paragraph (c) of this section." Id. § 1926.58(e)(1). A species of regulated area, the negative-pressure enclosure requirement appears in paragraph (e)(6)(i). It has no counterpart in the general industry standard for asbestos, 29 C.F.R. § 1910.1001.

Paragraph (e)(6)(i) provides:

> Wherever feasible, the employer shall establish negative-pressure enclosures before commencing removal, demolition, and renovation operations.

A negative-pressure enclosure is essentially a large bag built over an asbestos abatement work area. It is typically constructed of 6-mil polyethylene plastic sheet, sealing tape, air locks, and negative-pressure systems. See 29 C.F.R. § 1926.58, Appendix F. OSHA provides the following explanation:

> The negative pressure enclosures contemplated by the 1986 standard are area enclosures in which abatement and renovation employees work. The enclosures are required to be placed under negative pressure (a partial vacuum) so that asbestos fibers remain inside even if a leak develops in the enclosure shell. OSHA believes that negative pressure enclosures reduce employee risk primarily by reducing leakage and containing the asbestos material being disturbed. Thus areas outside the work area are not contaminated and bystander employees are protected from exposure.

54 Fed. Reg. 52024, 52026 (Dec. 20, 1989). Where the negative-pressure enclosure requirement is triggered, employers must also meet special requirements for supervision by a competent person, paragraph (e)(6)(ii); monitoring, paragraph (f)(3); protective clothing, paragraph (i)(4); and use of hygiene facilities and practices, paragraph (j)(2). There is an exemption from the negative-pressure enclosure requirement for small-scale, short-duration operations. 29 C.F.R. § 1926.58(e)(6)(iv) and Appendix G.

OSHA has proposed to amend the negative-pressure enclosure requirement to impose an explicit provision that the requirement is triggered not by the actual or reasonably likely

exposure level, but by the nature of the work involved. The proposal would also cut the 8-hour TWA PEL in half, from 0.2 f/cc to 0.1 f/cc. 55 Fed. Reg. 29712 (July 20, 1990).

B. The Text of the Standard

It is undisputed that a negative-pressure enclosure is a kind of regulated area. The negative-pressure enclosure requirement appears in paragraph (e), captioned "Regulated areas". Paragraph (b) defines the term "regulated area" as follows:

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

(Emphasis added.) Thus, this definition explicitly couples the negative-pressure enclosure requirement to actual excursions beyond the PELs or the reasonable likelihood of such excursions.

Further confirmation of this coupling appears in paragraph (e)(1), captioned "General". It provides:

> The employer shall establish a regulated area in work areas where airborne concentrations of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals exceed or can reasonably be expected to exceed the permissible exposure limit prescribed in paragraph (c) of this section.

(Emphasis added.) Since paragraph (b) classifies a negative-pressure enclosure as a regulated area, and since the requirement for negative-pressure enclosures appears in

paragraph (e), captioned "Regulated areas", the negative-pressure enclosure requirement is subject to the provisions of this "general" limitation on the requirement to establish regulated areas.

Where, as here, the language of a standard or statute is clear, that language controls, and no resort may be had to legislative or regulatory history or agency interpretations to construe the requirement contrary to its plain meaning. See, e.g., UAW v General Dynamics Land Systems Div., 815 F.2d 1570, 1575, 13 BNA OSHC 1201, 1205 (D.C. Cir.), cert. denied, 484 U.S. 976 (1987); Honeywell Inc. v. United States, 661 F.2d 182, 186 (Ct. Cl. 1981) ("legislative history is, in any event, unnecessary when the language and purpose of the regulation is plain"). In his opinion below, Judge Salyers did not carefully consider the language of the provisions set forth above. He quoted a portion of the definition of "regulated area", but made no comment on it, and he made no reference to paragraph (e)(1). AACC, slip op. at 7. In contrast, Judge Barkley quoted the complete text of the paragraph (b) definition, paragraph (e)(1), and paragraph (e)(6)(i). He then concluded:

> It seems clear to this Judge the standard requires a regulated area only if there is a showing of actual overexposure or that overexposure can be reasonably expected. The requirement of a regulated area is not triggered simply by engaging in asbestos removal. To read the standard as the Secretary suggests would require an employer to construct a negative-pressure area any time he was engaged in asbestos removal without consideration to whether there was a reasonable expectation of a hazard. I find this interpretation to be inconsistent with the language of the standard. If the employer is to be required to establish a negative-pressure area with the

attendant requirements of respirators, hygiene facilities, employee training and medical surveillance, there must be at a minimum a reasonable expectation of overexposure.

EEC, slip op. at 8-9.

C. Employers Have a Right to Have the Standard Enforced as It Is Written.

To depart from the terms of the standard as written, as the Secretary advocates, would be to deprive employers of notice of the conduct required of them. With penal sanctions imposed for violations of the standard, this would be an intolerable situation.

Employers could reasonably determine that airborne concentrations would not be reasonably likely to exceed the PEL during particular removal, demolition, or renovation operations. In the preamble to the construction industry asbestos standard, OSHA found that in many instances employers may use glove bags, wet methods, and other techniques to keep airborne concentrations of asbestos below the action level. 51 Fed. Reg. 22612, 22706 (June 20, 1986). It even predicted that:

> most employers engaged in maintenance and renovation projects in environments that do not lend themselves to the construction of negative-pressure enclosures will elect to use glove bags, wet methods, and other control measures to ensure that their employees' exposures to asbestos remain below the standard's action level.

Id. at 22711. In its recent notice of proposed rulemaking on the negative-pressure enclosure requirement, OSHA published estimates of current exposure levels during various asbestos removal, demolition, and renovation operations which showed none of them more than 50% of the current PEL. Most were one

or two orders of magnitude lower than the PEL. 55 Fed. Reg. 29712, 29735 (July 20, 1990). Indeed, the facts of this case, where monitored levels were two orders of magnitude below the PEL, show that in some operations it is reasonable to conclude that exposures are not reasonably likely to exceed the PEL. AACC, slip op. at 7. Thus, employers engaged in removal, demolition, or renovation operations who use these methods so as to eliminate any reasonable likelihood of airborne concentrations above the PELs may rely on the language of the standard to conclude that the negative-pressure enclosure requirement does not apply. Under OSHA's interpretation, however, they would be in violation of the standard, notwithstanding that reliance.

Such a situation deprives employers of their due process rights to notice. As Judge Barkley wrote:

> While this may not be the result the Secretary intended, it is well settled that "regulations cannot be construed to mean what an agency intended but did not adequately express." L.R. Wilkinson & Sons, Inc. v. Donovan, 685 F.2d 664, 675 (D.C. Cir. 1982). To hold otherwise would be to deny the employer fair warning of the conduct required. Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645 @ 649 (5th Cir. 1976).

EEC, slip op. at 9-10. Dravo Corp. v. OSHRC, 613 F.2d 1227, 1231-32, 7 BNA OSHC 2089, 2092 (3d Cir. 1980) ("Because we deal with a penal sanction, we begin with a recognition that the coverage of an agency regulation should be no broader than what is encompassed within its terms."); Usery v. Kennecott Copper Corp., 577 F.2d 1113, 1119, 6 BNA OSHC 1197, 1200 (10th Cir. 1977) (an employer is "not required to assume the burden of

guessing what the Secretary intended plain and unambiguous words employed in the safety regulation to mean. This is especially true when violation of a regulation subjects one to criminal or civil sanctions. A regulation cannot be construed to mean what an agency intended but did not adequately express."); Brennan v. OSHRC (Ron M. Fiegen, Inc.), 513 F.2d 713, 716, 3 BNA OSHC 1001, 1003 (8th Cir. 1975) ("Where, as here, the interpretation derives little support from the language of the regulation, it would be fundamentally unfair to impose on the employer civil penalties for its violation. To do so would subject him to liability without warning that his conduct is prohibited."); Brennan v. OSHRC (Pearl Steel Erection Co., 488 F.2d 337, 339, 1 BNA OSHC 1429, 1430 (5th Cir. 1973) ("The fault lies in the wording of the regulation.").

The Secretary may argue that OSHA regulations are to be liberally construed in order to effectuate better the remedial purpose of the Occupational Safety and Health Act of 1970 ("Act"). But that remedial purpose "does not give the Commission license to ignore the standard's plain meaning." Lisbon Contractors, Inc., 11 BNA OSHC 1971, 1973 (No. 80-97, 1984). See Marshall v. Anaconda Co., 596 F.2d 370, 377 n.6, 7 BNA OSHC 1382, 1387 n.6 (9th Cir. 1979) ("Nor can mere citation to OSHA's remedial purpose . . . substitute for analysis of the problem at hand.").

If in fact the asbestos standard does not say what OSHA intended it to say, then rather than attempt to amend it through interpretation, the Secretary should do so through

notice-and-comment rulemaking. See Fluor Constructors, Inc. v. OSHRC, 861 F.2d 936, 939, 13 BNA OSHC 1956, 1957 (D.C. Cir. 1988) ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation."); Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157, 161-62, 6 BNA OSHC 1440, 1443 (3d Cir. 1978) ("The responsibility to promulgate clear and unambiguous standards is upon the Secretary. The test is not what he might possibly have intended, but what he said. If the language is faulty, the Secretary has the means and the obligation to amend.").

Ironically, OSHA has just proposed to amend paragraphs (e)(1) and (e)(6) of the construction industry asbestos standard to impose an explicit requirement to use negative-pressure enclosures in certain operations, regardless of the exposure levels. 55 Fed. Reg. 29712 (July 20, 1990). Although OSHA claims that the proposed amendments are simply "clarifying revisions", id. at 29715, it is clear that new requirements would be imposed. For example, whereas currently paragraph (e)(6) applies only to removal, demolition, and renovation operations, under the proposal the paragraph would also apply to maintenance activities. Inexplicably, OSHA does not propose to amend the definition of "regulated area" in paragraph (b) to delete the current linkage between negative-pressure enclosures and actual or reasonably likely airborne concentrations above the PEL.

Although years late, a rulemaking is particularly appropriate since OSHA has never previously published a proposed negative-pressure enclosure requirement for public comment. The proposed rule which preceded the construction industry asbestos standard did not even propose a separate standard for construction. Instead, it proposed only a general industry standard similar to the then-existing standard but for the PEL and a few other provisions, and solicited comments on the advisability of a separate construction industry standard and what provisions such a standard should have. 49 Fed. Reg. 14116 (Apr. 10, 1984). Thus, to date OSHA has never had the benefit of public comment on the appropriate scope of a negative-pressure enclosure requirement.

At a time when OSHA is engaged in rulemaking to revise the negative-pressure enclosure requirement to read as it argues here that it should be read, it would be wholly inappropriate for the Commission, in effect, to declare that action unnecessary because employers can be required to divine OSHA's current intent from the contrary words of the existing standard.

II. The Secretary's Interpretation Is Not Entitled to Deference.

Judge Salyers ruled as he did below because of the deference that he believed was required to be accorded to the Secretary's interpretation. AACC, slip op. at 10. But deference to the Secretary's interpretation was not appropriate.

A. Deference Is Due to Interpretations of the Commission, Not to Interpretations of the Secretary

It is the Commission's interpretations of OSHA standards, not those of the Secretary, which are are entitled to deference. That position is explained in Dole v. OSHRC (CF&I Steel Corp.), 891 F.3d 1495, 14 BNA OSHC 1388 (10th Cir. 1989), petition for cert. granted, 58 U.S.L.W. 3811 (U.S. June 25, 1990). In that case the Tenth Circuit deferred to the Commission's interpretation of another regulated area provision and refused to defer to the Secretary's contrary interpretation, following the majority rule.

The Supreme Court has agreed to resolve a split in the circuits on this issue by reviewing the Tenth Circuit's decision. Unless and until the Supreme Court reverses that decision, the Commission should follow the majority rule and decline to accord the Secretary's interpretation any deference. Under that majority rule, it was inappropriate for Judge Salyers to have accorded the Secretary's interpretation deference.

B. Alternatively, the Secretary's Interpretation Is Not Entitled to Deference Because It Is Unreasonable and Inconsistently Applied.

Even if the Supreme Court were to reverse the Tenth Circuit's decision in CF&I, however, deference to the Secretary's interpretation would not be appropriate here. Deference to any agency's interpretation of its regulations is appropriate only if the interpretation is reasonable and consistently applied. See Northern Indiana Public Service Co.

v. Porter County Chapter of the Izaak Walton League of America, Inc., 423 U.S. 12, 15 (1975). Deference does not mean that an agency has the authority to rewrite its regulations through interpretations; on the contrary, the degree of deference is measured by the extent that the agency's interpretation does not strain the plain meaning of the words, or imply language that does not exist. Bonessa v. U.S. Steel Corp., 884 F.2d 726, 732 (3d Cir. 1989); Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157, 161, 6 BNA OSHC 1440, 1443 (3d Cir. 1978). It is also measured by the consistency of the agency's interpretation over time. Ehlert v. United States, 402 U.S. 99, 105 (1971). Here the Secretary's interpretation fails on each of these grounds.

1. **The Secretary's Interpretation Is Inconsistent With the Standard.**

The Secretary has made no creditable attempt to reconcile her interpretation with the language of the standard, as discussed above. That alone is enough to prove that her interpretation is unreasonable. See, e.g., Fluor Constructors, Inc. v. OSHRC, 861 F.2d 936, 939, 13 BNA OSHC 1956, 1957 (6th Cir. 1988) ("An agency's interpretation of a regulation is valid, however, only if that interpretation complies with the actual language of the regulation."); Union of Concerned Scientists v. NRC, 711 F.2d 370, 381 (D.C. Cir. 1983) ("When an agency's interpretation of its own rules flies in the face of the language of the rules themselves, it is owed no deference."); Miller v. Bond, 641 F.2d 997, 1002 (D.C. Cir. 1981).

This case may be usefully contrasted with the situation in GAF Corp. v. OSHRC, 561 F.2d 913, 916, 5 BNA OSHC 1555, 1556 (D.C. Cir. 1977). There the court supported the Secretary's interpretation that the medical surveillance provision of the general industry asbestos standard was not triggered by exposures above the PEL. The language of the standard contained no such quantitative trigger, and the court refused to imply one. Here, however, the situation is far different. Instead of silence about a quantitative trigger, the standard has not one but two explicit quantitative triggers for the negative-pressure enclosure requirement: paragraph (b)'s definition of the term "regulated area", and paragraph (e)(1). Both tie the scope of the requirement to airborne concentrations above the PEL, or to the reasonable likelihood of such concentrations.

2. **The Secretary's Interpretation Directly Contradicts Earlier Authoritative Interpretations.**

The deference due an agency's interpretation of its own regulations is dependent upon the consistency or inconsistency in its interpretations of those regulations over time. See, e.g., United States v. Paddack, 825 F.2d 504, 512 (D.C. Cir. 1987) ("We do not normally defer to a vacillating agency position"); National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("If the agency's interpretation of a contract has vacillated, deference might give the agency license to act arbitrarily by making inconsistent decisions without justification."); Kent Nowlin Construction Co. v.

OSHRC, 593 F.2d 368, 371, 7 BNA OSHC 1105, 1107 (10th Cir. 1979) ("The petitioner should not be penalized for deviation from a standard the interpretation of which . . . cannot be agreed upon by those who are responsible for compelling compliance with it and with oversight of the procedures for its enforcement."). Here OSHA has repeatedly espoused the precise opposite of the interpretation now advocated by the Secretary. Thus, no deference is due to the Secretary's current interpretation. If anything, deference is due to OSHA's contemporaneous interpretation. See United Transportation Union v. Dole, 797 F.2d 823, 829 (10th Cir. 1986) ("Interpretations published by the [agency] at the time the regulation was promulgated are entitled to greater weight than the interpretations the agency now espouses.").

As recently as 1988, OSHA formally interpreted the negative-pressure enclosure requirement to mean precisely the opposite of what the Secretary now asserts that it means. In a Federal Register notice signed by Assistant Secretary Pendergrass, who also signed the 1986 asbestos standard, OSHA stated:

> Paragraph (e) of the construction standard now requires employers to establish regulated areas whenever the PELs are exceeded. Regulated areas required by the standard can take two forms. For most employers who perform asbestos removal, demolition, or renovation operations (other than small-scale short- duration), the regulated area must consist of a negative-pressure enclosure that will confine the asbestos fibers being generated to the area within the enclosure and will thus protect other employees and bystanders on the site from exposure to excessive levels of

> asbestos. For small-scale, short-duration removal, demolition and renovation operations and for asbestos work operations that do not involve asbestos removal, demolition, or renovation, the employer may simply demarcate the regulated area by posted signs that limit the number of employees entering the area.
>
> Regulated areas do not have to be established where engineering and work practice controls reduce employee exposures to asbestos to levels below the standard's TWA and excursion permissible limits.

53 Fed. Reg. 35610, 35622-23 (Sept. 14, 1988).

Furthermore, OSHA's contemporaneous interpretations of the negative-pressure enclosure requirement, interpretations by the very individuals responsible for its promulgation, were directly contrary to the Secretary's current interpretation. Assistant Secretary of Labor Pendergrass, who signed the asbestos standard on June 12, 1986 (51 Fed. Reg. at 22733), just six months later expressly interpreted the negative-pressure enclosure requirement to be triggered by the reasonable likelihood of exposures above the PEL:

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

Letter of October 30, 1986 from John A. Pendergrass to Thomas R. Kupfer (Attachment 1).

Similarly, Charles Adkins, then OSHA's Acting Director of Health Standards Programs, wrote about the same time:

> The intent of 1926.58(e) is to require a negative pressure

> enclosure and "competent person" only where a regulated area is established . . . . Regulated areas are established only where concentrations exceed the PEL. Your second issue dealt with the type of operations that could qualify for exemption from the requirements of paragraph (e)(6). It should be noted that any operation can qualify for exemption provided airborne levels of asbestos are kept at or below 0.2 f/cc. This can best be accomplished by means of engineering controls used in conjunction with appropriate work practices since these two methods, when used either singly or in combination can be employed effectively to reduce asbestos exposures to below 0.2 f/cc.

Letter of Oct. 10, 1986 from Charles A. Adkins to Daniel Hoffman, National Steel Corporation (Attachment 2).

In his decision below, Judge Salyers relied heavily upon OSHA's interpretation expressed in the compliance directive for the standard, OSHA Instruction CPL 2-2.40 (Sept. 1, 1987). AACC, slip op. at 8-9. As an initial matter, that directive cannot be said to be controlling. Amici are aware of no evidence in the record that it reflects the intent of the drafters of the standard. It was issued over a year after the standard was published, June 20, 1986. There is no evidence in the record of which amici are aware that the drafters of the directive were also the drafters of the standard or that they consulted with the standard's drafters. See CF&I Steel Corp., supra, 12 BNA OSHC at 2074.

More importantly, the directive supports the precise opposite of the Secretary's interpretation. Appendix D of the directive is the only portion which explicitly classifies provisions of the standard as triggered by airborne concentrations above the PEL, triggered by airborne concentrations above the action level, or triggered regardless

of level of airborne concentrations. It classifies all of paragraph (e) among the requirements triggered by the PEL. The only requirements identified as being triggered regardless of level are paragraph (k) (labels) and (l) (housekeeping). (Paragraph (k)(3) is classified as being triggered by the action level.) Thus, the directive itself is unambiguous in limiting the negative-pressure enclosure requirement, along with almost all of the rest of the standard, to situations where the PEL is exceeded or is reasonably likely to be exceeded.

The provisions of the directive quoted by Judge Salyers do not support the Secretary's interpretation either. They acknowledge that paragraph (e) requires two distinctly different types of regulated areas to be established, but it does not explicitly state that paragraph (e)(1), with its linkage to potential exposure above the PEL, is inapplicable to paragraph (e)(6).

This is not to say that from time to time OSHA officials have not also expressed the Secretary's current interpretation in informal statements; they have. Among others, the current rulemaking proposal asserts that the proposed amendments to paragraphs (e)(1) and (e)(6) are simply clarifications. The Commission should give no weight to that assertion. See Collier-Keyworth Co., 13 BNA OSHC 1208, 1222-23 (No. 80-2048, 1987).

It should be obvious that OSHA's interpretations of paragraph (e)(6)(i) shortly after issuing the standard and its formal interpretations since then have construed the standard contrary to how the Secretary now argues that it should be read. In light of this vacillation, the Secretary's interpretation is entitled to no deference.

3. The Secretary's Interpretation Would Apply the Requirement in the Absence of Significant Risk.

The Secretary may regulate exposure to toxic materials, such as asbestos, only where a significant risk is present and can be eliminated or lessened by a change in practices. Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 8 BNA OSHC 1586 (1980). But the Secretary interprets paragraph (e)(6)(i) to apply even where there is no significant risk. Accordingly, her interpretation is unreasonable.

Under the Secretary's interpretation, the complete absence of asbestos fibers would nevertheless trigger the full negative-pressure enclosure requirement if removal, demolition, or renovation operations were involved. Yet clearly in that situation no significant risk would exist, nor would use of an enclosure lessen any risk. This interpretation thus fails to meet the signficant risk requirement. If endorsed by the Commision, it would make paragraph (e)(6)(i) invalid. Such an interpretation is to be avoided.

This dilemma is not averted by citing OSHA's conclusion that signficant risk continues to exist at airborne concentrations below the PEL. While significant risk may exist at some levels below the PEL, there is some concentration below which it does not exist. Yet the Secretary's interpretation would apply paragraph (e)(6)(i) even where it does not exist.

OSHA effectively concedes this point in the current rulemaking, where it discusses its finding that signficant risk exists even below the PEL:

> Most importantly, as noted above and by the Court, significant risk exists at levels below the PEL. Therefore requiring that the spread of asbestos be contained where it is likely, even if not certain, that the PEL would be exceeded is both appropriate and necessary to reduce still significant risk to bystander employees.

55 Fed. Reg. 29712, 29716 (July 20, 1990). That conclusion is consistent with the interpretation that paragraph (e)(6)(i) is currently triggered by the reasonable likelihood of exposure above the PEL. Significantly, OSHA did not state that to address residual significant risk below the PEL it was necessary to impose the negative-pressure requirement even where exposure above the PEL is not reasonably likely.

This situation differs from the medical surveillance provision at issue in GAF Corp. v. OSHRC, 561 F.2d 913, 5 BNA OSHC 1555 (D.C. Cir. 1977). OSHA may properly adopt "backstop" provisions, such as initial monitoring or medical surveillance requirements, which are not triggered by exposures above the PEL or action level. See Industrial Union Dept., AFL-CIO v.

American Petroleum Institute, 448 U.S. 607, 656-58, 8 BNA OSHC 1586, 1604 (1980). But such "backstop" provisions differ sharply in nature from control provisions such as requirements for PELs and negative-pressure enclosures. Those must eliminate or lessen a significant risk. Id. Where the regulation is interpreted to apply in the absence of significant risk, the significant risk requirement is not met.

4. **The Secretary's Interpretation Is Unsupported by Reasoning.**

The Secretary's interpretation is also unreasonable because the proffered justifications for it do not withstand scrutiny.

First, the Secretary suggests that her interpretation is appropriate because:

> The removal or encapsulation of asbestos-containing products . . . are typically associated with the highest asbestos exposures occurring in construction . . . .

51 Fed. Reg. at 22706. But an association with high exposures in some instances, even many instances, would not explain the necessity for a negative-pressure enclosure where that association is demonstrably absent, i.e., where it can be demonstrated that airborne concentrations above the PEL are not even reasonably likely.

Secondly, the Secretary cites a tiering approach to the hazards of asbestos, with the strictest controls reserved for operations with the highest exposure potential. As discussed in Part III below, that tiering approach of adjusting the degree of control to the degree of risk is inconsistent with an interpretation that controls are required even where there is

no reasonable likelihood of risk. On the contrary, triggering a negative-pressure enclosure requirement with the reasonable likelihood of high exposure would appear to advance the Secretary's avowed purpose far better than would her own interpretation.

5. **The Secretary's Interpretation Was Not Thoroughly Considered.**

As further support for the conclusion that the Secretary's interpretation is unreasonable, it is noteworthy that she has shown little indication that her interpretation was thoroughly considered. The evidence is to the contrary, since the issue was not specifically proposed for public comment, and within the last few weeks OSHA has found it necessary to request public comments on the appropriate scope of the provision.

Preceding adoption of the construction industry asbestos standard, OSHA published two proposed rules, neither of which contained a negative-pressure enclosure provision. The first was an emergency temporary standard, 48 Fed. Reg. 51085 (Nov. 4, 1983), which was later invalidated by a court. Asbestos Information Association/North America v. OSHA, 727 F.2d 415, 11 BNA OSHC 1817 (5th Cir. 1984). The second solicited comments on whether a separate construction industry standard should be adopted, and, if so, what its provisions should include, but it proposed only amendments to the general industry standard. 49 Fed. Reg. 14116 (Apr. 10, 1984). In response to the preamble to the proposed rule, some commentors suggested adoption of a negative-pressure enclosure requirement, but of necessity there

was no thorough discussion of what its provisions should be. 51 Fed. Reg. 22612, 22710-11 (June 20, 1986). Thus, the Secretary cannot maintain that her interpretation is solidly based upon thorough public discussion of the issue.

In effect, OSHA has acknowledged its lack of thorough consideration of the appropriate scope of the negative-pressure enclosure requirement by belatedly, years after adoption, specifically requesting public comment on its appropriate scope. 55 Fed. Reg. 29712 (July 20, 1990). The recent proposal stated:

> In 1986, OSHA believed, based on limited reports of experience using such enclosures for asbestos work, that the full enclosure, which encloses the work and the workers and limits access, would be effective in containing asbestos . . . .
>
> OSHA seeks comment on applying the requirements for negative pressure enclosure for all removal, demolition and renovation jobs which involve asbestos.

Id. at 29715, 29716. Whatever the outcome of the present rulemaking, it presumably will be well considered, based upon a full record. In contrast, the Secretary's interpretation of the current standard was not thoroughly considered.

III. Interpreting the Negative-Pressure Enclosure Requirement as Limited to Situations in Which Overexposures Are at Least Reasonably Likely Is Consistent With the Purposes of the Requirement.

In construing the meaning of paragraph (e)(6)(i), the Commission should keep in mind the purposes of that provision. The main purpose is a limited one, preventing overexposures. Thus, it is perfectly consistent to interpret the requirement's

application as limited to situations in which overexposures are at least reasonably to be expected.

A. Preventing Overexposure

The preamble to the 1986 construction industry asbestos standard recognized that "employees engaged in asbestos removal, demolition, and renovation operations generally have the highest asbestos exposures of all construction workers." 51 Fed. Reg. at 22706. Accordingly, OSHA adopted several provisions applicable only to those operations, including paragraph (e)(6)(i). But to say that some removal, demolition, and renovation operations are associated with high airborne concentrations is not to say that all or even most of those operations are so associated. On the contrary, as discussed in Part I.C. above, OSHA explicitly found that many removal, demolition, or renovation operations do not involve high potential exposures when certain techniques are followed, such as use of glove bags or wet methods.

In the preamble OSHA explained the purpose of the negative-pressure enclosure requirement as follows:

> The regulated area requirement in paragraph (e)(6) of the revised construction standard requires employers who perform asbestos removal, demolition, or renovation operations to establish regulated areas that consist of negative-pressure enclosures that will confine the asbestos fibers being generated to the area within the enclosure and will thus protect other employees and bystanders on the site from exposure to excessive levels of asbestos.

51 Fed. Reg. at 22710 (emphasis added). Thus, the purpose of the requirement is to protect employees outside the work area from overexposure. For some kinds of removal, demolition, or

renovation operations, the risk of overexposure of those employees may be substantial. But OSHA has recognized that for others kinds of those operations, use of certain techniques is sufficient to avoid even the reasonable likelihood of overexposures. Interpreting the requirement to be triggered by the reasonable likelihood of exposures above the PELs rationally relates the obligation to provide protective measures for bystanders to the need for such measures.

B. Graduated Response

Limiting the application of the negative-pressure enclosure requirement is also consistent with the tiering approach espoused in the preamble. There OSHA explained:

> Accordingly, the final standard applies to all occupational exposures to asbestos in the construction industry, but is tiered to apply increasingly stringent requirements to those work operations associated with the highest exposures . . . . OSHA believes that this tiering approach will simultaneously ensure maximum employee protection while scaling the burden of compliance with the standard to the degree of hazard associated with particular operations . . . .
>
> OSHA notes that the final standard has been carefully structured by the Agency to relate the stringency of the requirements to the extent and duration of employee exposures. OSHA therefore believes that no compliance burden will be placed on construction employers . . . who maintain asbestos exposures in their workplaces to levels below the action level of 0.1 fiber/cc.

Id. at 22706, 22707. If the degree of risk is very low because airborne concentrations are not reasonably likely to exceed the PEL, then under this approach the lesser risk should have less stringent requirements. Conversely, where the risk of airborne concentrations above the PELs is at least reasonably likely, more stringent requirements are appropriate.

In the passages quoted above, OSHA recognized the need to correlate the "compliance burden" placed upon construction employers with the degree of risk involved. That recognition is compelled by Section 3(8) of the Act, 29 U.S.C. § 652(8), which requires that OSHA standards be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." While the Act may not require explicit balancing of costs and benefits for health standards, the provisions of Section 3(8) apply even to those standards. See American Textile Mfrs. Ass'n v. Donovan, 452 U.S. 490, 514 n.32, 9 BNA OSHC 1913, 1922 n.32 (1981) (OSHA could not insist on a feasible requirement for use of five respirators if use of one respirator would achieve the same reduction in health risk). Accordingly, the Secretary must be able to establish that the negative-pressure enclosure requirement is "reasonably necessary or appropriate". That burden cannot be sustained when the requirement is interpreted to apply where airborne concentrations above the PEL are not at least reasonably likely.

Judge Barkley found that linking the negative-pressure enclosure requirement to the reasonable likelihood of overexposure was consistent with this tiering approach:

> Reading the standard to require a reasonable expectation of overexposure does not harm the Secretary's "graduated response" mentioned in the preamble to the standard. If there is a reasonable expectation of overexposure and the employer is engaged in asbestos removal, the employer is prohibited from utilizing the less restrictive regulated area, the demarcated area, but instead must utilize a negative pressure area, which in turn without any further showing imposes such requirements as respiratory protection, hygiene facilities, employee training and medical surveillance.

EEC, slip op. at 9.

Ironically, the Secretary's interpretation departs from this tiering scheme. It ignores the reasonable likelihood of airborne concentrations above the PEL, or the lack of such a likelihood, and instead lumps together all removal, demolition, and renovation operations. The only exceptions are for small-scale, short-duration operations, and where the use of negative-pressure enclosures is infeasible. For all others, it ignores OSHA's findings that in some cases there is no reasonable likelihood of overexposures and treats them all as though they uniformly pose a high degree of risk. OSHA's own tiering scheme can only be furthered by linking the negative-pressure enclosure requirement to the reasonable likelihood of overexposure.

C. Enforcement Burden

Although nowhere articulated by the Secretary, a sub silentio purpose underlying her interpretation may be the perception that enforcement of the negative-pressure enclosure requirement would be hampered by a linkage to the reasonable likelihood of overexposure. Certainly, if every removal, demolition, or renovation operation were subject to the requirements of paragraph (e)(6)(i), OSHA inspectors could cite employers for failure to comply with that provision simply based upon the objective fact of whether or not a negative-pressure enclosure was used. But linking the requirement to the reasonable likelihood of overexposure is not a significant obstacle to OSHA's enforcement of the provision.

Significantly, OSHA has no need to prove actual exposures above the PELs. If that were the case, OSHA would have a difficult burden of proof where the employer has not conducted monitoring. But OSHA needs only to prove a reasonable likelihood of airborne concentrations above the PELs. That can be established after the fact, even without monitoring results. Judge Barkley's decision in EEC, which the employer chose not to appeal to the Commission, illustrates this point.

CONCLUSION

The Commission should endorse the views of Judge Barkley in EEC rather than the views of Judge Salyers in this case on the issue of what triggers the provisions of 29 C.F.R. § 1926.58(e)(6)(i). Judge Barkley carefully considered both the language of the construction industry asbestos standard and the purposes of the negative-pressure enclosure requirement in concluding that the Secretary's interpretation was unreasonable and not entitled to deference. In addition, the Commission should consider OSHA's history of interpreting the requirement as Judge Barkley concluded that it should be interpreted, rather than how the Secretary now argues that it should be interpreted.

The Secretary's position is contrary to the language of the standard, and it works against the tiering approach endorsed in the preamble. The Secretary has an immediate opportunity to revise the standard to read as she feels it should read. Yet

sound policy reasons, as well as the current text of the standard, support retaining the standard's linkage of the negative-pressure enclosure requirement to the reasonable likelihood of airborne concentrations above the PEL.

For the foregoing reasons, Judge Salyers' decision on the issue of what triggers 29 C.F.R. § 1926.58(e)(6)(i) should be REVERSED.

Respectfully submitted,

Mark N. Duvall
Health and Safety Counsel
Attorney
Union Carbide Plastics
Plastics Company Inc.
Danbury, CT 06817-0001

Of Counsel:

Toby Alaska Threet
The Dow Chemical Company
Legal Department
2030 Willard H. Dow Center
Midland, MI 48674

Date: August 9, 1990

ATTACHMENT 1

"deposit" to insure the respirators return. The deposit is returned if and when the employee finds other employment.

An official interpretation on this issue would be greatly appreciated.

Thank you very much for your help in this matter.

Very truly yours,

NATIONAL ASBESTOS
TRAINING INSTITUTE

J. Scot Keyes
Director

JSK/mw

END OF DOCUMENT REACHED

ITEM 46-

STANDARD NUMBER: 1926.58(f)(J)
INFORMATION DATE 861030
SOURCE DESCRIPT. Letter to Mr. Thomas R. Kupferer
STATUS Current

OCT 30 1986

Mr. Thomas R. Kupferer
2231 Remington Drive
Naperville, Illinois 60565

Dear Mr. Kupferer:

This is in response to your letter of October 2 concerning regulatory provisions contained in the new standard for exposure to asbestos, tremolite, anthophyllite and actinolite in the construction industry.

Your fist area of concern was the provision that requires daily monitoring within a required area. You stated that conscientious employers will establish a regulated area for every astestos removal job, regardless of duration, and that this would result in a multitude of samples that essentially would be meaningless because employees will be wearing respirators.

The intent of 1926.58(f)(J) is to require daily monitoring only where airborne levels exceed 0.2 fiber/cc. When it is necessary to establish a regulated area, as required by the standard, daily monitoring not only verifies the adequacy of the respiratory protective devices work, but serves as a check to ensure that engineering controls are functioning properly and the specified work practices are being carried out. It should be noted that where daily monitoring reveals that employee exposures (as indicated by statistically reliable measurements) are below the action level, the employer may discontinue monitoring for those employees whose exposures are represented by those samples. In addition, daily monitoring is not required in a regulated area where all employers are equipped with supplied air respirators operated in the positive pressure mode.

Your second issue dealt with the establishment of a negative pressure enclosure for asbestos removal, demolition and renovation operations. The intent of 1926.58(e) is to require a negative pressure enclosure only where a regulated area is required. Regulated areas are established only where asbestos concentrations exceed the permissible exposure limit.

The requirement for setting up a negative pressure enclosure closely parallels the Environmental Protection Agency's requirement for proper work area containment. Without such containment measures, asbestos containing materials would be dispersed outside the area and a significant exposure hazard could result for plant or building occupants. The use of negative pressure systems, together with high efficiency particulate (HEPA) filtration to move air from within the work area to outside the regulated area, will provide added protection. A harmful level of contaminants would not, as a rule, build up in a regulated area, as negative pressure is required during work activities.

ST0281081

excess of the actior level. However, there is no mention of air concentrations found in the breathing zone of employees actually performing asbestos removal work. Depending on the nature and extent of exposure, the requirement for a negative pressure enclosure may not be applicable in your case.

Efforts are currently under way to correct the contradictory statements, such as those highlighted in your letter, which appear in [illegible] Federal Register notice will be published in the Federal Register in the near future.

I hope this information will be helpful to you.

Sincerely,

John A. Pendergrass
Assistant Secretary

OH:Wainless:ter:10/16/86:sec:10/17/86
Room N3671 x37111
Control:C 30861 Due Date 10/24/86

cc: CCU File, OH File, C.Adkins, Pendergrass, F.White, Wainless, Williams, Strothers, WPC File#86-324, Document#0059e

October 2, 1986

John A. Pendergrass
Assistant Secretary of Labor
For Occupational Safety and Health
200 Constitution Ave, N.W.
Washington, D.C. 20210

Dear Mr. Pendergrass,

I am writing to you today as a fellow professional industrial hygienist, to express my concern for damage being done to our profession by the recently promulgated OSHA standard regulating asbestos in construction activities. I regard this standard to be so poorly conceived and executed as to be a major embarrassment to those of us in the profession who now have been handed the job of trying to implement it. Many of the provisions call for mere activity which will contribute nothing to worker protection. Others will, in some cases, actually create more serious hazards than the standard intends to correct. Some are actually contradicted within the regulation itself. All of these could have been prevented if OSHA had simply submitted the construction standard to peer review in the same manner as they did the far superior asbestos standard for general industry.

As an example of the provisions which add nothing to the worker's protection, I call your attention to the section which requires daily monitoring representative of each worker when a regulated area exists. Since conscientious employers will establish a regulated area for every asbestos removal job, whether it will last 5 minutes or 5 months, this will result in a multitude of samples. These samples will be essentially meaningless, however, since, by the standard, all these workers will be wearing respirators. It is unnecessary to do this much monitoring to simply verify the adequacy of our respiratory protection choices. Nevertheless, industrial hygienists now must insist that our employers and clients perform sampling which we know is not justified, which certainly does nothing to enhance the image of our profession as a profession. Instead we just parrot regulations, pump pumps, and file away reams of expensive, meaningless data.

An example of the possibly dangerous activities prescribed by the standard is its insistence on building enclosures around removal operations. My company has frequently performed area samples at the perimeter of removal operations of various sorts, and we have never found levels in excess of the new action level. In fact, we usually don't find anything above background levels. The new standard would appear to now require us, in most cases, to create what amounts to a confined space, with all its hazards, and require our people to work within it. This will result in greater heat stress, and the possibility of trapping dangerous concentrations of toxic or flammable gases in their work environment. We will thus increase the risk to the health and safety of these persons in order to eliminate a non-existant exposure hazard to what is generally unoccupied surroundings. It will also require a lot of work just to construct the enclosures, with all the well documented risks of general construction work.

ST0281082

379275

As an example of contradictory statements within the standard, notice that the paragraph on fit testing requires that, "The employers shall ensure that the respirator issued to the employee exhibits the least possible facepiece leakage..." The note that Appendix C, on fit testing procedures requires that the employee be allowed to choose the most comfortable respirator passing a fit test, not the one providing the best seal. Also note that Appendix C states that when performing fit tests by the irritant smoke protocol the respirator wearer should be instructed to keep his eyes closed during the test. Shortly afterwards it has us instruct him to read the 'rainbow passage."

The above are only a very few examples of the major problems in this seriously flawed standard. I ask you to carefully review the onerous provisions of this standard, drawing on your own considerable practical experience, and direct reconsideration to develop a more flexible, performance oriented document. I ask this as one individual professional to another, not as a representative of any employer or association. The provisions of the construction standard, as written, show a serious lack of appreciation for the true scope of the work it is written to cover, and for the nature of the hazards it tries to control. It will result in a tremendous amount of activity, but little, if any, increase in worker protection. In fact, what it will serve to do more than anything else will be to divert this country's already strained industrial hygiene resources away from more productive activity where far greater contributions to worker health would be made.

I have spent a tremendous amount of my time over the last three to four years trying where ever I could to contribute something to the development of a meaningful and effective asbestos standard. Upon reading the construction industry asbestos standard, I feel the effort was totally wasted.

Sincerely,

Thomas E. Kupferer, CIH

END OF DOCUMENT REACHED

ITEM 47

STANDARD NUMBER	1910.1001(r)(1)(vii), 1926.58(s)(2)(iii)
INFORMATION DATE	860814
SOURCE DESCRIPT.	Letter to Mr. Robert J. Bettacchi
COMPANY	Construction Products Division
STATUS	Current

AUG 14 1986

Mr. Robert J. Bettacchi
Vice President
Construction Products Division
W. R. Grace & Company
62 Whittemore Avenue
Cambridge, Massachusetts 02140

Dear Mr. Bettacchi:

This is in response to your letter of June 23 seeking interpretation of certain regulatory provisions contained in the standards for occupational exposure to asbestos, tremolite, anthophyllite and actinolite issued June 20 (51 FR 22612). Specifically, your concern is that certain provisions of the new standards may apply to many activities that pose no asbestos risk to worker health and that were not intended by the Occupational Safety Health Administration (OSHA) to be covered by the new standards.

Your letter raised interpretive issues about three provisions. The first provision states that: "Materials containing asbestos, tremolite, anthophyllite, or actinolite shall not be applied by spray methods" (1910.1001(r)(1)(vii) and 1926.58(s)(2)(iii)). As you pointed out, other government agencies which have restricted the application of asbestos materials by prohibiting spraying that, since the OSHA provisions do not contain an exclusion, the OSHA regulation will inappropriately apply to a wide variety of sprayed products that contain trace amounts of naturally occurring levels of asbestos which you term "de-minimis."

ATTACHMENT 2

Washington, D.C. 20210

Dear Mr. Wainless:

In confirmation of our phone conversation dated 08-13-86 it is my understanding that the following interpretations of 1926.58 are true and correct.

1. Sec. (h) (ii)

   A. Fit tests are only required for half face negative pressure respirators. Either qualitative or quantitative methods may be used.

   B. Fit testing for full face negative pressure respirators is not required, however, if desired, only quantitative methods will be accepted.

   C. Fit testing for half and full face positive pressure, powered, powered air purifying respirators is not required.

2. Appendix A. to 1926.58 (O.R.M.), (1st paragraph)

   A. The present verbiage is not meant to imply that all sampling for asbestos fibers/fibers be conducted by an analytical laboratory, merely that those laboratories analyzing such samples use the O.R.M.

My thanks again for your invaluable assistance. 1926.58 will, I'm sure, be great a boon to the abatement industry.

Respectfully,

James T. Hewes
Health and Safety Director

df

cc: Richard A. Clark
Richard Ehrlich

END OF DOCUMENT REACHED

ITEM 49

STANDARD NUMBER	1926.58(e)(6), 1926.58(j)(2), 1926.58(e)
INFORMATION DATE	861016
SOURCE DESCRIPT.	Letter to Mr. Daniel E. Hoffman
COMPANY	National Steel Corporation
STATUS	Current

OCT 10 1986

Mr. Daniel E. Hoffman
Granite City Division
National Steel Corporation
20th & State Streets
Granite City, Illinois 62040

Dear Mr. Hoffman:

This is in response to your letter of August 28 to Ira Wainless seeking interpretation of certain regulatory provisions contained in the new stardard for exposure to asbestos, tremolite arthophyllite and actinolite in the construction industry.

Your first area of concern was whether 1926.58(e)(6), which imposes requirements for negative pressure enclosures and the designation of a "competent person," and 1926.58(j)(2), which requires the establishment of a decontamination area, apply to all asbestos removal, demolition, and renovation operations, or only those where airborne concentrations of asbestos exceed or can reasonably be expected to exceed, the PEL of 0.2 f/cc. The intent of 1926.58(e) is to require a negative pressure enclosure and "competent person" only where a regulated area is established. Similarly, 1926.58 (j)(2) requires the establishment of a decontamination area when a regulated area is required. Regulated areas are established only where concentrations exceed the PEL.

Your second issue dealt with the type of operations that could qualify for exemption from the requirements of paragraph (e)(6). It should be noted that any operation can qualify for exemption provided airborne levels of asbestos are kept at or below 0.2 f/cc. This can best be accomplished by means of engineering controls used in conjunction with appropriate work practices since these two methods, when used either singly or in combination can be employed effectively to reduce asbestos exposures to below 0.2 f/cc. The exemption from paragraph (f)(6), therefore, does not depend on the length of time it takes to complete a job or the magnitude of the job.

Your interest in occupational health is appreciated.

Sincerely,

Charles E. Adkins
Acting Director
Health Standards Programs

OH:Wairless:ac:9/30/86:kec
Room N3671 x7111

cc: OH File, Wairless, Adkins, WPC, File#86-298, Document#0060a

ST0201086

88A

Mr. Ira Wavinsless
Irdustrial Hysienist
U. S. Dept. of Labor/OSHA
Health Standards Branch
Room N-3178
200 Constitution Avenue N.W.
Washington, D.C. 20210

ar Mr. Wavinsless:

Thank you for your prompt response to questions I recently posed to you by telephone regarding the new OSHA Asbestos Stardards published June 20, 1986 in the Federal Register.

I am writing in request of written confirmation of OSHA's position concerning several of the issues we discussed by telephone. Specifically, if a company such as ours is engaged in a project involving the removal of asbestos insulation from duct work or piping, etc. at one of our facilities, would we be required to meet the requirements of 29 CFR, Section 1926.58(e)(6) regardless of the employee asbestos exposure levels? My understanding from your verbal response is that Section 1926.58(e)(6), "Regulated areas", only applies to situations in which the P.E.L. of 0.2 f/cc is exceeded. That is, if the use of wet methods or other methods are utilized and are successful in maintaining exposures at or below 0.2 f/cc, then negative pressure enclosures, hygiene facilities (decontamination rooms) and the use of "competent persons" (as defined in the standard) are not required. We feel this is an important point and is in need of clarification.

Also, please provide clarification as to what type of operations would qualify for the exception provisions contained in Section 1926.58(e)(6)(IV). My recollection is that you indicated that for jobs which are relatively short duration, i.e., eight hours or less, the exception would apply.

Please respond at your earliest possible convenience.

Very truly yours,

Daniel E. Hoffman
Manager, Environmental Health

DEH/01.44:sc

END OF DOCUMENT REACHED

ITEM 50

STANDARD NUMBER 1910.1001(j)(4)(ii), (j)(2) and (j)(3)
INFORMATION DATE 861016
SOURCE DESCRIPT. Letter to Mr. Peter T. Barnes
COMPANY Barmin Inc.
STATUS Current

Mr. Peter T. Barnes
Barmin Inc.
P.O. Box 240
Waterdown, Ontario L0R 2H0
Canada

ST0281087

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1990, I mailed one copy of Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Union Carbide Chemicals and Plastics Company Inc. and The Dow Chemical Company to the following by first class, postage-paid mail:

Tony Gil, Esq.
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Robert W. Thomson, Esq.
Meyer, Darragh, Buckler, Bebenek, Eck & Hall
2000 Frick Building
Pittsburgh, PA 15219

Mark N. Duvall
Health and Safety Counsel
Union Carbide Chemicals and
Plastics Company Inc.

Date: August 9, 1990