

KIRKLAND & ELLIS

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

Chicago Office
200 East Randolph Drive
Chicago, Illinois 60601
Telex 25-4361
312 861-2000

655 Fifteenth Street, N.W.
Washington, D.C. 20005
Telex 89-690

202 879-5000

Denver Office
1225 Seventeenth Street
Denver, Colorado 80202
303 291-3000

To Call Writer Direct
202 879-

November 29, 1984

BY HAND

Dr. John A. Moore
Assistant Administrator
Pesticides and Toxic Substances
Environmental Protection Agency
Room 637, East Tower
401 M Street, S.W.
Washington, D.C. 20460

A. James Barnes, Esq.
General Counsel
Environmental Protection
Agency
Room 537, West Tower
401 M Street, S.W.
Washington, D.C. 20460

Dear Dr. Moore and Mr. Barnes:

This letter, submitted on behalf of our client, the Asbestos Information Association/North America (AIA/NA), supplements our earlier letters and calls to your attention further developments since we met with you and Deputy Administrator Alm last spring. As we show, these developments, including the recently completed proceedings before OSHA, hearings before the EPA Science Advisory Board, and actions by governments around the world, argue persuasively against banning asbestos products or imposing a regulatory cap on domestic asbestos use under the Toxic Substances Control Act (TSCA). The appropriate course is to regulate asbestos stringently in the workplace and in commerce so that it can be safely used by the public.

A. The International Regulatory Community
Has Again Reaffirmed the Consensus
Against Banning and in Favor of Safe
Use of Asbestos.

As detailed in our March 22, 1984 letter, experts as diverse as the International Labor Organization (ILO),

Dr. Moore and Mr. Barnes
November 29, 1984
Page 2

Irving Selikoff of Mount Sinai Medical School, and the European Economic Commission have all concluded banning asbestos is not only unnecessary but also very likely counter-productive given the potential health risks posed by uncontrolled asbestos substitutes. Since EPA's ban and phase-out plans have become more widely known, international opposition has become more pronounced.

Following receipt of diplomatic notes opposing EPA's ban plans from the European Economic Community, Austria, Belgium, Canada, the Federal Republic of Germany, Mexico, Switzerland, and the United Kingdom, the Agency conducted a poll through the State Department to determine whether any nation supported its plans. Only Denmark of all the responding nations supported the EPA approach.^{1/} In contrast to the U.S., however, Denmark has established an all-fiber regulatory standard to assure that substitute fibers are closely controlled. In the absence of comparable regulatory controls in this country, banning asbestos would encourage uncontrolled, and potentially more dangerous, exposures to alternative fibrous materials.

Significantly, the U.S. Department of Labor recently joined the many nations who have concluded that asbestos product bans are unwarranted. In Labor's official comments to an ILO questionnaire on asbestos, the Department noted its concern about the safety of substitute materials:^{2/}

^{1/} See "Inside EPA," at 5 (Aug. 31, 1984).

^{2/} Letter to the ILO Environmental Department from Department of Labor Deputy Under Secretary Robert W. Searby, Att. I, at 2-3 (Oct. 29, 1984). The AFL-CIO's comments to the ILO agree that any "[a]ctions to require or encourage the substitution of asbestos must include a full evaluation of the toxicity of the substitute materials and regulation of these materials as necessary." Id., Att. 3, at 4.

Dr. Moore and Mr. Barnes
November 29, 1984
Page 3

While continued use of asbestos may be curtailed where suitable substitutes are available, it should still be recognized that with appropriate protective measures asbestos is still a valuable resource. With regard to the replacement or substitution of asbestos by "harmless or less harmful substances," it should not be presumed that any substitute will be "harmless or less harmful." Rather, each potential substitute should be thoroughly evaluated.

Consistent with the international consensus, until "each potential substitute" has been "thoroughly evaluated", it would be precipitous and potentially counterproductive for EPA to ban or phase out asbestos use. This is especially true given the fact that the worker health concerns that originally gave rise to EPA's TSCA intentions will soon be substantially ameliorated by revised OSHA standards.

B. The Recently-Completed OSHA Proceedings
Will Lead to Safer Workplace and
Construction Industry Use of Asbestos.

Our March 22 letter summarized the OSHA proceedings then getting underway to tighten workplace control of asbestos use not only in manufacturing, but also in downstream fabrication, installation and use of asbestos-containing products, including construction, abatement and demolition activities. OSHA has since proposed reducing the permissible exposure limit from 2.0 to either 0.5 or 0.2 fibers/cc, imposing much more effective respirator requirements, and developing a separate standard for the construction industry, where the vast majority of asbestos exposures occur. 49 Fed. Reg. 14116 (April 10, 1984). The Agency held a three-week hearing in June and July during which more than 100 witnesses appeared and has compiled a massive evidentiary record on all aspects of asbestos control.

Dr. Moore and Mr. Barnes
November 29, 1984
Page 4

A major focus of discussion in the hearings was OSHA's asbestos hazard assessment, a document that EPA has referred to over the past year to justify its concerns about asbestos.^{3/} Each of the peer reviewers of this document expressed various concerns that it overestimated likely worker risks. These concerns are summarized in AIA/NA's OSHA post-hearing brief (pp. I-1 to I-34), copies of which are enclosed for your consideration.

Essentially the same types of concerns with OSHA's asbestos health assessment were recently voiced by EPA's own Science Advisory Board which had been called upon to consider an asbestos health update written for the Air Office by the same William Nicholson who authored the OSHA risk assessment.^{4/} Like witnesses in the OSHA proceedings, the SAB Panel had doubts about Dr. Nicholson's approach and expressed concern that the many uncertainties involved must

^{3/} See, e.g., letter from John A. Moore to Edward W. Warren (April 12, 1984).

^{4/} During that review, SAB member Dr. Morton Corn, who had appeared at the OSHA hearings for the AFL-CIO, noted that the "uncertainty" in Dr. Nicholson's risk assessments needed to be "put ... in perspective" as had been "clear[ly]" and "excellent[ly]" accomplished by the critique presented at the OSHA hearings by Dr. Kenny S. Crump. SAB Tr. at 131 (July 24-25, 1984). Dr. Crump, who has authored all recent OSHA risk assessments other than the asbestos assessment, concluded that in many respects OSHA had significantly overestimated likely risks. Many of those defects were also identified in the SAB Environmental Health Committee's letter to William D. Ruckelshaus from Herschel E. Griffin and Norton Nelson (October 29, 1984) (e.g., failure to consider fiber type differences, inappropriate evaluation of exposure data, finding associations for other than lung cancer and mesothelioma, insistence on a linear dose-response relationship).

Dr. Moore and Mr. Barnes
November 29, 1984
Page 5-

be fully explicated before any such document becomes the basis for EPA regulatory action. At a minimum, these concerns underscore the need for EPA to satisfy its statutory duty of submitting any asbestos assessments underlying its TSCA plans to the SAB for "advice and comment" before publishing its ban and phase-out proposals.^{5/}

AIA/NA was an active participant in the OSHA hearings and suggested to that Agency a comprehensive program to lower permissible exposures to the maximum extent feasible. See AIA/NA Br. at 1-4. AIA/NA has recommended that OSHA provide workers with the wherewithal to employ respirators to reduce exposures even further, and to require aggressive actions to end smoking among asbestos workers. Id. at III-1 to III-11, III-25 to III-26. Those actions would reduce lifetime cancer risks for the typical asbestos worker to less than 1/20,000 even if OSHA's exaggerated hazard assessment were accepted. Far lower risks would be predicted were the estimates based on a more balanced asbestos risk assessment of the type called for by the Science Advisory Board. Id. at I-28 to I-32.

OSHA's regulatory calendar calls for issuance of a revised asbestos standard in March 1985. 49 Fed. Reg. 41845 (Oct. 22, 1984). By that time, any remaining doubts that asbestos exposures can be reduced to levels well within an acceptable range should be resolved. The record in the OSHA hearings has provided ample basis to issue the most protective OSHA health standard ever developed for any carcinogen

^{5/} The Environmental Research, Development, and Demonstration Authorization Act of 1978, 42 U.S.C. § 4365(e), requires that the "Administrator, at any time any proposed...regulation under the...Toxic Substances Control Act...is provided to any other Federal agency for formal review and comment, shall make available to the [Science Advisory] Board such proposed...regulation, together with relevant scientific and technical information."

Dr. Moore and Mr. Barnes
November 29, 1984
Page 6

-- a standard that lowers risks to well within the range EPA has often considered too small to merit regulation.^{6/}

The likelihood that a comprehensive new OSHA asbestos standard will be in place shortly reaffirms Congress' wisdom that EPA should not replace OSHA as a workplace regulator. Although it might once have been appropriate for EPA to refer its occupational concerns to OSHA under TSCA Section 9, OSHA's own actions have made such referral unnecessary. To the extent there may exist occupational or other exposures that will not be reached by the revised OSHA standard, EPA should consider, following issuance of OSHA's final standard, whether or not further "gap-filling" measures might be advisable under TSCA. AIA/NA would welcome the opportunity to participate in any discussions of those questions.

C. AIA/NA Stands Ready, as Always, to
Resume the 1982 Discussions, Designed
to Identify Gaps in Asbestos Regulation.

As we discussed in our meetings with you and Deputy Administrator Alm last spring, AIA/NA has long supported development of reasonable regulations to assure safe use of asbestos. The Association and its members met on numerous occasions in 1980 and 1981 with EPA's staff to

^{6/} As we have noted in our letters to you of March 22 and May 14, 1984, even OSHA's exaggerated risk assessment would predict few cancer cases over the next 50 years from manufacture and installation of asbestos-cement pipe -- the major product EPA has indicated it intends to ban. Given the very low exposures in such operations, the OSHA risk estimate would predict but one excess cancer death every 20 years -- a risk well within the range EPA has just recently found not worthy of regulation in its radionuclides decisions., 49 Fed. Reg. 43906, 43911-13 (Oct. 31, 1984).

Dr. Moore and Mr. Barnes
November 29, 1984
Page 7

identify whether and how TSCA initiatives might be useful in this effort. With the issuance of a comprehensive new OSHA standard expected shortly, now is an ideal time to recommence those discussions.

In 1982, EPA also was properly focusing its attention on identifying gaps in the government's regulatory control of asbestos. When issuing a TSCA Section 8(a) information collection rule, the Agency declared it was interested in "establish[ing] agreements, as appropriate, for industry to take voluntary steps to reduce the levels of risk," "examin[ing] the various Federal statutes to find the most appropriate authority to effect the necessary control," and "determin[ing whether] labelling of products would sufficiently reduce the risk." 47 Fed. Reg. 33197, 33198-99 (July 30, 1982). OSHA's activities to address all aspects of occupational exposures, EPA's own on-going reassessment of Clean Air Act regulations, and the continuing attention in the Office of Toxic Substances to asbestos in schools all are in accord with the approach EPA outlined in 1982. Likewise, they are in keeping with the international consensus for strict control, but not ban, of asbestos.

Rather than continuing to press for the issuance of ban and phase-out proposals that may be counterproductive from a public health standpoint, AIA/NA urges that EPA recommence the dialogue that was on-going in 1982. The information the Agency collected under its Section 8(a) rule, the comprehensive record now compiled at OSHA, and the work being done by the Air Office, all should be of use in identifying practical measures to regulate specific uses of asbestos. Moreover, AIA/NA would welcome the participation of other interested parties including other regulatory agencies, labor unions and environmental groups who have indicated interest in asbestos regulation.

Dr. Moore and Mr. Barnes
November 29, 1984
Page 8

If it would be helpful, AIA/NA would welcome the opportunity for an industry delegation to meet with you and your staff to discuss any of the matters discussed in this letter.

Sincerely,

Edward W. Warren p.c.
Edward W. Warren, P.C.

Enclosures

cc w/o encls: Don R. Clay
Joseph De Santis