

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

07/11
ASBESTOS
PLAINTIFF'S EXHIBIT

DOW-578

No. 88-2268

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LEGAL DEPT:

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

ST0281089

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Please call with comments.

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379282

ST0281090

OSHRC Docket
No. 88-2268

Amicus curiae Union Carbide Chemicals and Plastics Company Inc. is a wholly-owned subsidiary of Union Carbide Corporation. The following is a list of its affiliates and subsidiaries:

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

Attorney for Amicus Curiae
Union Carbide Chemicals and Plastics
Company Inc.

379283

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51 Fed. Reg. 22612 (June 20, 1986)
53 Fed. Reg. 35610 (Sept. 14, 1988)
54 Fed. Reg. 52024 (Dec. 20, 1989)
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MISCELLANEOUS:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

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

STATEMENT OF INTEREST

Amici Curiae Union Carbide Chemicals and Plastics Company Inc. ("Union Carbide") and The Dow Chemical Company ("Dow") are major chemical manufacturers with facilities throughout much of the United States. Many of those facilities contain asbestos. From time to time Union Carbide, Dow, and/or contractors engage in asbestos removal, demolition, or renovation operations. 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 Union Carbide and Dow 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 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, employees [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 was not thoroughly considered; it is unreasonable; and it is directly contrary to previous OSHA interpretations of the provision in the compliance directive for the standard, in interpretations by top officials of OSHA contemporaneous with issuance of the standard, and a Federal Register notice which explicitly discusses the issue. The Secretary has provided no basis for departing from these interpretations so directly contrary to the interpretation she now advocates.

Construing the negative-pressure enclosure requirement in accordance with the language of the standard would be consistent with the purpose of the requirement. That purpose is 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. Those provisions are consistent with other important provisions of the standard which are also triggered by potential exposure levels above the PEL.

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 on 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 terms of the standard, quoting key provisions at length. Then, referring to the Secretary's interpretation, 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 ¶126,924, 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 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 ("EL") 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). A subsidiary 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, 13 BNA OSHC 1201 (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 quoted 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. Decision 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. See Brennan v. OSHRC (Pearl Steel Erection Co.), 488 F.2d 337, 339, 1 BNA OSHC 1429, ____ (5th Cir. 1973) ("The fault lies in the wording of the regulation."); Dravo Corp. v. OSHRC, 613 F.2d 1227, 1231-32, 7 BNA OSHC 2089, ____ (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 its terms."); Usery v. Kennecott Copper Corp., 577 F.2d 1113, ____, 6 BNA OSHC 1197, ____ (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 be. 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, ____ (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.").

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 (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, ____ (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 asbestos standard for construction 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. OSHA also conveys its misunderstanding of the effect of its own proposals on negative-pressure enclosures by stating in the preamble:

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.

Id. at 29716. All parties agree that the current standard triggers the negative-pressure enclosure requirement "where it is likely, even if not certain, that the PEL would be exceeded"; the proposal would make that requirement apply even where it is not likely that the PEL would be exceeded.

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 intent from the contrary words of the current standard.

II. The Secretary's Interpretation Is Not Entitled to Deference Under the Circumstances Presented Here.

Normally, the Secretary's interpretation of OSHA standards are entitled to deference. Judge Salyers ruled as he did below because of the deference to be extended to the Secretary's interpretation. AACC, slip op. at 10. But deference is not appropriate in this case.

The general rule is that the administrative interpretation of a regulation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. See,

e.g., United States v. Larionoff, 431 U.S. 864, 872 (1977); Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945). In the context of the Commission's review of OSHA enforcement cases, there is substantial precedent for the assertion that it is the regulatory interpretation of the Commission, instead of that of the Secretary, which is entitled to this deference. See 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). The Supreme Court has agreed to decide this very issue in the CF&I case. Under the CF&I case and the cases it cites, it was inappropriate for Judge Salyers to defer to the Secretary's interpretation.

Even if it is the Secretary's interpretation which is generally entitled to deference, however, deference is not appropriate here. 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 (3d Cir. 1978). It is also measured by the consistency of the agency's interpretation over time. (citation) Here the Secretary's interpretation fails on each of these grounds.

A. The Secretary's Interpretation Is Plainly Erroneous and 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, ____ (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) (deference to an agency interpretation "is due only when the interpretation is 'reasonable and consistent with the regulation.'")

This case may be usefully contrasted with the situation in GAF Corp. v. OSHRC, 561 F.2d 913, 916, 5 BNA OSHC 1555, ____ (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.

In addition to its conflict with the language of the standard, the Secretary's interpretation is 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 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.

Sometimes OSHA properly adopts "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, ____ (1980). But such "backstop" provisions differ sharply in nature from control provisions such as requirements for PELs and negative-pressure enclosures. Those must tend to reduce a significant risk. *Id.* Where there is no reasonable likelihood of exposure above the PEL, there is no reduction of a significant risk.

OSHA effectively concedes this point in the current rulemaking, where it discusses its finding that significant 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 that it was necessary to impose the negative-pressure requirement even where exposure above the PEL is not reasonably likely.

B. The Secretary's Interpretation Was Not Thoroughly Considered.

As support for the conclusion that the Secretary's interpretation is plainly erroneous, 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 a temporary emergency 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 commentators 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 enclosed 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 is not thoroughly considered.

C. OSHA Has Interpreted the Negative-Pressure Enclosure Requirement Inconsistently.

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. Paddock, 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, ____ (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 interpretation.

In his decision below, Judge Salyers relied heavily on OSHA's interpretation expressed in the compliance directive for the standard, OSHA Instruction CPL 2-2.40 (Sept. 1, 1987). Decision at 8-9. As an initial matter, that directive cannot be said to be controlling. Union Carbide is 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 Union Carbide is 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).

In contrast, 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 addition to these informal interpretations (albeit by senior OSHA officials charged with responsibility for promulgating the asbestos standard), OSHA formally made the same interpretation in a 1988 Federal Register notice also signed by Assistant Secretary Pendergrass:

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).

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. The current rulemaking proposal asserts that the proposed amendments to paragraphs (e)(1) and (e)(6) are simply clarifications. But it should be clear that OSHA's interpretations of paragraph (e)(6)(i)

shortly after issuing the standard and its formal interpretations since then have interpreted the standard contrary to how the Secretary now argues that it should be interpreted.

In light of this vacillation, the Secretary's interpretation is entitled to no deference.

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

In construing the meaning of paragraph (e)(6)(i), the Commission should keep in mind the purpose of that provision. That 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.

The preamble to the construction industry asbestos standard recognizes 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 noted 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 related the obligation to provide protective measures for bystanders to the need for such measures.

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 hazard is very low because airborne concentrations are not reasonably likely to exceed the PELs, 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 Occupational Safety and Health Act of 1970 ("OSH 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 OSH 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, ___

(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 even when 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 PELs, or the lack of such a likelihood, and instead lumps together all removal, demolition, and renovation operations together. 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 with the use of wet methods and/or other techniques there is no reasonable likelihood of overexposures and treats them all as though they uniformly pose a high degree of hazard. OSHA's own tiering scheme can only be furthered by linking the negative-pressure enclosure requirement to the reasonable likelihood of overexposure.

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, as illustrated by Judge Barkley's decision in EEC, which the employer chose not to appeal to the Commission.

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 purpose 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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1990, I mailed one copy of 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:

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