

FILE NAME: No Safe Threshold (NST)

DATE: 1994 Aug 10

DOC#: NST005

DOCUMENT DESCRIPTION: Excerpt - Federal Register - Asbestos

to base its risk assessment on the assumption that employers will engineer to levels significantly below the PEL. First, as discussed below, the PEL of 0.1 f/cc is at the limit of feasibility for those workplaces in which asbestos levels are most difficult to control, and an assumption that average exposures will be substantially below the PEL will clearly be unrealistic for such workplaces. Second, OSHA found in issuing the 1986 standard that AIA's argument about uncontrollable fluctuations was exaggerated because such fluctuations could be minimized through proper inspection and maintenance of engineering controls and through proper training and supervision of employees whose work practices affected exposure levels. (51 FR at 22653). Third, OSHA's enforcement policy gives employers the opportunity to show that a compliance officer's measurement over the PEL is unrepresentatively high and does not justify a citation, thus alleviating any concern employers might have that they will be cited on the basis of a single measurement that results from uncontrollable fluctuations. Fourth, even if some employers are sufficiently risk-averse to engineer down to well below the PEL to avoid a slight risk of citation, OSHA cannot base a realistic risk assessment on the assumption that most employers will do so.

The 0.1 f/cc level leaves a remaining significant risk. However as discussed below, and in earlier documents, OSHA believes this is the practical lower limit of feasibility for measuring asbestos levels reliably. However the work practices and engineering controls specified below for specific operations and required respirator use will in OSHA's view further reduce the risk. As discussed below, OSHA has carefully reviewed all the public suggestions to further reduce significant risk and has adopted those which have merit.

After OSHA has determined that a significant risk exists and that such risk can be reduced or eliminated by the proposed standard, it must set the standard "which most adequately assures, to the extent feasible on the basis of the best available evidence, that no employee will suffer material impairment of health* * *," Section 6(b)(5) of the Act. The Supreme Court has interpreted this section to mean that OSHA must enact the most protective standard necessary to eliminate a significant risk of material health impairment, subject to the constraints of technological and economic feasibility. *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490(1981). The Court held that "cost-

benefit analysis is not required by the statute because feasibility analysis is." *Id.* at 509.

Authority to issue this standard is also found in section 8(c) of the Act. In general, this section gives the Secretary authority to require employers to make, keep, and preserve records regarding activities related to the Act. In particular, section 8(c)(3) gives the Secretary authority to require employers to "maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 6." Provisions of OSHA standards which require the making and maintenance of records of medical examinations, exposure monitoring, and the like are issued pursuant to section 8(c) of the Act.

Because the revisions to the asbestos standards are reasonably related to these statutory goals, the Secretary finds that these standards are necessary and appropriate to carry out its responsibilities under the Act.

Response to recommendations of public to further reduce risk: As noted above, this rulemaking proceeding is a response to a remand order of the Court of Appeals for the D.C. Circuit. The Court determined that in the earlier 1986 rulemaking, OSHA had not sufficiently explained its decisions not to adopt certain regulatory provisions recommended by participants in that rulemaking. In particular, the Court of Appeals held that it is OSHA's "duty to keep adding measures so long as they afford benefit and are feasible, up to the point where (it) no longer finds significant risk," and that it is OSHA's duty to consider the reasonableness of adopting them. 838 F.2d at 1269. The Court noted that OSHA need not justify its failure to adopt all suggested provisions: rather, the Agency must defend not adopting only those provisions demonstrated by their advocates, "to be feasible to implement and will provide more than a de minimis benefit for worker health." The Court further explained, "(n)aturally the force of the evidence and argument that OSHA must offer to defend its choice will vary with the force of the proponent's evidence and argument." *Id.* at 1271.

In this final rule, based upon the record evidence, OSHA is adopting certain regulatory recommendations made in the earlier rulemaking, is rejecting other recommendations, and is issuing other provisions which are based on, but are altered versions of yet other recommendations in the earlier rulemaking. In addition, new, different and expanded provisions also have been

urged for adoption by participants in this rulemaking. These participants represent labor, public interest and industry interests. The Agency is adopting, rejecting and changing these recommendations as well.

A large portion of this preamble is devoted to the Agency's explanations of these regulatory decisions. OSHA believes that its reasons when it has adopted or has not adopted recommended provisions are well supported by the evidence and that the reasons for its choices are stronger than the contrary arguments. In general, OSHA believes that the extent of its burden to refute claims of benefit for a recommended provision depends on the extent of the supporting data. If the data are valid and extensive, OSHA's burden is greater. If however, the claim of benefit is based on opinion, refutation by OSHA need not be grounded in data, but may be based on OSHA's well reasoned and expert contrary opinion.

In sum, OSHA's decision not to adopt recommended provisions to reduce asbestos related risk reflects the Agency's expert judgment, often where available data creates considerable uncertainty, that the provisions would not offer more than de minimis benefit in reducing a still significant risk. Many recommendations were unsupported by data showing benefit. For example, it was recommended to prohibit high speed burnishing of asbestos-containing floor tile. However, the data do not show a measurable reduction of airborne asbestos fiber levels, based on actual fiber counts using such practices. Other recommended provisions simply do not reduce a still significant risk. For example, requiring very low clearance samples (analyzed by transmission electron microscopy) to deregulate all "regulated areas" to assure that EPA/AHERA level of 0.01 f/cc is met does not appear to be necessary to reduce a significant risk to employees. There is an extremely low (although speculative) risk of asbestos related disease estimated at such clearance levels, and, there is evidence that immediate clearance sampling does not predict later concentration levels.

OSHA discusses the recommendations made by participants in the preamble sections which cover the recommended provisions. The following is a list of the major recommendations made by public which are discussed later:

1. Recommendations for a mandatory building inspection program: Recommended by BCTD (Ex. 143, Att. A); Gobbell Hays Partners, Inc. (7-149). Service Employees International Union (SEIU) (Ex. 144); American Federation