

ATTACHMENT 1



OFFICE OF COMMISSIONER

STATE OF CONNECTICUT
DEPARTMENT OF HEALTH SERVICES

July 10, 1981

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

Dear Mr. Hickey:

I have enclosed a copy of the proposed Memorandum of Decision of the hearing panel on asbestos cement pipe. Pursuant to Section 4-179 of the Connecticut General Statutes, you may file any written exceptions and/or briefs by July 24, 1981. I am also scheduling a meeting on July 30, 1981 at 9:30 a.m. to provide you an opportunity to present oral arguments in this matter. Please notify my office if you would like to change the time of the meeting.

Sincerely yours,

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

DSL:mlp
Enc.

Telephone
79 Elm St. Hartford, Ct. 06115
An Equal Opportunity Employer

CAPCO JEN 0033127

Re: Declaratory Ruling on Health
Hazard of Asbestos-Cement Pipe

Report of Hearing
Officers

MEMORANDUM OF DECISION

BACKGROUND

Public Act 80-398, Section 2 states the following:

"On and after October 1, 1980, no person, firm, corporation or municipality may install any asbestos cement pipe in any water supply system until the Commissioner of Health Services determines that the use of such pipe in water supply systems does not create a public health hazard."

This Act has placed a ban on the installation of asbestos-cement (A-C) pipe in Connecticut until the Commissioner of Health Services finds that the use of such pipe is not hazardous to the public health.

An application for declaratory ruling pursuant to Public Act 80-398 was received on August 5, 1980 from Certain-Teed, Inc. and Johns-Manville Sales Corporation. The applicants requested that the Commissioner determine whether the use of A-C pipe "in water supply systems does not create a public health hazard."

The undersigned members of the Department of Health Services were appointed by letter dated October 24, 1980 to serve as a hearing panel.

Dr. Stephen Havas is the Chief of the Bureau of Health Promotion and Disease Prevention. Dr. Havas is a board certified internist. He holds two public health degrees from Harvard School of Public Health; one is a Master of Public Health and the other a Master of Science in Health Policy and Management.

Anthony V. Sardinas is the Director of the Preventable Diseases Division. Mr. Sardinas holds a baccalaureate degree in microbiology, a masters degree in allied health, a masters degree in public health (MPH) and is completing a doctoral degree in public health (DrPH). Both the MPH and DrPH are from Yale University and are in public health administration and epidemiology.

Richard S. Woodhull is the Chief of the Water Supplies Section. Mr. Woodhull has a baccalaureate degree in engineering from Tufts University, a masters degree in sanitary engineering from Harvard and is a licensed professional engineer in Connecticut.

Following the issuance of a notice of hearing dated September 12, 1980, and publication of said notice in the Connecticut Law Journal on September 23, 1980, a hearing was held in the State Capitol on October 29 and 30, 1980 to receive evidence in this matter. Certain-Teed, Inc. and Johns-Manville Sales Cor-

poration were admitted as parties. Intervenor I status allowed an individual or group the opportunity to appear before the panel, provide testimony, examine witnesses, cross-examine witnesses produced by the parties and other Intervenor I, and to file a brief. This status was granted to Citizens for Clean Water, which was represented by Attorney Daniel Millstone, Litigation Director of the Connecticut Fund for the Environment.

Eleven individuals were granted Intervenor II status. This status allowed an individual or group to appear before the panel and make or submit a statement for the record, but did not subject to or allow that individual or group the opportunity for cross-examination by an Intervenor I or any of the parties to the proceeding.

A large number of reference documents submitted by the panel and by witnesses were noted for the record.

FINDINGS OF FACT

1. The materials used to produce pipe for the transmission of drinking water in Connecticut include ductile iron, steel, polyvinyl chloride, concrete and asbestos-cement.

2. Asbestos-cement pipe is composed of asbestos fibers and cement.

3. Asbestos fibers have been found in Connecticut in drinking water carried by asbestos-cement pipe. The fibers are released from the pipe into the water because of the corrosive effect that certain substances in the water have on the pipe. This process may be slowed considerably but not totally eliminated.

4. Asbestos ingested by animals migrates from the digestive system of such animals to other organs in their bodies.

5. To date, animal studies concerning the effects of ingestion of asbestos fibers in water are equivocal. There are data indicating increased malignant tumor formation in rats which ingest asbestos. Other studies have not found any increase in malignant tumor formation.

6. The inhalation of asbestos fibers can cause a lung disease in humans known as asbestosis, a severe type of chronic obstructive lung disease.

7. Asbestos is a known human carcinogen. Individuals who have been occupationally exposed to asbestos fibers have an increased incidence of cancers of the lung and gastrointestinal tract as well as the linings of the lungs and abdominal cavity. It is not yet known whether the gastrointestinal cancers result from swallowed asbestos or inhaled asbestos which has been carried through the bloodstream to the abdominal area.

8. Some epidemiologic data indicate that the ingestion of asbestos fibers occurring in drinking water can increase the risk of cancer of the lung, peritoneum, pancreas and gall bladder in humans. Other studies have not found any increase in such cancers.

9. The risk of developing cancer increases substantially as the level of exposure to a carcinogenic substance increases. However, the existence of a safe (threshold) level for exposure to a carcinogenic substance, below which no excess cancer is produced, has never been proven.

DISCUSSION

10. Information presented by the intervenors and some scholarly works entered into the record establish that humans exposed to airborne asbestos in the work place develop cancers of the lung, gastrointestinal tract, and the linings of the lungs and abdominal cavity at a much higher rate than the general population. Individuals exposed to asbestos in the work place also frequently develop asbestosis, a severe chronic lung disease. This disease is never seen in individuals who have not been exposed to asbestos.

11. The applicants argue that the results of workplace studies involving high level asbestos exposure are not relevant to the issue presently before this hearing panel. They claim that asbestos fibers in drinking water transported by A-C pipe are not hazardous to health because of their comparatively low levels of occurrence. This implies that there is a threshold level of asbestos exposure which, if exceeded, will result in human disease, but below which there is no ill effect. It is the opinion of this panel that no such threshold level has yet been shown for carcinogenic substances. If a substance causes cancer at one level of exposure, one can still expect cancer at a reduced rate at lower levels of exposure. Exposure to a carcinogenic substance must be entirely eliminated in order to avoid all risk of cancer.

12. Laboratory studies on the health effects of feeding asbestos to animals are equivocal. Several studies using a small number of animals showed no adverse health effect to animals ingesting asbestos. Other studies demonstrated tumor formation in animals exposed to asbestos. The conflicting results of such studies make it difficult to draw support for the thesis that asbestos is or is not hazardous to the public health. However, the fact that asbestos that is ingested by animals migrates

from the digestive system to other body organs suggests that the potential effects of asbestos can occur at those other organs.

13. The applicant suggests that preliminary data from a massive feeding study sponsored by the United States Environmental Protection Agency is adequate to support the hypothesis that ingestion of asbestos in drinking water has no adverse health effects. Such data is of no assistance to this panel since it is not published final data which has withstood peer review.

14. Evidence was presented which showed that water passing through A-C pipe may be contaminated with asbestos fibers from the pipe. The release of asbestos fibers may be slowed by chemically treating water passing through the pipe, thus reducing the corrosive effect of the water.

15. There was a great deal of testimony during the hearing concerning epidemiologic studies that deal with the public health hazards associated with drinking water containing asbestos fibers. Expert witnesses called by the applicant testified that in their opinion these studies indicated minimal risk to the public health. This position is not accepted by the panel.

16. The applicants have requested a declaratory ruling pursuant to Public Act 80-398. The Act allows the Commis-

sioner of Health Services to make a determination that the use of A-C pipe in water supply systems does not create a public health hazard. It is the opinion of this panel that there is not sufficient data to support such a determination. There is sufficient question as to the effects of the oral ingestion of asbestos that we cannot at this time say that A-C pipe does not present a public health hazard. Alternative pipe which presents fewer potential hazards is available and should be used.

RECOMMENDED DECISION

It is recommended that the applicants' request be denied at this time.

Date

Stephen Havas, M.D.

Anthony V. Sardinas

Richard S. Woodhull

STATE AGENCIES

such evidence, and there was no other evidence supporting suspension of motorist's driver's license, admission of such evidence substantially prejudiced motorist, and motorist's appeal from suspension was properly sustained. *Id.*

5. Workmen's compensation

Procedural due process is a requirement of adjudicative administrative hearings, including those held before workmen's compensation commissioners, and the admission of hearsay material without an opportunity to cross-examine is ordinarily a deprivation of procedural due process. *Balkus v. Terry Team Turbine Co.* (1974) 355 A.2d 227, 17 Conn. 170.

6. Board of education

In action by nontenured teacher for mandamus to compel board of education to retain teacher as certified employee, teacher failed to sustain her burden of proving that board of education's alleged violation of applicable statute gave her "clear legal right" to reinstatement. *Light v. Board of Ed. of Town of Lebanon* (1975) 384 A.2d 229, 1 Conn. 35.

Town board of education was, with regard to matters not involving strictly dietary concerns, a "state board" within statutory provision of § 4-166. That term "agency" within Uniform Administrative Procedure Act means "each state board . . . authorized by law . . . to determine contested cases." *Murphy v. Berlin Bd. of Ed.* (1974) 355 A.2d 265, 167 Conn. 368.

7. Disciplinary proceedings

When a party appeals pursuant to optional grant of Uniform Administrative Procedure Act, agency action measured by standards contained in that Act, and appealing party burden of proof in challenging administrative action. *Leib v. Board of Miners for Nursing of State of Conn.* (1979) 411 A.2d 42, 177 Conn. 78.

Standard of relevance governing proceedings at agency disciplinary hearing is by the complaint as propounded and by the charges provided by agency. *Murphy v. Berlin Bd. of Ed.* (1974) 355 A.2d 265, 167 Conn. 368.

Town board of education was "authorized by law to determine contested cases" within statutory provision that "agency" within Uniform Administrative Procedure Act means "each state board . . . authorized by law . . . to determine contested cases."

Disciplinary proceeding in which town board of education decided not to dis-

MANAGEMENT OF STATE AGENCIES § 4-179

miss teacher but placed her on probation for 12 months and froze her salary was a "contested case" within statutory provision that term "agency" within Uniform Administrative Procedure Act means "each state board . . . authorized by law . . . to determine contested cases." *Id.*

9. Notice requirement

Where notice given to teacher only referred to her conduct with regard to certain student, where town board of education made findings that teacher had lack of sympathy and understanding of problems of students of average and below average ability and failed to carry out and pursue channels available for students participating in "Work-Experience Program" and where board's decision to place teacher on probation and freeze her salary was based in part on such findings, board had not complied with notice requirements of Uniform Administrative Procedure Act or with Act's requirements that findings be based on matters officially noticed and that irrelevant evidence be excluded. *Murphy v. Berlin Bd. of Ed.* (1974) 355 A.2d 265, 167 Conn. 368.

10. Documentary evidence

Photostatic copies of abstract of the record of defendant's conviction in Maine for traffic violation and notice of suspension of right to operate motor vehicle in Maine forwarded by Maine officials, were admissible at administrative hearing on revocation of motorist's operator's license. *Hickey v. Commissioner of Motor Vehicles* (1975) 365 A.2d 403, 170 Conn. 136.

Documents giving notice of conviction of traffic violation, forwarded by state in which violation occurred, need not

be formally exemplified to sustain the suspension or revocation of operator's license by the home state. *Id.*

11. Parole release hearings

There is no statutory requirement that parole board determine eligibility for parole of any particular prisoner, and thus parole release hearing is not a "contested case" to which provisions of Uniform Administrative Procedure Act apply, so that procedures which such Act requires for "contested cases," which procedures exceed the minimal procedural safeguards mandated by due process clause, are not statutorily required at parole release hearings. *Taylor v. Robinson* (1976) 372 A.2d 102, 171 Conn. 691.

12. Motor vehicles—Coroner's report

Failure of coroner to submit certified copy of report of investigation of automobile accident was not fatal to exhibit's admissibility in hearing held by commissioner of motor vehicles on suspension of motorist's license since the objection was not raised at the hearing. *Lawrence v. Kozlowski* (1976) 372 A.2d 110, 171 Conn. 705, certiorari denied 97 S.Ct. 2930, 431 U.S. 969, 53 L.Ed.2d 1066.

13. Witnesses

Failure of commissioner of motor vehicles to subpoena three witnesses sought by motorist at hearing which resulted in suspension of the motorist's driver's license did not contravene the Uniform Administrative Procedure Act nor the motorist's constitutional rights. *Lawrence v. Kozlowski* (1976) 372 A.2d 110, 171 Conn. 705, certiorari denied 97 S.Ct. 2930, 431 U.S. 969, 53 L.Ed.2d 1066.

§ 4-179. Proposal for decision. Procedure. Waiver

When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

(1971, P.A. 854, § 14, eff. Jan. 1, 1972.)

Library references

Administrative Law and Procedure
 489.

C.J.S. Public Administrative Bodies
 and Procedure § 142.

LAW OFFICES
SCHNADER, HARRISON, SEGAL & LEWIS
1719 PACKARD BUILDING
PHILADELPHIA, PENNSYLVANIA 19102

215-988-2000 • CABLE: WALEW
TELEX: 83-4280

WASHINGTON OFFICE
1111 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036
202-463-2900

July 14, 1981

TO: MEMBERS OF THE EXECUTIVE COMMITTEE
FROM: ARTHUR KAHN
RE: STATE OF CONNECTICUT

As you are by now aware, a hearing panel consisting of three officials of the Connecticut Department of Health Services has issued a proposed "Memorandum of Decision" denying our application for a determination that A/C pipe does not constitute a "health hazard." Such a determination by the Commissioner of the Department of Health Services is required to lift the moratorium on the use of A/C pipe imposed by the Connecticut statute enacted in mid-1980. The proposed decision is extremely unfavorable, not only in that it would deny our request but also in regard to some of the statements contained therein regarding the dangers of ingested asbestos.

We have discussed with Brandon Hickey, our Connecticut counsel, various alternatives available to us at this juncture. I shall outline the three general courses of action that appear to be available to us. We must make a decision rather promptly since, at least with respect to two of the possible courses of action (the two that we believe to be worth serious consideration), we must act within the next few weeks.

CAPCO JEN 0033137

The procedural posture is that the hearing panel has forwarded the proposed decision to the Commissioner of the Department of Health Services, and we now have an opportunity to take exceptions to the proposed decision. Based on the present schedule, we have to submit written exceptions (if we choose to do so) by July 24. A hearing before the Commissioner on the exceptions is scheduled for July 30. Thereafter, the Commissioner will either adopt (as proposed or as he may modify it) or reject the proposed decision. I have requested Brandon Hickey to obtain an extension of the date for filing exceptions and for the hearing to allow us additional time to decide what action we are going to take and to prepare exceptions should we decide to file them. I do not know if Brandon will be successful in obtaining an extension.

As we see it, generally speaking, there are three courses of action available to us. Of the three, we believe we can easily eliminate one as not being feasible. However, we shall discuss it briefly at the outset. The three possibilities are as follows:

First, we can do nothing. If we were to take this approach, it would, in effect, constitute acquiescence in the proposed decision, which would, undoubtedly, be adopted by the Commissioner. The only possible advantage to be achieved by this course of action would be to save the money involved in preparing and arguing the exceptions (which Brandon Hickey estimates at \$5,000), on the basis that this will be a wasted effort and that

the Commissioner will adopt the proposed decision, in any event. Nevertheless, it does not seem to us to be a considered approach, in effect, to acquiesce in the decision proposed by the panel without taking exception to it. We believe that from a public relations point of view, as well as from a legal point of view, this approach is unacceptable.

Second, we can prepare, file and argue exceptions to the proposed decision. This would be the way we would proceed in the ordinary situation. However, we do not believe there is any reasonable likelihood that the Commissioner will reject or significantly modify the proposed decision. The next step would be to appeal to the Connecticut Superior Court. The cost of such an appeal is estimated by Connecticut counsel as being approximately \$15,000 (this does not include the time of Schnader, Harrison, Segal & Lewis). With respect to an appeal, we share the view of Connecticut counsel that there is little likelihood that the court would reverse the Commissioner of Health Services as being arbitrary. We would be relegated to trying to invalidate the statute on the grounds that it lacks adequate standards and, consequently, is invalid. The assessment of Connecticut counsel (which we share) is that we have perhaps a 20% chance of prevailing on the appeal.

Third, we can withdraw our application. We would have to draft a carefully worded statement indicating that, in view of the pending animal feeding studies, etc., rather than press the matter at this time, we will await the outcome of these and other studies, at which time we would then hope to convince the

Commissioner that the moratorium should be lifted. The advantage would be that we would not be faced with a decision of the Commissioner that could be used against us elsewhere. While the proposed decision may still be cited in proceedings in other jurisdictions, etc., it might be less damaging than an opinion by the Commissioner, which has been affirmed by the Connecticut courts. In addition, we would probably save \$20,000-25,000 in further costs incident to proceeding before the Commissioner and in the state courts.

Since we see little likelihood of reversing a decision by the Commissioner, if we proceed it is likely that we will end up with an adverse opinion by the Commissioner which might carry greater weight than the proposed decision. Although we could continue to say for sometime that the matter is in litigation, I'm not sure that this would be of much help in the face of a ruling by the Commissioner. To reiterate, the proposed decision of the panel will still probably be used against us elsewhere, but it may be less harmful than a final decision by the top health official of the State of Connecticut.

Furthermore, we have to re-examine our purpose for filing the application in the first instance. Counsel for the companies decided to file the application, based on a number of considerations. Apparently, they felt that there was a good chance of getting a favorable opinion from the Commissioner or of overturning the Connecticut legislation, and, further that this might discourage the enactment of similar legislation in other states.

We now find that we will not much longer have a market on the east coast. Moreover, in over a year, we have not seen any significant efforts by other states, other than the State of Massachusetts, to adopt similar legislation. It is now the assessment of local Connecticut counsel, which we share (and which has been our view from the beginning) that there is very little likelihood of obtaining a favorable opinion from the Commissioner and little greater likelihood of obtaining a favorable decision in court.

Consequently, we see little to be gained from proceeding: (1) it will cost a substantial amount of money; (2) we will gain no significant advantage as a result of keeping the proceedings (in state court) going for another year or two since the adverse parties in proceedings, etc., elsewhere are not likely to be dissuaded from citing the decision of the Commissioner even though an appeal is pending; (3) we will be faced with a decision by the Commissioner of the Department of Health Services of the State of Connecticut, rather than by a proposed "Memorandum of Decision" by a hearing panel; (4) ultimately, if we are correct, the Commissioner will be affirmed by the Connecticut courts, which will most likely uphold the Connecticut statute; and, finally, (5) we will have achieved no significant psychological or public relations advantage, so far as we can see.

The basic questions are, as we see them, (1) whether we are better off during the next year and one-half to two years

with (a) a proposed "Memorandum of Decision" by a "hearing panel" or (b) a final decision of the Commissioner of the Department of Health Services of Connecticut (the top health official of the state and the person charged by the statute with responsibility) which is in the process of being appealed, and (2) thereafter, whether we are better off with the proposed decision or with a decision of the Commissioner that has been affirmed by the Connecticut courts. You should also keep in mind the cost of proceeding on the one hand, and the chance, although remote, that the Commissioner will reject the proposal of the panel (or that the court will reverse the Commissioner) on the other hand.

THE HARTFORD COURANT, Wednesday, July 15, 1981

32

State Health Panel Recommends Keeping Ban on Asbestos Pipe

By ANNE BÖNNY
 Courant Staff Writer

A panel of state health experts Tuesday recommended continuing a ban on the future use of asbestos water pipes.

The panel stated that questions about the effects of swallowing asbestos have not been resolved and added, "We cannot at this time say that asbestos does not present a public health hazard."

The panel also stated that "alternate kinds of pipe" that pose fewer potential hazards are available and should be used. There are now 800 miles of asbestos pipe in use in 80 towns throughout the state.

Dr. Steven Havas, chief of the Bureau of Health and Disease Prevention and one of the panel's three members, said state Health Commissioner Douglas S. Lloyd will decide at the end of the month whether to accept the recommendation.

Lloyd is scheduled to participate in a public hearing on the ban before making his decision. He was on vacation Tuesday and could not be reached for comment.

Johns-Manville Sales Corp., which previously produced asbestos pipe, and the Asbestos-Cement Pipe Producers Association last fall asked Lloyd to lift the ban, claiming studies have not proven asbestos pipe is harmful.

Some studies have shown that asbestos fibers are harm-

ful when inhaled, but there is no conclusive evidence that swallowing the fibers produces the same effect.

Hearings on the ban were held last fall, and briefs were filed in the spring by attorneys representing the manufacturers.

"The panel rejected substantial and compelling evidence we presented at the hearings in the way of scientific studies that showed no evidence that could back up changing the current water distribution," John Wells, director of public information for the Asbestos-Cement Pipe Producers, said of Tuesday's recommendation.

Wyatt McCalli, speaking for Johns-Manville, echoed these sentiments.

He said the recommendation, if adopted by Lloyd, "will

have very little effect" on his company's sales in the state. He said the company sold only a small percentage asbestos pipe before the ban took effect last year and now sells only plastic pipe.

Supporters of the ban, including the Connecticut Public Health Department, hailed the recommendation. "It is prudent and careful decision — we are thrilled to bits," said Daniel Millstone, a spokesman for the group.

The group also has drafted proposed regulations monitoring the asbestos-cement pipe already in use.

Besides Havas, the other panel members are Anthony Sardina, director of preventable diseases, and Richard Woodhull, chief of the water supplies division.



A/C Pipe
Producers Association

Public Affairs Committee
International Affairs Committee

TO

FROM

SUBJECT

Field Problem - Black River Falls, Wisconsin

ACTION REQUIRED: Review for information

Messrs.: ~~W. T. Whitley~~, ~~W. H. Beasley~~,
~~S. G. Leyshock~~, ~~I. L. Taylor~~
5-4-81

Internal Correspondence

DATE April 29, 1981

J. F. Welch
J. F. Welch, Director, Public Affairs

On April 8, 1980, Staff contacted Gary Logsdon (Environmental Protection Agency - Municipal Environmental Research Laboratory) for routine follow up. During the course of our conversation, Logsdon revealed that approximately 6500 feet of A/C water pipe at Black River Falls Mission (Indian reservation), Black River Falls, Wisconsin was being removed as a result of extensive interior corrosion. The line is to be replaced with PVC pipe. According to Logsdon, the 4 inch line was installed approximately 12 years ago by the Indian Health Service. Source waters are from two local wells which are chlorinated and fluoridated prior to consumption. Water quality data follow:

	<u>Well 1</u>	<u>Well 2</u>
pH	6.3	6.6
Alkalinity	20	20
Calcium hardness	14	17

EPA's analysis of water quality indicates that the pH is closer to 4.2, alkalinity -0.42, and calcium hardness 7.0. This approximates an Aggressive Index of 5.

Contact for the project is Larry Gaynor, P.E., Indian Health Service, Rhinelander, Wisconsin (715/362-5145).

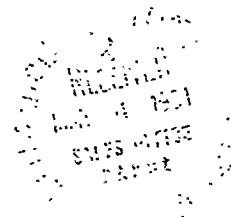
AACPP Action Plan

1. Staff plans to contact Gaynor prior to and during a fact finding trip to the State.

If you have any questions, please do not hesitate to call.

JFW/ajb

cc: A. Kahn, Esq.
N. Rahn, Esq.



CAPCO JEN 0033144

copies to:

Public Affairs Committee

H. Olson
I. Adams
B. Cook
W. Perrell
J. Woods
J. Baker
T. Dougherty
D. Stinson
W. McCallie

International Affairs Committee

R. Dorner
E. Van Der Rest
B. Giboin
R. Hobbs
C. Walters
A. Saoulis
R. Jalan
V. Pattabhi
H. Hudson
C. Barton
S. Al-Tarkait
E. Costa

FP/1
Chrono

CAPCO JEN 0033145