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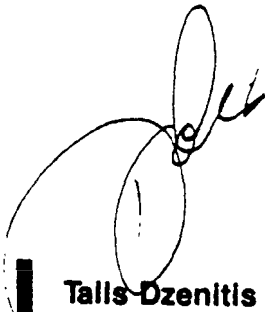
April 2, 1992

TO: D. Hudson, D/766
J. Pepper, D/766
G. Zelazny, D/817

RE: ASBESTOS TILE, ETC.

Attached is the EPA's proposed interpretation that vinyl/asbestos floor tile and other products continue to be subject to EPA's ban. Comments are due May 4, 1992.

TD/er



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of low-yield livestock, bringing average milk yield down from 3,544 liters per cow in 1990 to 2,879 liters in 1991, he noted. Over the next year, the system of agricultural subsidies will be directed toward stopping overproduction and promoting selected crops and livestock output. Krsek said. Foreign investment in food processing has been cautious, and "not in accordance with our needs and desires," he explained. □

Consumer Protection

FDA COMMISSIONER TELLS STATES OF DESIRE FOR JOINT EFFORTS OF CONSUMER PROTECTION

The head of the Food and Drug Administration on March 31 told state attorneys general that his agency must work with them and other federal agencies to protect consumers.

FDA Commissioner David A. Kessler, addressing the Spring Meeting of the National Association of Attorneys General, noted that many states during the 1980s stepped into the breach left by the FDA, which spent much energy on writing letters but little on enforcement activities.

As he took charge of the FDA, industry officials expected "business as usual," he observed. However, they have since learned the "error of such thinking."

It now takes 80 days before a case is turned over from the FDA to the Justice Department, down from as many as 300 days, Kessler advised NAAG.

Prosecutions numbered 43 in 1991, up from 25 in 1990; and the number of injunctions increased from 9 to 21, he said.

Kessler also pointed out that he has initiated a new office of criminal investigations.

However, "we can't do it alone," he told the attorneys general and their staffs. The FDA needs to strengthen its ties to both the attorneys general and state regulators.

As part of this cooperative effort, he announced a joint campaign with NAAG and the Federal Trade Commission to focus on false claims on weight loss products. Many of these products claim a "quick fix," but the public needs to know that there is no "magic bullet" to weight loss.

"This is the first such joint effort to combat health fraud," Kessler declared. But, he stressed his expectation that this will be the first of many.

He noted that he met in October with Iowa Attorney General Bonnie J. Campbell, who chairs NAAG's FDA Working Group, to discuss the exchange of information and a public education campaign on health fraud.

NAAG's FDA Working Group has combined efforts on three prosecutions, one dealing with a weight loss product and the other two with AIDS cures, Kessler reported.

Environmental Marketing Claims

Rep. Al Swift (D-Wash), who chairs the House Energy and Commerce Committee's Transportation and Hazardous Materials Subcommittee, also addressed NAAG.

Swift, whose subcommittee has jurisdiction over FTC-related matters, declared that his bill (HR 3865) on environmental marketing claims only preempts the states in a limited capacity.

The bill, which recently was cleared by his subcommittee on a 16-1 vote, would require the Environmental Protection Agency to develop standards for manufacturers which want to make claims that their products are beneficial to the environment.

HR 3865 would allow the states to continue to make their own rules on green marketing in the two years after enactment of the legislation but before the EPA rules are promulgated.

After the EPA rules are finalized, the states may promulgate their own rules as long as they use definitions identical to those in the EPA rules. If the states wish to develop a rule about an issue that is not contained in the EPA rules, they may do so.

Swift added that he hopes the bill will be considered by the House before the congressional recess for Independence Day.

On another issue, he expressed optimism that his bill on telemarketing enforcement (HR 3203), which would allow the states to file suits on an FTC rule in federal court, would be considered by the House before the Easter recess. □

Hazardous Substances

VINYL/ASBESTOS FLOOR TILE, FELT PRODUCTS SHOULD BE EXEMPT FROM BAN, GROUP SAYS

The president of the Asbestos Information Association charged March 31 that the Environmental Protection Agency cannot continue to ban vinyl/asbestos floor tile and flooring felt products under Section 6 of the Toxic Substances Control Act because those products were being imported at the time the ban took effect.

In a notice expected to be published April 2, EPA said vinyl/asbestos floor tile and asbestos flooring felt products still are subject to the agency's ban on asbestos products. The agency evaluated which asbestos products still could be made and sold in the United States after an appeals court overturned most of the 1989 ban and phase-out rule (*Corrosion Proof Fittings v. EPA*, CA5, No. 89-4596).

The court ruled that EPA could continue to ban new uses of asbestos and any specific asbestos-containing products that were not being manufactured, imported, or processed on July 12, 1989, the date the ban rule was made final.

AIA President Robert Pigg told BNA that vinyl/asbestos floor tile and asbestos flooring felt products were being imported into the United States from Canada, Mexico, and possibly other countries at the time the rule was issued. While he conceded the imports are not a large market, Pigg said EPA cannot continue to ban those products under the 1989 ban and phase-out rule because the court overturned and remanded the entire rule to the agency.

"That doesn't mean the EPA could not revisit those products," Pigg explained. If the agency wants to ban those products, AIA believes EPA would have to do so under a new rule-making, he said. In a new rule-making, EPA would have to consider less burdensome alternatives to a ban, which the appeals court ruled EPA did not do for the 1989 ban rule.

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Walter Anderson of the Resilient Floor Covering Institute was not available March 31 to confirm Pigg's statement and provide documentation about the import status of the floor tile and flooring felt products.

An EPA official told BNA March 31 the agency does not have proof that asbestos floor tile and flooring felt products were being imported at the time the rule was issued.

The agency said in the notice, however, that while AIA and the Asbestos Institute substantiated that vinyl/asbestos floor tile and flooring felt products were not being produced in the United States, "recent communications . . . raise some questions about the status of these products."

Other Asbestos Products

Other asbestos products the agency is considering to keep under the ban include asbestos-cement shingle; commercial, corrugated and specialty paper; and roll-board and millboard, according to the EPA notice. These products were subject to the third phase of the ban, which had not gone into effect when the court overturned the ban. Because Phase 3 of the ban was not yet in effect when the court invalidated the rule, the industry association will question whether EPA still can ban those products, Pigg said.

As for asbestos-cement shingles, "there is no question they've been manufactured in the United States and continue to be," and so the court decision requires the agency to discontinue banning them, Pigg said.

The association will send documentation to support its position on the status of these products with comments after the notice is published in the *Federal Register*, Pigg said. 

Hazardous Substances

SECOND PUBLIC MEETING ON REASSESSMENT SET FOR APRIL 28; EPA REQUESTS COMMENTS

A second public meeting has been scheduled by the Environmental Protection Agency for April 28 to discuss EPA's scientific reassessment of dioxin, the agency announced March 30.

The public is invited to hear presentations by officials from EPA's Office of Research and Development on the status of agency reassessment research projects (57 FR 10761).

Each presentation will be followed by a short question and answer period, EPA said. The rest of the meeting will be devoted to oral comments presented by preregistered attendees, the agency explained.

The meeting will be held April 28 from 8:45 a.m. to 5 p.m., at EPA's Education Center Auditorium, Water-side Mall, 401 M St. S.W., Washington, D.C.

In April 1991, EPA Administrator William Reilly initiated a re-evaluation of the agency's risk assessment for dioxins. The reassessment has five elements and is focused on the risks associated with TCDD, also known as 2,3,7,8-tetrachlorodibenzo-P-dioxin.

Oral comments will be limited to five minutes each, EPA said. The deadline for registering to present comments at the meeting is April 27, according to the announcement.

Only 30 people will be allowed to make presentations, the agency said.

Anyone interested in making an oral presentation on EPA's reassessment of the risks associated with dioxins should contact Environmental Management Support Inc., (301) 589-0885.

Written comments may be sent to Environmental Management Support Inc., 1010 Wayne Ave., Suite 200, Silver Spring, Md. 20910.

New Issues

The agency said comments should be limited to issues that were not discussed at the first public meeting on the dioxin reassessment, held Nov. 15, 1991. At that meeting, several industry representatives explained that some polychlorinated biphenyls that exhibit "dioxin-like" attributes in their biologic process and toxic effect are being reviewed by EPA in the dioxin reassessment.

EPA said it was interested in receiving comment on: new scientific data; any ongoing or recently published research; any scientific or technical interpretation of and analysis of data relevant to the dioxin reassessment; and suggestions for additional public participation and involvement in EPA's reassessment project.

The agency also seeks comment on the five elements that comprise the reassessment:

- Development of a new biologically-based, dose-response model for dioxin to estimate health risks;
- Support(ing) of laboratory research relevant to development of a new dose-response model;
- Update and revision of the health assessment document for dioxin;
- Update and revision of the exposure assessment document for dioxin; and
- Supporting research to characterize ecological risks of dioxin in aquatic ecosystems, and development of an ecological risk characterization report.

For further information contact David Cleverly, Office of Technology Transfer and Regulatory Support (H-8105), EPA, ORD, 401 M St. S.W., Washington, D.C. 20460, (202) 260-7891.

International Trade

U.S. TO ASK JAPANESE GOVERNMENT TO HORSE-TRADE ON THOROUGHBRED RACING

TOKYO—(By a BNA Special Correspondent)—The U.S. government is asking that Japan relax regulations on U.S. race horses in Japan, U.S. and Japanese officials said March 30.

"We are asking the Japanese government" to take action on the race horse trade, said a U.S. embassy official who declined to be named.

The United States is asking for lifting of the existing 4 million yen (\$30,769) a head import tariff, as well as relaxation of Japanese regulations on foreign horses being able to run in high-stakes Japanese races, the official said. He said the United States may take up the issue in bilateral trade meetings.

The demand was lodged against the Ministry of Agriculture, Forestry and Fisheries by Sen. Mitch

federal register

Thursday
April 2, 1992

Part III

Environmental Protection Agency

48 CFR Part 763

**Asbestos; Manufacture, Importation,
Processing and Distribution Prohibitions;
Effect of Court Decision**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 763

[OPPTS-62114; FRL-4044-2]

Asbestos; Manufacture, Importation, Processing and Distribution Prohibitions; Effect of Court Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Continuing restrictions on certain asbestos-containing products.

SUMMARY: On October 18, 1991, the United States Court of Appeals for the Fifth Circuit, in *Corrosion Proof Fittings v. EPA*, No. 89-4596, slip op. 558 (Oct. 18, 1991), vacated and remanded most of the rule which prohibited the manufacture, importation, processing, and distribution in commerce of certain asbestos-containing products, and required the labeling of those products. Subsequently, the Court clarified the decision and held that the rule continued to govern asbestos-containing products that were not being manufactured, imported, or processed on July 12, 1989. This document identifies products that EPA believes may remain subject to the prohibition and labeling requirements of the rule, and solicits comments on EPA's determinations with respect to the status of various other asbestos-containing products as of July 12, 1989.

DATES: Comments must be submitted to EPA on or before May 4, 1992.

ADDRESSES: Written comments that contain information claimed as Confidential Business Information (CBI) should be identified by the docket number [OPPTS-62114] and submitted in triplicate, together with one version from which all claimed CBI has been deleted, to: TSCA CBI Docket Office (TS-790), Office of Pollution Prevention and Toxics, rm. E201, 401 M St., SW., Washington, DC 20460. Written comments that contain no claimed CBI should be submitted to: TSCA Public Docket Office (TS-793), Office of Pollution Prevention and Toxics, rm. G004, NE Mall, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, TSCA Assistance Division (TS-799), Office of Pollution Prevention and Toxics, rm. E-545, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Telephone: (202) 260-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION:

I. Background

On July 12, 1989, EPA issued a final rule under section 6 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605. The rule prohibited, at staged intervals, the future manufacture, importation, processing, and distribution in commerce of almost all asbestos-containing products, and required labeling of such products (40 CFR 763.160-763.179). The first stage of the ban regulated any "new uses of asbestos," and certain specifically identified asbestos-containing products. "New uses of asbestos" means those commercial uses of asbestos not identified in 40 CFR 763.165, and not excluded specifically by the definition, the manufacture, importation, or processing of which would be initiated for the first time after August 25, 1989 (40 CFR 763.163). After August 27, 1990, the rule banned the manufacture, importation, and processing of all stage one products, and required that those products be labeled while they remained in distribution (40 CFR 763.165(a), 763.167(a), 763.171(a)). After August 27, 1992, the rule also prohibited the distribution in commerce of all stage one products (40 CFR 763.169(a)). The second and third stages of the ban regulated additional types of asbestos-containing products. These two later stages of the rule contained provisions that were comparable to the first stage, but that were to take effect from 1992 through 1997 (40 CFR 763.165(b)-(e), 763.167(b) and (c), 763.169(b)-(d), 763.171(b) and (c)).

In *Corrosion Proof Fittings*, the Court agreed with EPA's determination that asbestos is hazardous and presents similar risks throughout different industries, and affirmed the Agency's authority to issue rules that ban all uses of a toxic substance under TSCA. The Court, however, held that the asbestos ban rule was not supported by substantial evidence because EPA failed to sustain its burden under TSCA section 6(a) of showing that the products banned by the rule present an unreasonable risk, and that a less burdensome regulation would not adequately protect against that risk. The Court also found that EPA failed to give adequate notice and opportunity to comment on the use of analogous exposure data to support parts of the rule. For products that "once were, but no longer are, being produced," however, the Court found that EPA properly evaluated the risks. Id. at 590-591. It held that TSCA authorizes EPA to ban future uses of asbestos, and specifically refused to "disturb the agency's decision to ban products that

no longer are being produced in or imported into the United States." Id. at 591.

EPA filed a Motion for Clarification with respect to the effect of the Court's decision on the portions of the rule that regulate asbestos-containing products that were no longer being produced or imported. In response to the Motion, the Court stated that its earlier holding not to disturb EPA's decision to ban certain products applies to "products that were not being manufactured, imported, or processed on July 12, 1989," the date the final rule was issued. *Corrosion Proof Fittings*, slip op. at 1007 (November 15, 1991). It also authorized EPA to resolve factual disputes with respect to the particular products that may be in that category. Id. In light of this clarification, it is clear that the Court did not disturb the rule with respect to products that were originally covered by the rule, and that were not being manufactured, imported, or processed on July 12, 1989. The Court did not require the Agency to go through an entirely new rulemaking process for these products. It did, however, recognize that there may be some disagreements regarding the status of some products, and it authorized EPA to resolve such factual disputes on remand.

EPA also filed a Request for Rehearing, which the Fifth Circuit denied on November 27, 1991. The Government has decided not to file a petition for a Writ of Certiorari to the United States Supreme Court.

II. Status of Products

Based upon the Court's clarified decision, EPA believes that new uses of asbestos, vinyl/asbestos floor tile, and asbestos flooring felt products are still subject to the rule. By definition, any product that constitutes a "new use of asbestos" was not being manufactured, imported, or processed on July 12, 1989. A "new use of asbestos" is defined as a use that is initiated for the first time after August 25, 1989 (40 CFR 763.163). Based upon this definition, any product that was being manufactured, imported, or processed on July 12, 1989, automatically cannot be a "new use" of asbestos because it would have been initiated prior to August 25, 1989. Thus any product that is a "new use of asbestos" was not being manufactured, imported, or processed on July 12, 1989, and continues to be governed by the rule pursuant to the Court's clarified decision (40 CFR 763.163).

The information available to EPA as part of the rulemaking proceeding also establishes that vinyl/asbestos floor tile and flooring felt were not being

manufactured, imported, or processed when the final rule was issued. EPA made such a determination in the preamble to the final rule (54 FR 29460, 29484, 29492, July 12, 1989), and in the Regulatory Impact Analysis of Controls on Asbestos and Asbestos Products. That determination was later substantiated in part by statements made to the Fifth Circuit Court of Appeals by the Asbestos Information Association of North America (AIA) and the Asbestos Institute (AI), which represent members of the asbestos industry. The two organizations told the Court that vinyl/asbestos floor tile and flooring felt were no longer produced in the United States. Recent communications from AIA, AI, and other entities, however, raise some questions about the status of these products. Therefore, EPA is requesting comments with respect to whether these products were being manufactured, imported, or processed on July 12, 1989.

Based upon information currently available to the Agency, EPA also believes that the following products may be subject to the rule: asbestos-cement (A/C) corrugated and flat sheet, A/C shingle, and asbestos clothing, flooring felt, pipeline wrap, roofing felt, commercial, corrugated and specialty paper, rollboard, and millboard. Both the AIA and the AI stated in their appeal to the Fifth Circuit that these products were not in production at the time the final rule was issued. Recent EPA efforts also indicate that these products probably were not being manufactured, imported, or processed when the final rule was issued, and the Agency is soliciting comments with respect to their status as of July 12, 1989.

Finally, there may be other asbestos-containing products identified in the rule that were not being manufactured, imported, or processed on July 12, 1989, and which therefore may continue to be subject to the rule. In the original rulemaking proceeding, EPA did not identify the status of every asbestos-containing product as of July 12, 1989. Accordingly, EPA seeks information concerning whether any of the other asbestos-containing products, which were identified in the rule but not discussed in the preceding paragraphs of

this document, were being manufactured, imported, or processed on July 12, 1989.

Commentators submitting information with respect to the July 12, 1989, status of asbestos-containing products should provide supporting documentation for any claims of manufacturing, processing, or importing as of that date. Such documentation may include records of customs declarations, or evidence of manufacturing or processing on the pertinent date.

As soon as possible after reviewing the comments, EPA will determine which asbestos-containing products were not being manufactured, imported, or processed as of July 12, 1989. The Agency will issue its determination in the *Federal Register*, and identify the products, in addition to new uses of asbestos, that continue to be governed by the prohibition and labeling requirements of the rule. The second notice also will provide information, to the extent that it is available to the Agency, on products that are not subject to the rule, including a list of specific asbestos-containing products and of the companies that were manufacturing, importing, or processing the products on July 12, 1989.

III. Comments Containing Confidential Business Information

All comments will be placed in the public record unless the commentator claims that they contain CBI, and the comments are clearly labeled as containing claimed CBI when they are submitted. Because of the need to expedite this process, CBI claims should be accompanied by comments substantiating the claim as described in 40 CFR 2.204(e)(4). While a part of the record, CBI comments will be treated in accordance with 40 CFR part 2. A sanitized version of all CBI comments should be submitted to EPA for the public file.

It is the responsibility of the commentator to comply with 40 CFR part 2 so that all materials claimed as confidential may be properly protected. This includes, but is not limited to, clearly indicating on the face of the comment (as well as on any associated correspondence) that information

claimed to be CBI is included, or marking "CONFIDENTIAL," "TSCA CBI," or a similar designation on the face of each document or attachment in the comment which contains the claimed CBI. EPA will consider the failure to clearly identify the claimed confidential status on the face of the comment as a waiver of any such claim and will make such information available to the public without further notice to the commentator or business.

IV. Record

EPA has established a record (docket number OPPTS-62114) for comments submitted pursuant to this document, and for other comments regarding the July 12, 1989, status of asbestos-containing products received by EPA before this document but after the Fifth Circuit decision. The Agency will supplement this record as necessary. A public version of the record, from which all CBI has been deleted, is available for inspection in the TSCA Public Docket Office, rm. G004, NE Mail, 401 M St., SW., Washington, DC, from 8 a.m. to noon and from 1 p.m. to 4 p.m., Monday through Friday, except legal holidays.

EPA has placed copies of the Fifth Circuit Court's decision, dated October 18, 1991, and Clarification of the decision, dated November 15, 1991, in Docket OPPTS-62114 for public review. These documents are:

1. Decision of the U.S. Court of Appeals for the Fifth Circuit in *Corrosion Proof Fittings, et al., petitioners, -vs- The Environmental Protection Agency and William K. Reilly, Administrator, respondents*, No. 89-4596 (5th Cir., Oct. 18, 1991).

2. U.S. Fifth Circuit Court of Appeals Clarification of its Decision in *Corrosion Proof Fittings, et al., petitioners, -vs- The Environmental Protection Agency and William K. Reilly, Administrator, respondents*, No. 89-4596 (5th Cir., Nov. 15, 1991).

Dated: February 28, 1992.

Linda J. Fisher,

Assistant Administrator for Prevention,
Pesticides and Toxic Substances.

[FR Doc. 92-7236 Filed 4-1-92; 8:45 am]

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