

File: Asbestos General (6)

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PLAINTIFF'S
EXHIBIT

AL-1526



Organization Resources
Counselors, Inc.

Memorandum

April 7, 1989

To: ORC Occupational Safety and Health Group
ORC Western Occupational Safety and Health Group
ORC Occupational Safety and Health Lawyers Group
ORC Asbestos Task Force

From: Rebecca L. Daiss

Subject: EPA Denial of SEIU Petition to Regulate Asbestos in
Commercial Buildings and Subsequent SEIU Suit to Force
Regulation

On April 4, 1989, EPA published in the Federal Register (54 FR 13632) a denial of the Service Employees International Union's (SEIU) petition that EPA initiate rulemaking under Section 6 of the Toxic Substances Control Act (TSCA) to control asbestos in public and commercial buildings other than schools (copy attached). Immediately after EPA issued the denial, SEIU filed suit with the U.S. District Court in the District of Columbia to force the Agency to regulate asbestos in non-school buildings. We will keep you informed of the status of SEIU's suit.

Notice of Public Meeting

In the same Federal Register publication (54 FR 13632), EPA issued a notice of public meeting to gather data and hear arguments that will assist EPA in assessing what activity is needed to address the problem of asbestos in public and commercial buildings. The meeting will be scheduled for May 1989. The meeting will be held on May 3, 1989 from 1:30 p.m. to 4:30 p.m. at the Washington Marriott Hotel, 1221 22nd Street, N.W. Washington, D.C. More information can be obtained by calling (202) 554-1404.

SEIU Petition

SEIU's petition requested that EPA:

- 1) Require inspection for, identification and communication of asbestos exposure to those potentially at risk;

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- 2) establish procedures for addressing potential asbestos exposure hazards identified; and
- 3) establish rules for safe asbestos abatement and mitigation during the time it takes for EPA to develop a national infrastructure to manage asbestos problems.

EPA Denial

In rejecting SEIU's petition, EPA concluded that the Union's assertions regarding health risks of asbestos exposure in commercial buildings are insufficient to complete the unreasonable risk determination needed to initiate TSCA section 6 rules and that workers are adequately protected under OSHA's Asbestos Standard.

In developing its response, EPA relied heavily on the conclusions reached in the Agency's February, 1988 Report to Congress. The report was based on an EPA study on "the extent of danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger." According to the study, additional Federal regulation of asbestos in public and commercial buildings is an inappropriate response to the asbestos problem because:

- 1) Currently the number of persons qualified to perform inspection and abatement activities and enforce compliance falls far short of the number that would be needed under the proposed regulation. Therefore, a major rulemaking could do more harm than good by overwhelming existing resources.
- 2) The primary focus of asbestos abatement should remain on schools. According to EPA data, asbestos may be more common and more likely to be disturbed in schools making students particularly vulnerable to asbestos exposure. Also students are subject to the 20 to 40 year latency period for manifestation of asbestos-related disease. Finally, expanding the focus of EPA's efforts might jeopardize the successful completion of the school asbestos program.
- 3) The data base of information about asbestos in public and commercial buildings is not complete enough to warrant a major asbestos exposure control program. By filling in significant data gaps prior to initiating rulemaking EPA could provide more effective, less costly public health protection.

BD:lgs

ENVIRONMENTAL PROTECTION AGENCY

(OPTS-82075, FRL-3549-8)

Asbestos; Public Meeting**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice of public meeting.

SUMMARY: EPA will hold a public meeting as part of its effort to gather data and hear arguments which will assist EPA in assessing what future activity is necessary to deal with asbestos in public and commercial buildings. If necessary, EPA will hold subsequent public meetings to ensure that all key issues are discussed thoroughly and that all affected groups have an opportunity to convey their opinions.

DATES: The meeting will be scheduled for early May 1989. The exact date and time of the meeting can be obtained by calling the TSCA Hotline at (202) 554-1404 after Wednesday, April 12, 1989.

ADDRESS: The meeting will be held in the Washington, DC area. The exact location of the meeting can also be obtained by calling the TSCA Hotline at (202) 554-1404 after Wednesday, April 12, 1989.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Room EB-44, 401 M Street, SW., Washington, DC 20460. (202) 554-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 201(b)(3) of the Asbestos Hazard Emergency Response Act (AHERA) required EPA to conduct a study to determine "the extent of danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger." In February 1988, EPA responded to that statutory mandate by publishing its study findings in a Report to Congress.

EPA's Report to Congress examined a variety of asbestos control options which go beyond present Agency actions. However, the EPA Administrator, in a letter transmitting the Report, concluded that greater Federal regulation of asbestos in public and commercial buildings was not the most responsible approach for EPA to take at this time. The Administrator reached that decision for three reasons. First, the current infrastructure of accredited personnel and enforcement staff is inadequate to handle the inspection and abatement actions that

could be stimulated by a new regulatory inspection or abatement program for public and commercial buildings. Second, the nation's primary focus needs to remain on schools, because children, who are the primary occupants of school buildings, may be particularly vulnerable to asbestos exposure and because any significant additional demand on the national infrastructure imposed by new and immediate regulation could undermine the successful completion of the school asbestos program. Finally, there is inadequate information about asbestos exposure and its control in public and commercial buildings to determine the appropriate scope and scale of a new regulatory program on asbestos.

Although the Administrator concluded, for the reasons stated above, that it would be unwise and inappropriate to initiate rulemaking at this time, the Administrator recommended four steps be taken for assessing and improving the quality of asbestos-related actions currently taking place in public and commercial buildings. These steps, to be carried out over a 3-year period, were to enhance the nation's technical capability, focus attention on thermal system insulation asbestos, improve enforcement activities directed at prevention of imminent hazards, and objectively assess the effectiveness of the AHERA Schools Rule and obtain additional information essential to future decisionmaking.

EPA believes that meeting with all groups which have an interest in the issue of asbestos in public and commercial buildings is important for the Agency to carry out successfully the steps recommended in the Report to Congress. EPA believes these groups can help prepare the Agency for any appropriate future programmatic and regulatory decisions on asbestos by sharing their views and insights on the current status of the nation's technical capability, the significance of new exposure and efficacy information, the applicability of the AHERA schools process for non-school buildings, and the merits of various regulatory strategies. For these reasons, EPA has scheduled the public meeting identified in this notice, and is prepared to schedule additional meetings if they are necessary to ensure that all key issues are discussed thoroughly and that all affected groups have an opportunity to convey their opinions.

II. Key Issues for Discussion

EPA anticipates that the following will be among the key issues for discussion at the public meeting:

1. What is the nature and scope of exposure to asbestos in public and commercial buildings, given the current regulations in place and the effectiveness of their enforcement?

2. Is the infrastructure of accredited personnel and enforcement staff developing adequately to handle a major, new program of asbestos control for public and commercial buildings? If not, under what circumstances and when could we expect this infrastructure to be in place?

3. How can EPA best fill some of the significant gaps in its information base on asbestos exposure in public and commercial buildings?

4. What further Federal actions are appropriate either now or in the future? What are the societal burdens associated with such actions and what benefits to society could be anticipated?

III. Participants

All interested individuals and groups are invited to attend and to participate in the public meeting. EPA has identified certain groups whose interests should be represented. These groups include building owners and managers, service workers, real estate interests, mortgage bankers, asbestos management and control professionals, and former and present manufacturers of asbestos-containing materials.

IV. Additional Meetings

Additional meetings may be necessary to ensure that all key issues are discussed thoroughly and that all affected parties have an opportunity to convey their concerns. Such meetings will be open to the public. Persons wishing to be given notice by mail of future meetings may contact the TSCA Assistance Office at the address and telephone number given above under "FOR FURTHER INFORMATION CONTACT."

Dated: March 29, 1989

Charles L. Elkins,

Director, Office of Toxic Substances.

[FR Doc. 89-7933 Filed 4-3-89; 8:45 am]

BILLING CODE 5600-60-6

(OPTS-211023, FRL-3524-2)

Asbestos; Denial of Citizens' Petition.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Denial of citizens' petition.

SUMMARY: On November 8, 1988, the Service Employees International Union

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(SEIU) petitioned EPA under section 21 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2620, to initiate a rulemaking proceeding, under section 6 of TSCA, 15 U.S.C. 2605, concerning friable asbestos-containing materials in non-school public and commercial buildings. This notice announces EPA's denial of SEIU's petition.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Room EB-44, 401 M Street SW., Washington, DC 20460, (202) 554-1404, TDD: (202) 554-0551.

SUPPLEMENTARY INFORMATION:

I. Background

On November 8, 1988, SEIU petitioned EPA, under section 21 of TSCA, to initiate a proceeding to issue a rule to control friable asbestos-containing materials (ACM) in public and commercial buildings other than schools. Specifically, SEIU requests that EPA initiate a rulemaking, under TSCA section 6, to:

1. Require adequate inspection for, and identification of ACM and communication of this knowledge to those at risk (petition pages 3 and 14).
2. Establish procedures to be followed where actual or potential hazard is present (petition pages 3 and 14).
3. Establish rules to ensure that the most beneficial and least harmful actions are taken during the time that EPA considers it necessary to develop the national infrastructure to manage asbestos problems (petition pages 3 and 10 through 13).

The petition also requests action on asbestos in school buildings to the extent that they are not covered by EPA rules. However, the petition does not discuss any gaps SEIU perceives in EPA's school rules, nor does the petition set forth any facts which SEIU claims establish that it is necessary to issue a rule affecting schools. Accordingly, EPA does not regard the petition as applying to schools.

This is the second TSCA section 21 petition filed by SEIU requesting Federal regulation of asbestos in buildings. In November 1983, SEIU filed its first petition, which requested EPA to issue rules affecting asbestos in schools and in public and commercial buildings and to issue rules to protect employees performing abatement activities. EPA responded to the first petition by issuing notices in the Federal Register on March 7, 1984 (49 FR 8450), and June 14, 1984 (49 FR 24552).

In response to SEIU's first petition, EPA issued final rules to protect certain State and local government employees

engaged in asbestos abatement. See 40 CFR Part 763, Subpart C. With respect to the other rules requested in the petition, EPA stated that it granted the petition, initiated a proceeding by holding hearings to decide on its next course of action, and ultimately decided not to proceed to a proposed rule. SEIU filed suit against EPA in the United States District Court for the District of Columbia to compel EPA to propose these other rules.

After several years of litigation, the court, in *SEIU v. Thomas*, No. 84-2790 (D.D.C.) (Memorandum Opinion, October 24, 1986), ordered EPA to propose rules requested by SEIU under TSCA section 6 for schools and other buildings. The court reasoned that EPA was obligated to propose rules under TSCA section 6 because EPA had originally stated that it granted SEIU's petition. The court did not reach the issue of whether Federal rules were needed to protect against asbestos risk in buildings. At approximately the same time as the court issued its order, Congress enacted the Asbestos Hazard Emergency Response Act (AHERA) of 1986, which required EPA to issue rules for the inspection and management of asbestos in schools and required EPA to submit a study to Congress which would assess the risks of asbestos in other public and commercial buildings and recommend whether rules were appropriate for those buildings.

AHERA created some inconsistencies with the court order. While EPA was able to comply with the court's order affecting schools by meeting the AHERA mandate, AHERA created a conflict with the court's order as it applied to non-school public and commercial buildings. The order required proposed rules: AHERA only mandated a study. In deference to Congress, on July 17, 1987, the court vacated its order regarding the other buildings.

EPA complied with both AHERA and the District Court order by promulgating rules affecting asbestos in schools. See 52 FR 41826 (October 30, 1987). EPA successfully defended these rules against a challenge in the United States Court of Appeals for the District of Columbia Circuit. See *Safe Buildings Alliance v. EPA*, 846 F.2d 79 (D.C. Cir. 1988). The Supreme Court declined to review the Court of Appeals decision.

In February 1988, EPA submitted to Congress its study on public and commercial buildings. SEIU, thereupon, petitioned the District Court to clarify or reconsider its June 1987 order vacating the requirement for EPA to propose rules on public and commercial buildings. Before the court could hear the parties on this motion, EPA and

SEIU settled the District Court litigation with regard to public and commercial buildings. The U.S. Government paid SEIU approximately \$220,000 in attorneys' fees, and SEIU agreed that EPA no longer had any obligations with regard to the first SEIU petition. EPA also agreed to consider, in accordance with TSCA section 21, any further SEIU petitions on asbestos in public and commercial buildings.

II. EPA Asbestos Activities

EPA has undertaken a variety of technical and financial assistance programs and regulatory activities designed to control ACM in buildings and minimize inhalation of asbestos fibers. This Unit discusses those actions taken to date by EPA.

A. Technical and Financial Assistance Programs

Since 1979, EPA staff have assisted schools and other building owners in identifying and controlling ACM in their buildings. EPA employs nearly 50 technical assistants, hired through a special environmental program with the American Association of Retired Persons (AARP), to counsel building owners. With the help of these technical assistants, many school officials and building owners have effectively and safely dealt with their asbestos problems.

In addition, EPA has published state-of-the-art guidance to help identify and control asbestos in buildings. EPA's principal asbestos guidance document, *Guidance for Controlling Asbestos-Containing Materials in Buildings* (EPA 600/5-85-024, also known as the Purple Book), was expanded and updated in June 1985, based on recommendations from recognized national experts. The document provides criteria for building owners to use in deciding which abatement method is most appropriate for each situation.

An important EPA goal has been to provide training for people involved in all aspects of the identification and control of asbestos. During 1985 and 1986, EPA established five Asbestos Information and Training Centers to provide information concerning the identification and abatement of asbestos hazards and to train people in proper asbestos abatement techniques. The five centers are located at the Georgia Institute of Technology in Atlanta, the University of Kansas in Kansas City, Tufts University in Medford, Massachusetts, the University of Illinois in Chicago, and the University of California at Berkeley. In addition, EPA established four satellite training

centers in 1986 and 1987 to help keep pace with the growing demand for training resulting from the enactment of AHERA. These centers are located at the University of Utah in Salt Lake City, the University of Texas at Arlington, Rutgers Medical School in Piscataway, New Jersey, and Drexel University in Philadelphia.

These centers, alone, are not able to supply the nation's schools with the very large number of trained and accredited asbestos personnel required to implement AHERA. To help increase the number of individuals qualified to perform asbestos work in schools, EPA has developed a program for reviewing and approving individual training courses taught across the nation. As of December 22, 1988, EPA had approved a total of 310 training providers for 660 individual training courses.

Abatement decisions need to be made locally, because the large number of asbestos abatement projects and the short-term nature of many of them preclude extensive Federal involvement. EPA, therefore, believes that contractors should be State-certified and that States should oversee projects to ensure that they are properly performed. To that end, EPA has provided States with model legislation to help them develop contractor certification programs. EPA has also awarded a total of \$2.5 million in grants to 39 States for the purpose of establishing contractor certification programs. Finally, in 1988 EPA distributed slightly more than \$1 million in grants to 17 States to help them develop inspector accreditation programs.

In addition to the wide variety of technical assistance programs, EPA has also provided financial assistance to public school districts and private schools for the purpose of controlling ACM in their school buildings. The Asbestos School Hazard Abatement Act (ASHAA) authorized EPA to award grants and loans to local education agencies (LEAs) which have serious asbestos problems and which have a demonstrated financial need. These funds are limited to only those abatement projects necessary to reduce the risk of harmful asbestos exposure for school children and/or school employees. Since 1985, EPA has awarded over \$150 million to deserving LEAs for nearly 1,800 individual abatement projects. Also, since October 1987, EPA has provided \$20 million to 28 States, 2 territories, and the Bureau of Indian Affairs to help schools in these areas conduct the asbestos inspections and develop the asbestos management plans mandated by AHERA.

B. Regulatory Program

EPA's asbestos regulatory program began in 1973 when EPA issued the National Emission Standard for Hazardous Air Pollutants (NESHAP), Asbestos Regulations (40 CFR Part 61). The NESHAP for asbestos applies to building renovation and demolition involving friable ACM. The building owner or operator must provide to EPA written notice of intention to renovate or demolish and follow basic asbestos emission control procedures. Transport and disposal practices prohibit visible emissions into the air. The NESHAP for asbestos is currently being amended to enhance enforcement and to promote compliance with the existing standard.

In 1982, EPA issued an asbestos identification and notification rule for schools (47 FR 23360). This rule required school officials to inspect all school buildings for friable materials, take a minimum of three samples of each type of friable material found, analyze samples using polarized light microscopy (PLM) to determine if asbestos is present, and keep records of the findings. School officials who found friable ACM were required to notify employees of the location of the materials, post a notification form in the primary administrative and custodial offices and faculty common rooms, provide maintenance and custodial employees with a guide for reducing asbestos exposure, and notify parent-teacher associations or parents directly of the inspection results.

In 1986, after extensive consultation, comment, and public hearings, the Occupational Safety and Health Administration (OSHA) promulgated rules which establish standards for occupational exposure to asbestos. OSHA's construction standard (29 CFR Part 1926.58) and general industry standard (29 CFR Part 1910.1001) set a permissible exposure limit for all private sector workers. These standards also provide for exposure monitoring, medical surveillance, and hazard communication to employees.

Following OSHA's lead in worker protection and responding to SETU's first petition, EPA issued a worker protection rule (40 CFR Part 763, Subpart G) in 1986 which essentially extended the provisions of the OSHA construction standard to public sector employees in those States not covered by the current OSHA standards. The EPA rule also includes a provision not in the OSHA rules, i.e., EPA must be notified 10 days before an asbestos abatement project is begun when public sector employees are doing the work. The Agency is committed to modifying its worker

protection rule to remain consistent with any OSHA revisions. In particular, EPA is now in the process of extending its regulations covering public sector employees to include those service workers not already covered under the OSHA rules.

In October 1987, EPA issued a comprehensive rule, as mandated by AHERA, for managing and abating ACM in schools. This rule, known as the AHERA schools rule, requires all LEAs to identify ACM in their school buildings and to take appropriate actions to control the release of asbestos fibers. LEAs are required to describe their activities in management plans, which must be made available to all concerned persons and submitted to State Governors. The rule also requires LEAs to use specially-trained persons to conduct inspections for asbestos, develop the management plans, and design or conduct major actions to control asbestos.

In January 1988, EPA proposed a rule to prohibit, over a 10-year period, the manufacture, importation, and processing of asbestos products. Since the 1980 proposal, EPA has evaluated public comments, held public hearings, updated much of its hazard, exposure, and economic analyses, and is now in the concluding stages of issuing a final rule.

C. Recent Developments

In addition to establishing a comprehensive regulatory framework for controlling asbestos in schools, AHERA also required EPA to conduct a study to determine "the extent of danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger" (AHERA, section 201(b)(3)). In February 1988, EPA responded to that statutory mandate by publishing its study findings in a report to Congress.

The EPA study consisted of a number of activities including a review and reanalysis of data previously collected by EPA during its 1984 national building survey, a review of information on asbestos in buildings available from sources outside EPA, and a description of new data collection efforts initiated by EPA during 1987. The activities in 1987 included a series of workshops with panelists consisting of building owners, managers and investors, abatement contractors, State and local officials, and Federal building managers involved in asbestos management and a study of airborne asbestos levels in Federal buildings.

The February 1988 Report to Congress found that approximately 733,000 or 20

percent of the 3.6 million public and commercial buildings in the 1984 EPA survey contain friable asbestos. An estimated 501,000 or 14 percent of the total buildings contain some damaged ACM. About 317,000 or 9 percent of all buildings have at least some significantly damaged ACM. The Report points out that significantly damaged material is commonly thermal system insulation, often found in nonpublic building areas, such as boiler and machinery rooms.

The Report states that estimates of absolute risk associated with exposure to asbestos in public and commercial buildings are subject to great uncertainty due to limited exposure data in these buildings. EPA, however, has developed a proportional risk model which suggests that the elimination of asbestos exposures in schools might significantly reduce residual risk for populations later exposed in public and commercial buildings, assuming equal or higher exposures in schools. Even though the elimination of asbestos exposures in schools may significantly reduce risk, there may be significant residual risk resulting from exposure in public and commercial buildings. Service workers, for example, may encounter higher episodic exposures, if existing OSHA and EPA worker protection standards are violated.

To try to determine the most appropriate course of action, the Report examined six major scenarios which go beyond present EPA activity. For each scenario, EPA analyzed the feasibility, risk reduction, and costs of implementation. The scenarios ranged from enhancement of current technical assistance programs without imposing additional Federal regulations, through development of programs using Federal buildings as a management model, to promulgation of various levels of Federal regulation. Regulatory considerations ranged from inspection rules only, through regulations targeted to specific activities beyond inspection (e.g., operations and maintenance), through sequential regulations that gradually expand the coverage of building types, to a comprehensive regulatory program as currently established for schools. EPA specifically refers readers to pages 24 through 35 of the Report to Congress and applicable appendices and references for a more detailed discussion of the scenarios.

After considering the various options for additional EPA action, the EPA Administrator, in a letter transmitting the Report to Congress, concluded that greater Federal regulation of asbestos in public and commercial buildings was

not the most responsible approach for the Agency to take at this time. The Administrator reached that decision for the following reasons:

1. *Inadequate infrastructure.* EPA believes that a new regulatory inspection or abatement program for public and commercial buildings could stimulate more inspection and abatement actions than the current infrastructure of accredited personnel and enforcement staff can handle. As a result, abatement may be performed improperly, which, in turn would likely increase rather than reduce risk. The Administrator stated on page 5 of his transmittal letter that "until the necessary infrastructure to manage asbestos problems on a much larger scale exists, I fear a major initiative in other buildings could do more harm than good."

2. *Primary focus on schools.* Although asbestos in commercial buildings represents a potential health hazard that deserves careful attention, EPA believes that the nation's primary focus needs to remain on asbestos in schools. That priority is merited, because children, who are the primary occupants of school buildings, may be particularly vulnerable to asbestos exposure. First, data suggest that asbestos material appears to be more common and more likely to be disturbed in schools than other buildings. Second, the student population is clearly subject to the 20- to 40-year latency period before an asbestos-related disease usually manifests itself.

In addition to the special concerns about children, EPA must be very careful now not to take steps which might undermine the successful completion of the school asbestos program. During the next few years, AHERA school rule activities will stretch the resources of this country, in terms of trained and accredited inspectors, contractors, laboratories, as well as compliance assistance and enforcement capabilities among the various levels of government. In fact, Congress recently extended the AHERA deadline for some schools, due, in large part, to the perceived inadequacy of the infrastructure of accredited inspectors and laboratories to meet school needs. Although EPA expects the supply of accredited professionals and laboratories to expand in response to demand for increased services, any significant additional demand imposed by law and immediate regulation could pose a serious obstacle to the success of the AHERA schools program.

3. *Inadequate information.* At present, there are significant gaps in our base of

information about asbestos exposure in public and commercial buildings. Estimates of the number of persons exposed, prevailing fiber levels, and the frequency and effect of episodic events are highly uncertain. As a result, the Administrator stated on page 4 of the transmittal letter that "it would be foolish for the country to consider a large new program of asbestos control without first asking basic questions which could improve our response to asbestos in public and commercial buildings and probably provide public health protection at a lower cost."

Although the Administrator concluded, for the reasons discussed above, that it would be unwise and inappropriate to initiate rulemaking at this time, he also stated in his letter that "this should not be interpreted as ruling out an inspection rule or even greater Federal regulation of these public and commercial buildings at some later time." The Administrator closed the letter by adding that "we should address (the question of rulemaking) in about 3 years after we have had more experience with the AHERA school rule, have dealt with the large surge of demand for trained professionals, and have completed the important studies I have outlined above."

Finally, the Administrator made four recommendations for assessing and improving the quality of asbestos-related actions currently taking place in public and commercial buildings. These recommendations were to be carried out over a 3-year period. The recommendations and the actions EPA has taken to date to implement these recommendations are discussed below:

1. *Enhance the nation's technical capability.* The Report identifies two major categories of activities to enhance the nation's technical capabilities. First, EPA should increase the number of asbestos professionals accredited to perform management and abatement tasks in public buildings. Second, EPA must help building owners better select and apply appropriate asbestos control and abatement actions in their buildings. It is important to point out that, while EPA has helped build the national infrastructure to accommodate the increased level of asbestos activity mandated by AHERA for the nation's 100,000 schools, a much larger infrastructure would be required to provide a similar level of activity in the nation's more than 3.6 million public and commercial buildings.

EPA estimates that, as of October 1988, EPA-approved courses had trained some 21,000 individuals to become accredited inspectors and management

planners under AHERA. However, even this number of accredited personnel may not be adequate to handle the nation's 100,000 schools. Anecdotal information suggests that, in several sparsely populated States at least, the available supply of trained asbestos professionals could not meet the demand for services in schools within the original AHERA time frame.

In addition, it is not a simple matter to extrapolate from the number of accredited personnel needed for schools to those needed for public and commercial buildings. EPA estimates that about 30 percent of inspector/management planner courses are filled by school district personnel, not private contractors. While school officials may conduct inspections and draw up management plans in their local schools, they are unlikely to perform asbestos work in other public and commercial buildings. Moreover, a number of EPA training centers report that each accreditation training course includes Federal, State, and local government officials, attorneys, and others who are unlikely to conduct asbestos inspections and other asbestos-related activities in public and commercial buildings.

Finally, the universe of public and commercial buildings is quite heterogeneous. Compared to the homogenous nature of the universe of school buildings, power plants, skyscrapers, hospitals, factories, etc., all present unique characteristics that greatly increase the difficulty of conducting asbestos-related activities. Given the great variety in size, function, and design of public and commercial buildings, it is very difficult to approximate how many of these buildings a trained professional can inspect or develop management plans for during a specified period of time. Consequently, EPA cannot determine, at this time, the size of the infrastructure which would be necessary for the more than 3.6 million public and commercial buildings; but it is clearly much larger than the current infrastructure.

The following are activities EPA has recently started or completed to enhance the nation's technical capability and increase the size of the infrastructure for asbestos management and control:

a. **Asbestos training.** In July 1988, EPA made available final model course materials for inspection and management planning training. In December 1988, EPA also made available a revised course for asbestos abatement contractors and supervisors. EPA makes these course materials available to training providers to help ensure consistent instructional quality.

As of December 22, 1988, EPA had approved a total of 310 training providers for 660 individual training courses taught across the nation. This total includes 230 asbestos abatement worker courses, 159 contractor/supervisor courses, 118 inspector/management planner courses, 7 inspector only courses, and 12 project designer courses.

b. **State accreditation programs.** AHERA mandates that each State adopt a contractor accreditation plan at least as stringent as EPA's model plan within 180 days following the commencement of the State legislature's first regular session after April 30, 1987. As of January 1, 1989, three States had received full EPA approval of their accreditation programs for all asbestos contractor disciplines (i.e., workers, supervisors, inspector/management planners, and project designers). Nine other States had received EPA approval for part of their accreditation program. The remaining States do not have EPA-approved accreditation programs.

The National Conference of State Legislatures (NCSL), through a cooperative agreement with EPA, has developed model legislation that addresses all the major components of a comprehensive AHERA-grade accreditation program. All State legislatures have received this model legislation to assist in developing an accreditation plan for all asbestos management and abatement personnel. NCSL also provides technical assistance to individual States on accreditation issues.

c. **National data base of AHERA accreditation.** The National Asbestos Council, under a cooperative agreement with EPA, is developing a listing of all individuals accredited to perform asbestos-related inspection, management planning, and abatement activities under AHERA. This national data base is scheduled to be operational in 1989.

d. **AHERA-accredited laboratories.** EPA has provided funds over the past 2 years to support the development of a laboratory accreditation program for asbestos analysis at the National Institute of Standards and Technology, formerly called the National Bureau of Standards. The bulk analysis component of this program should be fully operational in April 1989. The second half of the program, air sampling analysis, should be in place by April 1990. In the meantime, EPA has established the Interim Asbestos Bulk Sample Quality Assurance Program, under which some 700 laboratories are currently approved for analysis of suspect materials.

e. **Operations and maintenance guidance and training for asbestos.** EPA has resumed the development of an operations and maintenance (O&M) guidance manual for public and commercial building owners. Publication of the new O&M manual is scheduled for 1989.

Model O&M course curriculum and materials are also being developed through an EPA cooperative agreement with the University of Minnesota for training custodial and maintenance personnel who work in schools and public and commercial buildings. These O&M course materials should be complete in 1989, when they will be made available at cost to training organizations, schools, and other interested groups.

f. **GSA/EPA asbestos management program.** Following a longstanding cooperative effort, EPA has launched a new public building management program with the General Services Administration (GSA). The featured component of the GSA/EPA asbestos program is the development of a Federal building manager's "kit," which would include guidance, model forms, and reports for the comprehensive management of ACM in Federal buildings. It would also serve as a useful tool for other public and commercial building managers. The "kit" is scheduled for completion in the summer of 1989. The joint program will also provide for specialized management training, a GSA asbestos managers' information network, and an ongoing GSA/EPA exchange on asbestos issues and abatement technology.

g. **Commercial buildings case study.** EPA has reinstated its case study of responsible corporate asbestos management with a major national corporation. This project will demonstrate how an asbestos management program in a corporate setting is properly initiated and conducted. EPA expects to complete the study by mid-1989.

2. **Focus attention on thermal system insulation (TSI) asbestos.** The Report indicates that TSI asbestos is more common, more likely to be damaged and of a higher asbestos content than other forms of ACM. In addition, TSI is generally easy to repair and abate, and thus amenable to quick, safe remediation. As a result, EPA has recommended specific activities to develop and provide proper guidance through a new TSI assistance program:

a. **Information on TSI asbestos in public buildings.** EPA has consolidated its current knowledge about the presence of TSI asbestos in the Nation's

public and commercial buildings through a reanalysis of data collected during EPA's 1984 survey of public and commercial buildings. This information will provide a better basis for establishing EPA's TSI assistance program.

b. New TSI guidance and model course materials. EPA intends to develop new guidance and instructional materials on TSI repair and abatement techniques. EPA will be working with asbestos training programs to improve the quality of TSI training materials and to increase training opportunities.

3. *Improved integration of activities to reduce imminent hazards.* The Report acknowledges that more should be done to avoid high peak exposures associated with improper or poorly timed asbestos removal activities. Steps should be taken to improve coordination among EPA and other Federal, State, and local asbestos control organizations and to increase EPA's capability of enforcing existing asbestos regulations.

a. Revised asbestos NESHAP strategy. On January 10, 1989, EPA issued a proposed rule in the Federal Register to revise the asbestos NESHAP. This proposed rule revises the current standard by enhancing enforcement and promoting compliance without altering the stringency of existing controls.

b. NESHAP/TSCA coordination project. EPA initiated a pilot TSCA/NESHAP coordination project in its Region VII area in 1986 to better integrate NESHAP compliance inspection activities with TSCA technical assistance. EPA has directed all of its regional offices to establish formal practices for NESHAP/TSCA coordination by FY 1990.

c. Federal Asbestos Task Force. EPA has sponsored the Federal Asbestos Task Force, a working group of officials from Federal agencies with asbestos program responsibilities. Over the next 2 years, EPA expects to develop information systems which allow these Federal agencies to share information about asbestos.

4. *Objectively assess the effectiveness of the AHERA Schools Rule and other current activities.* The Report commits EPA to determine whether the AHERA schools rule approach is working in schools and whether it is appropriate for public and commercial buildings. Further, the Report identifies several "data gaps" which limit EPA's ability to assess options, draw conclusions, and make recommendations about asbestos in nonschool buildings. EPA is committed to filling these "gaps," to the extent possible and practicable, through ongoing Agency research and a special

research initiative with the private sector.

a. AHERA evaluation. EPA has established the AHERA Evaluation Project to collect data about how well the asbestos control process is working in schools. It will also help provide EPA with information it needs to determine what components of the AHERA schools rule might be applicable for public and commercial buildings.

To this end, several individual studies have been identified. A final report on the entire AHERA evaluation project is planned in 1991, when all studies are scheduled for completion.

b. Exposed population study. EPA has initiated a study to determine, among other things, the number, sex, and age distribution of people exposed to asbestos in public buildings. This information will increase EPA's ability to calculate potential risk.

c. EPA's ongoing research program. EPA has initiated a new research study to help identify appropriate engineering control technologies for asbestos control and abatement in occupied spaces and tall buildings.

Other research projects include a program to standardize air sampling of asbestos, using transmission electron microscopy (TEM); a program to test the efficacy of glovebags for TSI removal; and a study to determine the effectiveness of wet vacuuming to control the release of asbestos fibers.

d. Health Effects Institute (HEI) research. In EPA's fiscal year 1989 appropriation, Congress provided \$2 million for asbestos research that would help fill in the informational gaps identified in EPA's February 1988 Report to Congress. Congress stipulated that these funds be matched by private contributions. Congress also specified that the research be conducted under the auspices of the Health Effects Institute (HEI) to assure the quality and objectivity of the research.

The HEI research, as specified by Congress, should help provide EPA with answers to questions about prevalent airborne asbestos levels in buildings, prevalent exposure levels of particular groups (e.g., service workers), the contribution of "peak" asbestos fiber releases to total exposure, and fiber levels following removal and O&M activities. The answers to these questions should greatly aid in the design of an effective and efficient response to the presence of asbestos in public and commercial buildings and could reduce the cost of dealing with the problem by billions of dollars.

III. Statutory Requirements

Section 21 of TSCA provides in part that any person may petition EPA to initiate a proceeding for the issuance of a rule under section 6. The petition must set forth the facts which it is claimed establish the need for the rule. EPA is required to grant or deny the petition within 90 days after filing. If EPA grants the petition, EPA must promptly commence an appropriate proceeding. If EPA denies the petition, EPA must issue its reasons in the Federal Register. Within 60 days of denial, or if EPA fails to grant or deny the petition within 90 days, within 60 days of the expiration of the 90-day period, the petitioner may commence a civil action in a U.S. District Court. In the case of a petition to issue a rule under section 6, the court is required to order EPA to initiate the action requested by the petitioner if the petitioner shows to the satisfaction of the court by a preponderance of the evidence that "there is a reasonable basis to conclude that the issuance of such a rule . . . is necessary to protect health or the environment against an unreasonable risk of injury. . . ."

In reviewing the SEIU petition, EPA assessed whether the rules requested by SEIU are necessary to protect against an unreasonable risk of injury to human health. This is the same test as the court would apply under section 21. The test has two aspects. Rules must be "necessary" and there must be an "unreasonable risk" against which the rules will protect.

EPA interprets the standard that rules are "necessary" to require consideration of whether TSCA rules are the appropriate remedy to protect against the risk described. For example, regulations under other Federal statutes, administered by EPA or other agencies, may be more appropriate than TSCA rules. Another consideration may be whether State or local initiatives constitute the appropriate remedy instead of Federal rules.

To determine "unreasonable risk," EPA believes it is appropriate to use the criteria of TSCA section 6, since SEIU is requesting rules under that section. The finding of unreasonable risk under TSCA section 6 is an administrative judgment under which EPA determines that the reduction of health or environmental risk resulting from a potential regulation outweighs the regulatory burden to society. Determining whether a risk is unreasonable under section 6 involves balancing the probability that harm may occur from a chemical substance or

mixture and the magnitude and severity of that harm, against the effect on society, including economic effects, of placing regulatory restrictions on that chemical. Specifically, TSCA section 6(c) requires that the following be considered:

1. The effects of the chemical of concern on human health and the environment.
2. The magnitude of exposure of the chemical to humans and the environment.
3. The benefits of the chemical for various uses and the availability of substitutes for such uses.
4. The economic consequences of the rule after considering the effect upon the national economy, small business, technological innovation, the environment, and public health.

In summary, to decide whether a chemical presents an unreasonable risk, EPA must determine the risk by considering evidence on chemical toxicity and exposure, and then weigh that evidence against the projected burdens and any countervailing risk of regulation. If EPA decides that the risks outweigh the burdens, the risks are unreasonable.

An unreasonable risk finding requires more than a determination by EPA that a chemical has toxic properties and that numbers of persons are exposed to that chemical. Rather, EPA must examine the reduction in risk that will result from taking various alternative actions and the societal burdens that will be incurred from each of those alternatives. For example, if contaminant levels are low and extremely high burdens would be incurred to achieve small incremental risk reduction, the Agency might not find the risk unreasonable. On the other hand, an unreasonable risk may be found if moderately high levels may be reduced to acceptable levels at a low burden.

Furthermore, the greater the societal burden of regulation, the better the evidence of risk must be to impose that burden. This concept is discussed in the legislative history of TSCA. The House Report notes that risk is measured by elements of probability of harm and severity of harm that may vary in relation to each other and that the regulatory effect will be of greater significance in making an unreasonable risk determination if greater restrictions are imposed by regulation (H.R. Rep. 94-1341, 94th Cong., 2d Sess., pages 14 and 15). Thus, for example, in order to impose regulations banning a chemical substance and thereby imposing a significant burden on society, EPA would need considerable information on toxicity and exposure. On the other

hand, the Agency would need less information on risk if it were to impose only a testing requirement that would not, by itself, result in the loss of benefits of the chemical to society.

Finally, if governmental action under section 6 would itself create additional risk, either directly or indirectly, by shifting the risk to another location or pathway or population, these risks must be considered as decreasing the total risk reduction achieved by governmental action. This consideration is especially relevant in the present case.

EPA evaluates the SEIU petition in the next unit in light of these criteria and the weight of the evidence presented.

IV. Evaluation of the Petition

A. Summary of Petition

SEIU's petition, first, briefly summarizes the history of litigation and legislation involving ACM in schools and other buildings (petition pages 1 through 4) and, then, makes the following claims which, SEIU asserts, establish the need for a rule (petition pages 4 through 13). EPA has determined that asbestos is a toxic chemical (petition page 5). In addition, EPA does not know which of the approximately 3.6 million public and commercial buildings in the United States contain asbestos, although EPA estimates that approximately 20 percent do (petition page 6). Many of the buildings containing asbestos have some damaged material (petition page 6). Many of the very large numbers of people occupying these buildings do not know of the presence of asbestos in the buildings (petition pages 2 and 4). Peak levels of asbestos during serious disturbances can be very high and could cause serious risk to individuals (petition pages 4, 6, and 7). EPA's guidance urges building owners and operators to take voluntary action, but also acknowledges that not all action taken is competent and that action improperly taken could increase risk (petition pages 2 and 13).

SEIU uses these claims to support its argument that uniform Federal rules constitute the necessary response to remedy the risks from asbestos in public and commercial buildings. SEIU makes three basic arguments. First, the widespread risk from asbestos in buildings is beyond dispute. In support of this argument, SEIU cites various EPA pronouncements which state that asbestos has toxic properties, is present in a large number of buildings, and in some cases, may lead to peak exposure levels if improperly treated.

Second, EPA has effectively made the unreasonable risk findings to mandate

rulemaking. SEIU bases this argument on the following logic. EPA found in support of its 1982 school inspection rule that inspections for asbestos in schools were necessary to protect against unreasonable risk. EPA also determined in its February 1988 Report to Congress that service workers are equally at risk whether employed in schools or in public or commercial buildings. Also, EPA, by its guidance, counsels building owners and operators to take action voluntarily and, thus, cannot argue that protective actions are too costly. According to SEIU, these arguments necessarily lead to the determination that asbestos in public and commercial buildings presents an unreasonable risk, at least for service workers.

Finally, SEIU argues that by counseling building owners through guidance to take voluntary action without controlling and/or limiting that action by rulemaking, EPA may exacerbate the problem of asbestos in schools. SEIU argues that this voluntary program is nothing more than a repetition of a discredited policy that building owners follow Agency guidance (petition pages 9 and 10). In support of this argument, the petition generally incorporates by reference documents that SEIU claims show EPA's "internal conclusions that, in the absence of regulations, building owners/operators were too frequently either not taking action, or taking action that was counterproductive" (petition page 12, footnote 18). While SEIU does not cite any specific documents, it apparently refers to various documents obtained in its earlier litigation against the Agency and subsequently presented to Congress during various hearings on asbestos in buildings (petition pages 1, 2, and 12, footnote 18).

B. Evaluation of SEIU'S Petition

As a preliminary matter, EPA notes that it does not entirely agree with SEIU's characterizations of earlier asbestos in buildings litigation or legislative deliberations, particularly deliberations affecting public and commercial buildings. For the most part, it is not necessary for EPA to respond to characterizations of the litigation in this notice because litigation disputes are well documented in court records and need not be further elaborated here. In addition, legislative deliberations generally support the view taken by EPA in its Report to Congress that further study is needed before considering additional regulation for public and commercial buildings, and do not support SEIU's petition requests.

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at best, anecdotal information and internal Agency discussions about problems with earlier voluntary programs. In any event, these documents were never considered probative by EPA, or by a court, to discredit any voluntary program to the extent that regulations should replace it.

Second, EPA is not encouraging broad voluntary action, but prudent action based on local circumstances. EPA counsels building owners to consider inspecting and/or taking broader action than that mandated by law only when appropriate and when qualified people are available to ensure the work is conducted properly. EPA's current position is that prudent building owners should turn to the AHERA rule for technical guidance as their own conditions and circumstances warrant. Thus, decisions on risk and risk reduction measures are to be made at the appropriate local level, and these case-by-case decisions would not burden the limited infrastructure of accredited and enforcement personnel as much as a regulatory requirement. Nor would the voluntary program limit the flexibility of building owners and managers to abate serious risks if they feel such action is needed under the circumstances.

V. Conclusion

EPA shares the deep commitment of SEIU to protecting individuals from asbestos hazards in all public and commercial buildings. However, for the reasons stated above in this notice, EPA must deny SEIU's petition. EPA, in the absence of additional information on risk reduction, believes that an unreasonable risk determination cannot be made at this time. In this regard, EPA is especially concerned about the acknowledged inadequacy of the infrastructure of accredited professionals. Thus, EPA cannot

determine that Federal rules under TSCA are necessary to protect against unreasonable risk and is not initiating a rulemaking proceeding under section 6 of TSCA at this time. EPA notes, however, that it does not believe it needs to reach other issues relating to whether rules under TSCA are the appropriate remedy to protect against risk from asbestos in buildings. These other issues, instead, will be addressed when EPA has obtained the information it has determined is lacking.

EPA has not permanently ruled out a regulatory response to the asbestos problem in public and commercial buildings. At some later time, EPA may, in fact, recommend an inspection rule or even greater Federal regulation. Yet, EPA believes that it would be inappropriate and unwarranted, at least at this time, to initiate a new regulatory inspection and abatement program for these buildings.

In the meantime, SEIU might be well advised to pursue protection of its members with OSHA, which has primary jurisdiction for providing that protection and which is even now reconsidering its asbestos rule. EPA is committed to extending OSHA's asbestos rules to public sector workers who are not covered by OSHA's protections and, in limited cases, to supplementing that protection. Since SEIU apparently has a fundamental disagreement with the scope of the OSHA asbestos rule, this disagreement should appropriately be taken up with OSHA rather than EPA.

EPA, however, has begun and intends to continue discussions with affected groups in the public and commercial buildings community. These groups include SEIU and other worker groups, building owners and managers, mortgage bankers, and former and present manufacturers of asbestos-containing materials. Together, these

groups can help EPA review new exposure and efficacy information, assess the experience and information gained from the AHERA implementation and evaluation process, explore the merits of various regulatory strategies and nurture the development of the nation's asbestos management and abatement capabilities, especially the infrastructure of accredited asbestos control professionals.

EPA expects to work closely and productively with these groups. In fact elsewhere in this Federal Register is a notice which announces a public meeting to gather data and hear arguments which will assist EPA in assessing what future activity is necessary. This will allow the Agency to proceed quickly and effectively with any subsequent activity which may prove to be necessary to deal with the asbestos problem in public and commercial buildings.

VI. Administrative Record

EPA has established a public record of those documents the Agency considered in denying SEIU's petition. The record consists of documents located in the file designated by Docket Control Number, OPTS-211023, located at the TSCA Public Docket Office. This Docket is available for reviewing and copying from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, at the following address: Environmental Protection Agency, Room NE-G004, 401 M Street, SW., Washington, DC 20460. The public record consists of all documents in the OPTS-211023 file and all documents cited in the documents in that file.

Dated: March 28, 1989

William K. Reilly,

Administrator.

[TR Doc. 89-7932 Filed 4-3-89; 8:45 am]

BILLING CODE 5550-60-M