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To: Members of the Ad Hoc Lawyers Group

From: Mark Duvall

Re: Negative-Pressure Enclosure Requirement of OSHA's
Asbestos Standard

An issue we have discussed several times at our meetings is whether the negative-pressure enclosure requirement of OSHA's asbestos standard is triggered by the exposure level or by the type of work involved, regardless of the exposure level. After waffling for several years, OSHA has recently taken the firm position that it is solely the type of work that triggers the requirement, as indicated in OSHA interpretations and an ALJ decision which I distributed earlier. Union Carbide has decided to follow OSHA's current position for the present, while seeking to change OSHA's position either through litigation or rulemaking.

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AN OPPORTUNITY TO HELP CHANGE OSHA'S POSITION THROUGH rulemaking has presented itself. As you are aware, OSHA recently published a Federal Register notice committing itself to publish a proposed rule on the related issue of the small-scale short-duration exemption by the end of February. While the notice did not indicate that OSHA intended to solicit comments on the issue of the appropriate trigger for the negative-pressure enclosure requirement, it did indicate a willingness to take comments on issues potentially relevant to the appropriate trigger.

Nevertheless, if OSHA should fail to ask directly for comments on the trigger issue itself, any final rule which addresses the trigger issue favorably might be vulnerable to procedural attack on judicial review. Thus, it is important to persuade OSHA now to include the trigger issue in the notice of proposed rulemaking.

Union Carbide has asked ORC to petition OSHA to add the issue, but ORC has declined to do so, preferring to take the lower-profile approach of sending OSHA a brief letter. We are considering submitting a petition for rulemaking to OSHA similar to the attached draft. We would prefer to act in concert with other companies, and so I would like to know whether your companies would be interested in joining in such a petition.

The petition gives three reasons for the requested action: (1) OSHA is already committed to rulemaking on a closely related issue, and it would be waste of administrative resources not to address this pressing issue; (2) the controversy continues on what the current rule requires, and OSHA can best resolve that controversy through rulemaking; and (3) experience since 1986 has shown that negative-pressure enclosures do not reduce risk where the PEL cannot reasonably be expected to be exceeded, and this evidence should be considered by OSHA through rulemaking to determine the appropriate trigger for the negative-pressure enclosure requirement.

I believe that a petition is important because OSHA needs to be pushed to include the trigger issue in the notice of proposed rulemaking. OSHA has four reasons for not soliciting comments on this issue unless pushed.

First, OSHA spent much of 1989 resolving internally, and then communicating externally, its position that the negative-pressure enclosure requirement is not triggered by exposure levels. It is unlikely to want to solicit comments on whether that position is unsound.

Second, OSHA's current position was recently upheld by an ALJ. OSHA is unlikely to want to retreat from a position which its attorneys say is winnable.

Third, OSHA must respond to the court order, which concerns the exemption but not the negative-pressure enclosure requirement itself. That OSHA regards itself as free to ignore the requirement itself is evident from the December 20 notice, which pointedly was silent on the trigger issue. If OSHA, which has long been aware of the controversy on the trigger issue, had intended to address it in the notice of proposed rulemaking, it could easily have mentioned it in the December 20 notice, but it chose not to do so.

Fourth, asbestos being a political hot potato, OSHA has little to gain and much political capital to lose if it were to be perceived as relaxing the asbestos standard. Voluntarily adding the trigger issue might be so perceived.

Together, these reasons suggest that OSHA needs to be pushed to consider adding this issue to the planned rulemaking. The time for pushing is now, given that OSHA needs time to prepare the notice of proposed rulemaking and it has committed itself to acting by the end of February (although I understand that that date may slip somewhat).

Please call me at (203) 794-6617 to discuss your company's interest in joining in the petition. If possible, please call by Monday, January 22.

Sincerely,



Mark N. Duvall

MND:mm
Attachment

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[UCCP letterhead]

February __, 1990

The Hon. Gerard F. Scannell
Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Petition for Rulemaking to Clarify or Revise the
Negative-Pressure Enclosure Requirements of OSHA's
Asbestos Standard for the Construction Industry, 29
C.F.R. § 1926.58(e)(6)

Dear Mr. Scannell:

Pursuant to 29 C.F.R. § 1910.3(a), Union Carbide Chemicals and Plastics Company Inc. ("Union Carbide") hereby petitions OSHA to include an important additional issue within the scope of its planned rulemaking concerning the exemption for small-scale short-duration operations from the negative-pressure enclosure requirement of the asbestos standard for the construction industry. Union Carbide petitions OSHA to consider also whether the negative-pressure enclosure requirement should apply in removal, demolition, or renovation operations which would not qualify as small-scale or of short duration, but where airborne concentrations of asbestos do not exceed, nor can they reasonably be expected to exceed, the permissible exposure limit ("PEL"). It is our position that the requirement should not apply where the PEL cannot reasonably be expected to be exceeded.

Union Carbide is a major manufacturer of chemicals and plastics with facilities throughout the United States. Many of those facilities contain asbestos. From time to time Union Carbide or its contractors engages in asbestos removal, demolition, or renovation operations. In the course of these activities we have gained considerable practical experience with the use of negative-pressure enclosures and alternatives to their use.

Several reasons support this petition. First, OSHA has initiated a rulemaking which will address closely related issues, including issues which relate directly to whether negative-pressure enclosures should be required where the PEL cannot reasonably be exceeded. It would be a waste of OSHA's scarce resources not to consider at the same time additional pressing issues relating to the appropriate scope of the negative-pressure enclosure requirement.

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Second, there has been widespread confusion and disagreement as to whether the current standard requires the use of negative-pressure enclosures where the PEL cannot reasonably be expected to be exceeded. Rather than continue disputes as to the meaning of the current standard, OSHA should establish clearly through rulemaking just what triggers the negative-pressure enclosure requirement. That trigger should be established only after consideration of relevant evidence in light of the policies underlying the asbestos standard.

Third, experience under the asbestos standard since 1986 has developed evidence which could establish empirically that use of negative-pressure enclosures where the PEL cannot reasonably be expected to be exceeded does not reduce risk of asbestos exposure. Union Carbide believes that rulemaking comments would show that in such circumstances, the use of alternative procedures, such as glove bags and wet methods, effectively protects both the employees performing the work and those in the surrounding area.

1. Relevance to OSHA's Planned Rulemaking

In a recent Federal Register notice, OSHA announced its intention to publish a proposed rule concerning the scope of the small-scale, short-duration exemption from the negative-pressure enclosure requirement. 54 Fed. Reg. 52024 (Dec. 20, 1989) (Attachment 1). The notice was a partial response to an order of the court in Building and Construction Trades Department v. Brock, 838 F.2d 1258 (D.C. Cir. 1988), and a related order of the court issued on October 30, 1989.

Among other things, the court had ordered OSHA to "clarify" that the exemption is limited to operations where the use of negative-pressure enclosures is impractical. In the notice, OSHA determined not to adopt that "clarification" at this time, for three reasons: (1) doing so would not necessarily reduce employee risk from asbestos exposure; (2) OSHA had already narrowed the scope of the exemption by interpretation, preventing the potential overbreadth of concern to the court; and (3) additional rulemaking is required to compile and assess information on the risk reduction for employees working in negative-pressure enclosures.

Union Carbide believes that these reasons also support this petition. OSHA stated with respect to the first reason:

First, the agency believes, based on its experience in enforcing the construction standard, that explicitly limiting the exemption to situations where negative pressure enclosures are impractical might not reduce employee risk from asbestos exposure

[Doing so] would result in the use of such enclosures in operations where they would not necessarily enhance worker protection. It would mean that virtually all removal and renovation jobs, regardless of the amount of asbestos being disturbed, the effectiveness of worker isolation techniques such as glove bags, and the incidental nature of the removal, would have to be performed within enclosures. . . . OSHA believes that employees disturbing only small amounts of asbestos, protected by the controls in appendix G, may not additionally benefit from negative pressure enclosures and thus may not be at increased risk as a result of their absence. Similarly, bystander employees do not always need the protection provided by walk-in enclosures, where glove bags contain fibers released and the amount of asbestos being disturbed is small. OSHA therefore concludes that an expanded negative pressure enclosure requirement is not necessary to protect employees in these restricted situations at this time.

54 Fed. Reg. at 52026. Similarly, where the exemption does not apply, there are many circumstances where the use of negative-pressure enclosures does not add to the protection of either employees inside the enclosure or outside of it. Indeed, experience has shown that in some instances, such as on many roofing jobs, use of a negative-pressure enclosure actually increases employee risk of injury. Rulemaking is necessary to establish that in non-exempt removal, demolition, or renovation operations where the PEL cannot reasonably be exceeded, the risk reduction through use of a negative-pressure enclosure is at best insignificant.

Second, whereas OSHA has cured potential overbreadth of the exemption by interpretation, OSHA has created overbreadth for the basic requirement by interpretation. Correcting that overbreadth should be examined through rulemaking.

A genuine dispute has existed for years as to the appropriate interpretation of the negative-pressure enclosure requirement in light of the definition of "regulated" area in paragraph (b) of the standard. That provision defines "regulated area", explicitly including a negative-pressure enclosure, as "an area established by the employer to demarcate areas where airborne concentrations of asbestos . . . exceed or can reasonably be expected to exceed the permissible exposure limit." Notwithstanding this and other provisions, such as paragraph (e)(1), OSHA has interpreted paragraph (e)(6) as being applicable even where airborne concentrations cannot reasonably be expected to exceed the PEL. The result is overbreadth, in that a requirement designed to protect against exposure above the PEL applies even where the PEL cannot reasonably be expected to be exceeded. OSHA should explore through rulemaking how best to cure this overbreadth.

Third, OSHA announced that it intended to examine technological alternatives to negative-pressure enclosures which may provide equivalent protection:

The agency is also collecting information on experience with negative pressure enclosures and on alternatives which may provide the same degree of protection to employees removing asbestos and to bystander employees. OSHA believes that additional rulemaking is required to compile and assess information on the risk reduction for employees working in negative pressure enclosures

In the supplemental rulemaking, OSHA intends to discuss the effectiveness and drawbacks of negative pressure enclosures, glove bags, and alternative control systems; and to specify more clearly under what circumstances various control systems may be used. OSHA will consider allowing new technology unavailable in 1986, such as negative pressure glove bags, which appear to offer improved employee protection in certain circumstances.

54 Fed. Reg. at 52027. Clearly, that inquiry relates not just to use of negative-pressure enclosures in small-scale, short-duration operations, but even more so to the use of such enclosures in non-exempt operations. If alternatives to negative-pressure enclosures can provide at least equivalent protection in some situations, such as where the PEL cannot reasonably be expected to be exceeded, then there is no policy need to continue to require use of negative-pressure enclosures in those situations. Accordingly, the rulemaking's scope should be expanded to consider situations in addition to small-scale, short-duration operations.

2. Resolution of Controversy Over Scope of the Negative-Pressure Enclosure Requirement

As noted above, there is widespread disagreement with OSHA's current interpretation that negative-pressure enclosures are required if feasible, even where the PEL cannot reasonably be expected to be exceeded. Rather than attempt to impose its current interpretation by fiat, OSHA should explore through rulemaking what interpretation best serves the policies underlying the asbestos standard.

It was just over one year ago that OSHA published an interpretation of its negative-pressure enclosure requirement which unambiguously took the position that the requirement does not apply where the PEL cannot reasonably be expected to be exceeded:

Paragraph (e) of the construction standard now requires employers to establish regulated areas whenever the PELs are exceeded. Regulated areas required by the standard can take two forms. For most employers who perform asbestos removal, demolition, or renovation operations (other than small-scale short-duration), the regulated area must consist of a negative-pressure enclosure that will confine the asbestos fibers being generated to the area within the enclosure and will thus protect other employees and bystanders on the site from exposure to excessive levels of asbestos. For small-scale, short-duration removal, demolition and renovation operations and for asbestos work operations that do not involve asbestos removal, demolition, or renovation, the employer may simply demarcate the regulated area by posted signs that limit the number of employees entering the area.

Regulated areas do not have to be established where engineering and work practice controls reduce employee exposures to asbestos to levels below the standard's TWA and excursion permissible limits.

53 Fed. Reg. 35610, 35622-23 (Sept. 14, 1988) (emphasis added).

That statement, signed by Assistant Secretary Pendergrass, who signed the 1986 standard, is consistent with Mr. Pendergrass's 1986 interpretation:

The intent of 1925.58(e) is to require a negative pressure enclosure only where a regulated area is required. Regulated areas are established only where asbestos concentrations exceed the permissible exposure limit

Depending on the nature and extent of exposure, the requirement for a negative pressure enclosure may not be applicable in your case.

Letter of Oct. 30, 1986 of John A. Pendergrass to Thomas R. Kupferer (Attachment 2).

Similarly, Charles A. Adkins, then Acting Director of Health Standards Programs, wrote in 1986 in response to a request for clarification of the standard's intent through asking what interpretation best serves the public interest:

The intent of 1926.58(e) is to require a negative pressure enclosure and "competent person" only where a regulated area is established Regulated areas are established only where concentrations exceed the PEL.

Your second issue dealt with the type of operations that could qualify for exemption from the requirements of paragraph (e)(6). It should be noted that any operation can qualify for exemption provided airborne levels of

asbestos are kept at or below 0.2 f/cc. This can best be accomplished by means of engineering controls used in conjunction with appropriate work practices since these two methods, when used either singly or in combination can be employed effectively to reduce asbestos exposures to below 0.2 f/cc.

Letter of Oct. 10, 1986 from Charles A. Adkins to Daniel E. Hoffman, National Steel Corporation (Attachment 3).

In contrast, OSHA's current position is that the negative-pressure enclosure requirement is not triggered by exposures at or above the PEL, but rather by the nature of the operation involved:

According to the standard, negative pressure enclosures are required for all removal, demolition and renovation operations regardless of airborne concentrations.

Memorandum of Jun. 2, 1989 from Patricia K. Clark, Acting Director, Directorate of Compliance Programs, to Michael G. Connors, Regional Administrator, Region V (Attachment 4).

Clearly, there is room for debate as to what OSHA originally intended paragraph (e)(6) to mean. Rather than leave this important issue to lawyers who could argue it out in court, however, OSHA should address it through rulemaking. It should clearly determine what paragraph (e)(6) should mean, in light of the policies and evidence underlying the asbestos standard.

3. Evidence That There Is No Risk Reduction Through Use of Negative-Pressure Enclosures in Situations Where the PEL Cannot Reasonably Be Expected to Be Exceeded

OSHA's current position that negative-pressure enclosures are required regardless of exposure level is apparently based upon two assumptions: (1) that removal, demolition, and renovation operations tend to have the highest asbestos levels of all construction operations; and (2) that there is no way to predict in advance whether such an operation will result in airborne concentrations above the PEL. ORC believes that a rulemaking would establish that these assumptions are at best half-truths. Some removal, demolition, and renovation operations do have the potential for high airborne concentrations, but others do not. For those with little or no potential for high airborne concentrations, objective evidence can establish that the PEL cannot reasonably be exceeded. When more detailed and current evidence is gathered, OSHA can better determine the appropriate scope of the negative-pressure enclosure requirement.

OSHA has defined "removal", "demolition", and "renovation" so broadly that, unless of small-scale and short-duration, most maintenance and repair operations which involve asbestos-containing materials are covered by paragraph (e)(6). Accordingly, that provision applies not only to situations where the potential for exposure is high, such as building demolitions, but also to those where it is very small, such as removal of a few transite panels. Transite is a non-friable building material which contains at most 1% asbestos. Experience has shown that transite panels may be removed using wet methods and other procedures, but without the use of negative-pressure enclosures, with resulting exposures rarely exceeding the level of detection (generally 0.01 f/cc). In such cases, use of a negative-pressure enclosure would add nothing to employee protection.

Transite is but one example of removal, demolition, or renovation operations where experience has shown that airborne concentrations cannot reasonably be expected to exceed the PEL if appropriate work practices are followed. Through rulemaking, OSHA may determine empirically, rather than through assumptions, whether negative-pressure enclosures in fact reduce risk where the PEL cannot reasonably be expected to exceed the PEL.

In summary, OSHA has a unique opportunity to resolve a longstanding controversy and to determine empirically what are the appropriate uses of a negative-pressure enclosure. OSHA has already committed itself to conduct a rulemaking on closely related, and to some extent overlapping, issues. The Agency should take this opportunity by announcing in the notice of proposed rulemaking that it will consider the proper trigger for the negative-pressure enclosure requirement, both in the context of small-scale, short-duration operations, and in those which are not small-scale or of short duration.

Respectfully submitted,

Robert E. Bollinger
Director of Occupational
Health; Product Safety/
Liability

Attachments

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Deputy Assistant Secretary of Labor

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File: OSHA/asbestos



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* MESSAGE *

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