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To	Mail Code	From	Mail Code	Ext.
Please See Below		Thomas A. Dougherty/c	#1125/2A	7349

Subject	Date
EPA AND OSHA ASBESTOS DEVELOPMENTS	11/3/86

Forward copies to JLA JAB, information only no action req. xc's 11/10/86

TO: Mr. M. P. Simmons - #1125-1
Mr. L. C. Ambler - #2125-2B
Mr. J. P. McGinley - #2125-2B
Mr. C. M. Pontz - #1125-1
Dr. L. J. Mellon - #1125-4
Ms. D. C. Wackerman - #1125-1

Attached are copies of materials received from AIA/NA regarding the latest developments concerning EPA and OSHA asbestos rulemaking.

I think you will find them self-explanatory, but if you want further information I shall be glad to try to get it.

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AIA ASBESTOS INFORMATION ASSOCIATION
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Arlington, Virginia 22202 • (703) 979-1150

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Employee & Industrial Relations

PRIORITY MAIL

October 22, 1986

Memorandum For: MEMBERS

Subject: Forwarding of Items of Interest Pertaining to EPA and OSHA Regulatory Matters

As you know from earlier mailings, EPA, in response to a request from this Association and The Asbestos Institute in Monreal, granted cross-examination of the agency's experts in regard to the proposed ban and phase-out of asbestos products. This second set of hearings occurred during the period October 6-21, 1986. Hearings were not conducted every day. You will recall that the first (legislative) hearings were conducted from July 15 to July 25, 1986. Details of the first hearings were included in the July issue of AIA/NA's newsletter.

Counsel for AIA/NA and The Asbestos Institute (Kirkland & Ellis) has prepared background notes on EPA's just concluded cross-examination hearings. A copy of these notes is enclosed and invited to your close attention. EPA now appears to be redoing its entire case, and we believe that it is quite possible the proceeding will slow down for the next few months in order for the agency to complete a number of documents and studies before industry will need to file any rebuttal testimony or a final administrative brief.

As indicated above, we know that EPA has let contracts recently to again collect various information and data on the U.S. asbestos industry. Consultants that are involved in this new round of contacting "asbestos companies" include ICF Technology, Battelle and Versar - and perhaps others that are not known at this writing. In order to assist the Association in participating in the ongoing EPA rulemaking, it is recommended that U.S. member companies who may be contacted by an EPA contractor do the following:

1. Do not provide any information to EPA contractors other than in written form in order to assure that the correct information is in EPA's records. Providing information orally risks misinterpretation.

2. Allow the Association the opportunity to review any written information submitted to EPA contractors prior to its submission. Since EPA has previously collected similar information and employed it to support its proposed ban and phase-out of asbestos use, any new information is likely to be used for the same purpose.

- over -

3. Contact or submit information for review to AIA/NA counsel, Tim Hardy, law firm of Kirkland & Ellis, rather than direct to the Association since some of the information might be considered as confidential. K&E will protect the information in their role as counsel to our membership. The address and 'phone number for K&E is as follows:

Timothy S. Hardy
Kirkland & Ellis
655 Fifteenth St., N.W.
Washinton, D.C. 20005
(202) 879-5042

New subject - OSHA's final regulations for general industry and construction that were published in June 1986 - Pertinent excerpts (cover page, table of contents, statement of the issues presented for review and conclusion) from industry's brief filed in challenge with the U.S. Court of Appeals for the District of Columbia Circuit on October 20, 1986, are appended. OSHA is required to file a brief in response with the court by December 29, 1986. It is expected that the case will be argued before the court in late spring or early summer of 1987.

The EPA and OSHA situations will, of course, be principal items for discussion at the December 4, 1986, board of directors meeting, Details for this meeting will be forwarded in the near future. In the meantime, however, we will be pleased to respond to questions or inquiries.

B. J. Pigg
President

Enclosures

cc: Joseph A. Artabane, Esq. (SB&H)
Edward W. Warren, Esq. (K&E)
Gary Nash, AI
Joseph C. Jackson, AACPP

(October 15, 1986)

BACKGROUND NOTES ON EPA'S PUBLIC HEARINGS

Last week (October 6-10, 1986), EPA staff members responsible for EPA's asbestos ban and phaseout proposal were cross-examined by AIA/NA and The Asbestos Institute (AIA) counsel at hearings in Washington, D.C.

AIA's cross-examination showed that EPA's proposal was prepared by persons lacking scientific and technical expertise who made baseless or exaggerated estimates of health risks from current asbestos products.

This background memorandum summarizes key testimony brought out in cross-examination and demonstrates that the true risks presented by continued use of asbestos in the U.S. are much closer to the testimony submitted by AI's witnesses than to EPA's claim that its ban/phaseout proposal will save 1,000 American lives.

Before summarizing what EPA's witnesses had to say at the cross-examination hearings, it is useful to keep in mind the main difference between the testimony of AIA's expert witnesses and the findings underlying EPA's proposal:

A. AIA's experts concluded that EPA's proposal, if it accomplished anything at all, would avoid approximately 5 cancer cases 30 to 50 years from now rather than the approximately 1,000 cases predicted by EPA;

B. According to AIA's witnesses, EPA's overestimate (1,000 vs 5 cases) is attributable both to an overestimate of the health risks (potency) of asbestos and to an overestimate of the cumulative exposure Americans would face from continued production and sale of asbestos products;

C. AIA's expert, Dr. Robert Crandall, Ph.D., found the present value of EPA's proposal to be more than $4 billion rather than the $2 billion estimated by EPA. Dr. Crandall also recommended that EPA's whole approach to cost and benefit estimation be reconsidered so as to take account of the fact that most of the costs would be borne immediately while the predicted benefits would not occur until the 21st century;

D. AIA's expert, Dr. Joseph Rodricks, Ph.D., concluded that any health risks posed by continued use of asbestos were likely to be more than offset by the greater risks of asbestos substitutes (many of which are carcinogens), and by the very real possibility that asbestos substitutes in lifesaving uses (e.g., auto brakes) may not perform as well as asbestos; and,

E. AIA's experts accordingly urged that EPA consider "less burdensome" regulatory alternatives to the proposed ban and phaseout, and that EPA adopt the "controlled use" approach followed by the EEC, the United Kingdom, the Ontario Royal Commission and recently endorsed by the International Labor Organization.

Testimony was given by EPA witness on only the first three of these points last week. The following is a summary of what they had to say.

A. Overestimate of the Health Risk (Potency) of Asbestos

The first critical element in any evaluation of the possible benefits of EPA's proposal is the potency of asbestos in producing disease. EPA's witness of this issue, Bruce Sidwell, is neither a medical doctor nor a Ph.D. in toxicology, epidemiology or bio-statistics. Instead, Mr. Sidwell is an EPA staffer (a plant biologist) who assessed the risks of asbestos based exclusively on a report prepared for the U.S. Consumer Product Safety Commission, (commonly referred to as the CHAP's Report).

Mr. Sidwell was accompanied in his testimony by Dr. Marvin Schneiderman, one of the seven authors of the CHAP's Report. Dr. Schneiderman was the only outside scientist to review EPA's proposed rulemaking.

By contrast, AIA's experts, Drs. J.M.G. Davis and Kenny Crump, are both highly regarded asbestos health scientists. Last summer, they testified in writing that the potency of asbestos varies depending upon the fiber type, size and industrial process involved. Their testimony is consistent with the findings of a number recent studies and reviews on asbestos conducted in Canada and the United Kingdom. Although EPA ignored these distinctions in its proposal, Mr. Sidwell admitted on cross-examination that the evidence "suggests" that chrysotile (the kind of asbestos mined in Canada) may be less potent, and that fibers less than five microns in length may cause far less disease.

EPA's case rests upon mathematical extrapolations to consumer and environmental exposures 10 to 100 thousand times lower than those faced by Canadian miners and U.S. factory workers in the past. AIA noted that recent epidemiological studies conducted at low level exposure have not shown any excess incidence of disease. Although defending such extrapolations, Mr. Sidwell admitted that EPA had overestimated by 33% the risk of persons developing mesothelioma (a type of cancer), a concession that necessarily reduces EPA's benefits estimates by about 150 cases.

Following the cross-examination of Mr. Sidwell and Dr. Schneiderman, AIA counsel reiterated AIA's previous request that EPA call the world's leading asbestos health experts to testify in Washington. AIA's request, repeating a similar request made by the Swiss Eternit Group in hearings last summer, calls upon EPA to follow the example of the Ontario Royal Commission (ORC) which heard testimony from over twenty of the world's leading asbestos health experts in preparing its report.

On the same day (October 6) AIA made its request for testimony by the world's asbestos health experts, a similar request was made in writing to EPA Administrator Lee Thomas by Canadian Minister of Energy, Mines and Resources Marcel Masse. On October 7, EPA agreed to reconsider the issue of calling additional asbestos health witnesses and asked AIA to make an additional written submission detailing why and how such a hearing might prove productive.

B. Overestimate of Asbestos Exposure and Benefits

The second critical element underlying EPA's benefits estimates is the cumulative asbestos exposures expected to be faced by the continued use of asbestos over the next 16 years. This total cumulative exposure is multiplied in EPA's computer model by the estimated potency of asbestos to calculate the total benefits that supposedly would accompany banning or phasing out asbestos. In written testimony filed last summer, Dr. Gordon Bragg, professor at the University of Waterloo, Ontario and one of the world's leading experts on asbestos exposure control measures, concluded that EPA's exposure estimates were more than 40 times too high.

EPA's asbestos exposure witnesses were Ms. Amy Moll and Ms. Lynn Delpire. Ms. Moll and Ms. Delpire respectively have college degrees (B.A.'s) in economic and chemistry, and Ms. Moll has a Masters in Public Administration. On cross-examination, Ms. Moll and Ms. Delpire admitted that they were not qualified to measure asbestos fibers by any of the approved techniques; that they were not qualified to advise EPA regarding engineering or other controls to reduce asbestos exposures; and indeed, that they had never even been inside an asbestos product plant.

Ms. Moll and Ms. Delpire were on the witness stand for two full days during the course of which they conceded that the Agency's exposure estimates reflected a number of errors, and that major portions of EPA's exposure case were in the process of being redone by outside contractors. In particular, EPA's witnesses agreed that the following problems, among others, exist in EPA's exposure case;

(1) EPA's exposure and benefit estimate (468 cancer cases avoided) from a ban on vinyl-asbestos (V-A) floor tile rests on two studies (Constant and Lee) that were shown on cross-examination to be deficient. EPA promised that at least one of these studies (Constant) would not be used in EPA's final estimates, and admitted that if EPA were consistent with OSHA (measuring only fibers longer than five microns), its exposure and benefits estimates would drop to zero cases.

Ms. Moll hinted that EPA might base new floor tile exposure estimates on four isolated asbestos measurements taken at a single building outside Paris, France in 1980. The person taking those readings (Dr. Sebastien) stressed the need for other laboratories to take further measurements in many more buildings before any conclusions could be drawn from his work. Ms. Moll testified, however, that EPA has no plans to make any additional measurements and that it might decide to ban V-A tile based only on Dr. Sebastien's four measurements.

(2) EPA conceded that its benefits estimate for installation of asbestos cement pipe (about 50 cases) is more than 90 times higher than the U.S. Occupational Safety and Health Administration's (OSHA's) benefit estimates for the same activity. (OSHA reviewed the exposure date on A-C pipe installation as well as a variety of other asbestos exposure situations in connection with its new worker standard, issued June 20, 1986).

(3) EPA conceded that its benefits estimate (about 25 cases) for installation of A-C sheet materials is about 20 times higher than OSHA's estimate for the same activity.

(4) EPA announced that it was reconsidering its estimate of the number of full-time brake repair workers in light of AI's testimony and conceded that, on the issue of exposure levels alone, EPA's benefit estimate (about 400 cancers avoided) is four times higher than OSHA's.

(5) EPA agreed that its estimate of the benefits of eliminating manufacturing workplace exposures (39 cases) was 50% higher than OSHA's comparable benefit estimate.

(6) EPA acknowledged that its estimate of the risks posed to persons living near A-C pipe and other U.S. asbestos product manufacturing plants (about 50 cases) is nearly 10 times higher than the comparable estimate recently completed by EPA's own Clean Air Office.

AIA's counsel repeated during the cross-examination a long-standing request for a precise breakdown of the benefits that EPA predicts would result for each product sector and subsector if EPA's proposal were implemented. EPA finally acknowledged that this information had not been provided, but refused to promise that it would be forthcoming anytime soon, if ever.

AIA's counsel announced AI's intention to request cross-examination of other EPA exposure witnesses, both on the sector-by-sector benefits information yet to be provided and on the substantial new work being done by EPA contractors to repair deficiencies in EPA's exposure case.

In the cross-examination of Ms. Moll and Ms. Delpire it was revealed that neither had done more than skim the testimony of AIA's witness, Dr. Bragg. Instead, both claimed that the extensive reworking of EPA's exposure case presently underway was attributable to the fact that EPA's information needed updating, a point supposedly recognized before Dr. Bragg's testimony was received. Neither Ms. Moll nor Ms. Delpire could explain why the EPA proposal had been issued if EPA really knew all along that its data were stale and that additional data-gathering was necessary.

C. Underestimate of the Costs of EPA's Proposal

EPA's witnesses on the costs of its proposal were Ms. Moll and Ms. Christine Augustyniak, who is an EPA staff economist about to receive her Ph.D. from the University of Michigan. By contrast, AIA's witness, Dr. Robert Crandall, a fellow of the Brookings Institution in Washington, is the author of numerous books and articles in professional journals on cost-benefit analysis.

The main thrust of Ms. Moll's and Ms. Augustyniak's testimony was that EPA was completely redoing its economic model and was gathering new data by a telephone survey to allow EPA to recalculate the costs of its proposal. Neither Ms. Moll nor Ms. Augustyniak would speculate on whether the new cost estimates would be higher or lower but did acknowledge that certain changes in the model (made particularly in response to Dr. Crandall's testimony) would lead to an appropriate doubling of predicted costs. EPA had no explanation for why the work now underway could not have been completed before the issuance of its proposal in January 1986.

At the conclusion of the cross-examination of Ms. Moll and Ms. Augustyniak, AIA's counsel reiterated AIA's long-standing request for a breakdown of EPA's cost estimates on a sector-by-sector basis. AIA was told that some of those estimates might lead to the disclosure of confidential information and that, in any event, EPA had not decided whether to grant AIA's request. AIA counsel als announced AIA's intention to request oral cross-examination of additional witnesses based on the cost data yet to be provided and on the new cost estimates that EPA's contractors are currently developing.

D & E. Risk of Substitutes and "Less Burdensome" Regulatory Alternatives

During the remainder of (October 13-17). AIA will be cross-examining additional witnesses on the risks posed by substitutes for asbestos and on the development of "less burdensome" alternatives short of a ban and phaseout of asbestos. The testimony on the former issue was postponed until October 17, 1986 because, on October 3, EPA provided AIA with over 1,000 pages of new studie by EPA contractors. It is apparent that EPA is redoing its case on both the risk of substitute and "less burdensome" alternative issues, and that further cross-examination of EPA witnesses will be necessary on these points even after the conclusion of next week's hearings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1359 and Consolidated Cases
Nos. 86-1360, 86-1409, 86-1410,
86-1411 and 86-1437

BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO,

Petitioner,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR,

Respondent.

On Petition for Review of Final Action of
the Occupational Safety and Health Administration

BRIEF FOR PETITIONER
ASBESTOS INFORMATION ASSOCIATION/NORTH AMERICA
AND INTERVENOR ASBESTOS INSTITUTE

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October 20, 1986

Counsel for the Asbestos
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North America and the
Asbestos Institute

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CTD001775

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, Petitioner, v. WILLIAM E. BROCK, SECRETARY OF LABOR, Respondent.	No. 86-1359 and Consolidated Cases, Nos. 86-1360, 86-1409, 86-1410, 86-1411, 86-1437.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Health standards issued under the Occupational Safety and Health Act ("OSH Act") 1/ must: (1) be "feasible," (2) constitute "objective" standards of "performance" in the sense that employers can confidently determine compliance by neutral criteria, and (3) utilize "reasonably necessary" measures to reduce or eliminate "significant" risks to workers. An OSHA health standard may be sustained only if the Agency has adduced "substantial evidence" demonstrating that each of these three criteria have been satisfied.

1/ 29 U.S.C. §§ 651 et seq. (1982). The statutory provisions pertinent to this challenge are reproduced in Appendix A.

This petition for review challenges OSHA's revised occupational health standard for asbestos. 2/ The background and details of the standard are summarized below in the Statement of the Case. For purposes of clarifying the issues presented for review, however, suffice it to say that OSHA lowered the previous permissible exposure limit ("PEL") for asbestos from 2.0 fibers per cubic centimeter ("f/cc") to a never-to-be-exceeded level of 0.2 f/cc.

Petitioner Asbestos Information Association/North America and intervenor Asbestos Institute (hereinafter collectively called "AIA/NA") have long supported tightening the OSHA standard to reflect the lower exposure levels being achieved by technological leaders in the various asbestos industry product sectors. AIA/NA contends, however, that the particular standard OSHA adopted satisfies none of the statutory requirements identified above.

The Agency attempted to carry its "substantial evidence" burden on the "feasibility" issue by showing that its new 0.2 f/cc limit could be attained "most of the time." To deal with acknowledged difficulties in consistently quantifying asbestos exposures under its new standard, OSHA

2/ 51 Fed. Reg. 22612 (June 20, 1986) (JA ____-____). "JA" refers to the Joint Appendix. Citations to the record will be either to an Exhibit ("Ex.") from OSHA's Certified Index, to the Transcript ("Tr.") of the hearings, or to the Joint Appendix.

adopted a new and substantially different measurement method. But it did not test the new method for comparability with the previous air sampling technique. The consequence of setting such a low PEL, enforced by an unverified measurement technique, is that employers lack "objective" criteria to determine whether or not they are complying with the standard.

OSHA's attempt to address the "significant risk" issue is equally flawed. OSHA made "significant risk" findings for a hypothetical (or at least highly atypical) worker who is exposed continuously, for a full 45-year worklife, at 0.2 f/cc. While acknowledging that "real world" workers are exposed to lower levels for shorter durations, OSHA made no findings regarding the risks actually faced in today's workplace.

Because OSHA addressed only extremely hypothetical rather than real work settings, it failed to determine which segments of the workforce would no longer face "significant risk" under a 0.5 f/cc PEL and, more importantly, which workers (if any) would still encounter "significant risks" and thus need additional protection. If significant risks continue to exist for certain workers, OSHA is obligated under the Act to prescribe supplemental measures to provide the additional margin of health protection needed. The record here reveals that several such measures were available to OSHA, including a short-term exposure limit, other supplemental exposure control measures, and programs to prevent smokers from working in asbestos jobs.

As the foregoing suggests, the issues for review here are interrelated but reduce essentially to the overriding question of:

> (1) Whether OSHA's never-to-be-exceeded permissible exposure limit of 0.2 f/cc should be set aside and remanded so that OSHA can: (i) set a revised PEL that represents a "feasible" and "objective" standard of "performance," (ii) properly evaluate whether some (if any) workers would continue to face "significant" health risks under the new PEL and, if so, (iii) adopt supplemental measures as "reasonably necessary or appropriate" to protect such workers.

In addition to this overriding question (dealt with in Parts I-III of the Argument), this petition also presents the following separate question:

> (2) Whether OSHA's total ban on all spraying of asbestos-containing products should be vacated because it was unlawfully promulgated without adequate notice and is unsupported by "substantial evidence."

This second question is addressed in Part IV below.

RULE 8(b) STATEMENT AND REFERENCES TO PARTIES AND RULINGS

These actions were not previously before this Court. 3/ Two other cases posing issues related to OSHA's revised

3/ Nos. 86-1409, 86-1410 and 86-1411 were originally filed in the United States Court of Appeals for the Fifth Circuit

(Footnote Continued)

asbestos standard are currently before this Court: R.T. Vanderbilt Co., Inc. v. OSHA, No. 86-1415 and National Stone Ass'n v. OSHA, No. 86-1454. The proceedings leading to the standard challenged here began in 1983 when OSHA, without notice or hearings, adopted an emergency temporary standard ("ETS") under Section 6(c) of the Act immediately reducing the asbestos PEL from 2.0 f/cc to 0.5 f/cc. 48 Fed. Reg. 51086 (Nov. 4, 1983) (JA ___).

On petitions for review filed by AIA/NA and others, the Fifth Circuit stayed the ETS on November 23, 1983, and later invalidated it, in part because the health benefits OSHA claimed for the ETS were largely achievable by enforcing the existing standard in certain high exposure operations in construction and other non-factory settings. Asbestos Information Association/North America v. OSHA, 727 F.2d 415, 426-27 (5th Cir. 1984). OSHA subsequently proposed a revised permanent standard. 49 Fed. Reg. 14116 (Apr. 10, 1984) (JA ___). After receiving public comment and holding informal hearings, OSHA adopted the final revised standard now under review.

(Footnote Continued)

and No. 86-1437 was originally filed in the United States Court of Appeals for the Eighth Circuit. These petitions were subsequently transferred to this Court pursuant to 28 U.S.C. § 2112(a).

CONCLUSION

For the reasons set forth above, OSHA's revised standard for asbestos should be set aside and remanded for reconsideration so that OSHA can:

1. Adopt a PEL that is both "feasible" and "objective" under the OSH Act;
2. Properly assess which segments, if any, of the work force would remain exposed to "significant risk" and, if so,
3. Adopt additional measures as "reasonably necessary" to provide those workers the extra margin of health protection needed; and
4. Reconsider, on a full record, whether an across-the-board ban on the spraying of asbestos products is "reasonably necessary."

Respectfully submitted,

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