

and thus are still subject to the rule. The remaining product categories were being manufactured, processed, or imported on July 12, 1989, and are no longer subject to the rule. In the near future EPA will publish a technical amendment to 40 CFR part 763 to bring it in line with the Court's ruling.

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SUPPLEMENTARY INFORMATION:

I. Background

In the Federal Register of July 12, 1989 (54 FR 29460), EPA issued a final rule under section 6 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605. The rule prohibited, at staged intervals, the future manufacture, importation, processing, and distribution in commerce of almost all asbestos-containing products, and required labeling of such products in the interim (40 CFR 763.160 through 763.179). The first stage of the ban regulated any "new uses of asbestos," and certain specifically identified asbestos-containing products. "New uses of asbestos" means those commercial uses of asbestos not identified in 40 CFR 763.165, and not excluded specifically by the definition, the manufacture, importation, or processing of which would be initiated for the first time after August 25, 1989 (40 CFR 763.163). After August 27, 1990, the rule banned the manufacture, importation, and processing of all stage one products, and required that those products be labeled while they remained in distribution (40 CFR 763.165(a), 763.167(a), and 763.171(a)). After August 27, 1992, the rule also prohibited the distribution in commerce of all stage one products (40 CFR 763.169(a)). The second and third stages of the ban regulated additional types of asbestos-containing products. These two later stages of the rule contained provisions that were comparable to the first stage, but that were to take effect from 1992 through 1997 (40 CFR 763.165(b) through (e), 763.167(b) and (c), 763.169(b) through (d), and 763.171(b) and (c)).

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 763

[OPPTS-62114A; FRL-4635-7]

Asbestos, Manufacture, Importation, Processing and Distribution Prohibitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Continuing restrictions on certain asbestos-containing products.

SUMMARY: EPA is announcing its factual determinations concerning the regulatory status of asbestos-containing product categories originally banned in the Asbestos Ban and Phaseout Rule. The United States Court of Appeals for the Fifth Circuit (the "Court") vacated and remanded most of the rule which prohibited the future manufacture, importation, processing, and distribution in commerce of certain asbestos-containing products, and required the labeling of those products in the interim. In a subsequent clarification, the Court noted that the rule continued to govern asbestos-containing products that were not being manufactured, imported, or processed on July 12, 1989. EPA has concluded that six asbestos-containing product categories were not being manufactured, processed, or imported on July 12, 1989,

On October 18, 1991, the United States Court of Appeals for the Fifth Circuit vacated and remanded most of the rule (*Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir., 1991)). The Court agreed with EPA's determination that asbestos is hazardous and presents similar risks throughout different industries. It also affirmed EPA's authority to issue rules that ban all uses of a toxic substance under TSCA. The Court, however, held that parts of the rule were not supported by substantial evidence because EPA failed to sustain its burden under TSCA section 6(a) of showing that the products banned by the rule present an unreasonable risk, and that a less burdensome regulation would not adequately protect against that risk. The Court also found that EPA failed to give adequate notice and opportunity to comment on the use of analogous exposure data to support some parts of the rule.

Although the Court vacated and remanded most of the rule, it left intact the portion of the rule that regulates products that were not being manufactured, produced, or imported when the rule was published on July 12, 1989. The Court concluded that it "will not disturb the agency's decision to ban products that no longer are being produced in or imported into the United States." *Id.* at 1229. In arriving at this decision, the Court found that TSCA gave EPA the general authority to ban future uses of asbestos. Moreover, the Court determined that EPA properly evaluated the benefits and risks of banning such products when it promulgated the rule. Petitioners had argued that the benefits outweighed the risks because the benefits of a product that is not being produced is more than zero, in that it may find a future use, while the estimated risk is zero. The Court noted, however, that this balance would soon change when the product returned to the marketplace. As a result, the Court found "it was not error on the part of the EPA" to ban products that "temporarily show[ed] no risk because they were not part of this country's present stream of commerce." *Id.* Even if some future use should arise for these products, the Court noted, manufacturers and importers have access to the waiver provisions in the rule. *Id.* Finally, the Court explicitly rejected Petitioners' argument that "EPA overstepped TSCA's bounds by seeking to ban products that once were, but no longer are, being produced in the United States." *Id.* at 1228.

Based upon the above language in the opinion, EPA tentatively concluded that the Court intended to leave in effect that

part of the rule that governed products that were not being produced or imported. To ensure that it was properly interpreting the decision, however, EPA filed a Motion for Clarification ("the Motion") with the Court. In the Motion, EPA noted that, while one section of the opinion seemed to leave intact the portion of the rule that governed asbestos-containing products that were no longer being produced or imported, another section of the opinion could arguably be interpreted as vacating and remanding the entire rule. EPA asked the Court to resolve the possible inconsistency. *Id.* at 591-592. EPA specifically requested clarification with respect to the status of the various asbestos-containing products that were banned in the first phase of the rule, and thus were no longer being manufactured, produced, or imported.

The Petitioners, including the Asbestos Information Association (AIA), opposed the Motion. They argued that EPA had improperly suggested that portions of the rule were not vacated, and asserted that the Court had vacated and remanded the rule in its entirety. They also noted that there was some uncertainty regarding whether some products banned by EPA were being manufactured or imported as of July 12, 1989, and suggested that the Agency, rather than the Court, should resolve this issue. Petitioners' Response to EPA's Motion for Time Extension, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991)(No. 89-4596).

The Court granted EPA's Motion. It did not adopt Petitioners' argument that the entire rule was vacated. Instead, the Court clarified the identity of the class of asbestos-containing products that continue to be subject to the rule. It specified that the "holding in part V.D. of our opinion applies only to products that were not being manufactured, imported, or processed on July 12, 1989." *Id.* at 1230. It also left it to EPA to resolve any factual disputes regarding whether a particular product fell within that category. *Id.*

In light of this clarification, it is clear that the Court did not require EPA to go through an entirely new rulemaking process, but instead authorized a factual inquiry into the actual status of particular asbestos-containing products as necessary.

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

Because the Court's date of July 12, 1989, corresponded to the date of publication, rather than to any time

benchmark in the rule, EPA decided that additional information regarding the July 12, 1989, status of various asbestos-containing products would assist the Agency in identifying the products that continue to be subject to the rule. Although published in 1989, the Regulatory Impact Analysis (RIA) only contained information that was current as of 1986. (The purpose of a RIA is to show that the rule complies with the requirements of Executive Order 12291. The RIA includes information on the need for the rule, the available options, the costs and benefits of each option, and the justification for the option selected. In addition, the RIA supports the finding of "unreasonable risk" required under TSCA section 6(a), and the determination of the least burdensome requirements to protect adequately against the risk.) However, two surveys conducted by EPA in 1991 confirmed information in the RIA. Moreover, in pleadings in *Corrosion Proof Fittings*, AIA and the Asbestos Institute (AI) acknowledged to the Court that some products were not in production when the final rule was issued in 1989. Joint Brief of Petitioners, the Asbestos Information Association/North America and the Asbestos Institute, at 94-95 and n. 241, *Corrosion Proof Fittings* (No. 89-4596). Other information submitted to EPA, however, raised questions about the status of some products.

As a result, EPA issued a notice in the Federal Register of April 2, 1992, (57 FR 11364) that requested information on the status of 14 product categories in the rule that, based on information contained in the RIA for the rule, may no longer have been manufactured, processed, or imported when the rule was published on July 12, 1989. The information was solicited in order to determine which of these categories were in fact no longer being manufactured, processed, or imported on July 12, 1989, and are, therefore, still subject to the rule. In addition, EPA solicited information on the status of any other product category in the rule that also may no longer have been manufactured, processed, or imported on July 12, 1989.

EPA supplemented the original information in the RIA with the comments received in response to the Federal Register notice and with additional research. In evaluating the information, EPA did not conclude that a product category was no longer being manufactured, processed, or imported simply because no information was available, or just because no comment was received in response to the Federal Register notice. Rather, EPA only

concluded that a product was no longer being manufactured, processed, or imported if there were a factual basis to support such a conclusion. Doubts were resolved in favor of concluding that a product was still being manufactured, processed, or imported.

This document gives EPA's final factual determinations and summarizes the information upon which each determination was made. The documents supporting EPA's conclusions have been deposited in the docket for this fact-finding.

II. Status of Products

In accordance with the Court decision, and based on information from the RIA for the rule, responses to EPA's April 2, 1992, notice in the Federal Register, and additional EPA research, EPA concludes that:

1. The six asbestos-containing product categories that are still subject to the rule are corrugated paper, rollboard, commercial paper, specialty paper, flooring felt, and new uses of asbestos.

2. The asbestos-containing product categories that are no longer subject to the rule are: asbestos-cement corrugated sheet, asbestos-cement flat sheet, asbestos clothing, pipeline wrap, roofing felt, vinyl-asbestos floor tile, asbestos-cement shingle, millboard, asbestos-cement pipe, automatic transmission components, clutch facings, friction materials, disc brake pads, drum brake linings, brake blocks, gaskets, non-roofing coatings, and roof coatings.

A. Products Still Subject to the Asbestos Ban

EPA has concluded that the Court in *Corrosion Proof Fittings* left intact the provisions of the rule that governed asbestos-containing products that were not being manufactured, produced, or imported on July 12, 1989. In its clarification, the Court recognized that EPA could undertake a factual inquiry into the July 12, 1989, status of particular products to determine whether such products continued to be regulated by the rule.

In response to EPA's April 2, 1992, Federal Register notice, AIA, one of the Petitioners in *Corrosion Proof Fittings*, submitted comments stating that the decision voided the entire rule and that "bans on discontinued products must take the form of a new rule." As indicated previously, EPA does not believe that AIA's interpretation is supported by the language of the decision. See discussion in Unit I of this document. Therefore, EPA concludes that the following product categories remain subject to the ban rule:

1. *New uses of asbestos.* By definition, new uses of asbestos are those that were not manufactured, processed, or imported on July 12, 1989. The rule defines "new uses of asbestos" as "commercial uses of asbestos not identified in § 763.165 the manufacture, importation, or processing of which would be initiated for the first time after August 25, 1989" (40 CFR 763.163). Based upon this definition, any product that was being manufactured, imported, or processed on July 12, 1989, automatically cannot be a "new use of asbestos" because the manufacture, importation, or processing of such a product would have been initiated on or before August 25, 1989. Thus, any product that is a "new use of asbestos" could not have been manufactured, imported, or processed on July 12, 1989, and continues to be governed by the rule pursuant to the Court's clarified decision.

2. *Corrugated paper.* The 1989 RIA for the rule concluded that there were no longer any manufacturers, processors, or importers of corrugated paper in 1986. Responses to EPA's April 2, 1992, Federal Register notice did not include any comment indicating that asbestos-containing corrugated paper was being manufactured, processed, or imported on July 12, 1989. Thus, EPA's conclusion in the RIA is not refuted. Therefore, EPA concludes that asbestos-containing corrugated paper was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

3. *Rollboard.* The 1989 RIA for the rule concluded that there were no longer any manufacturers, processors, or importers of rollboard in 1986. Responses to EPA's April 2, 1992, Federal Register notice did not include any comment indicating that asbestos-containing rollboard was being manufactured, processed, or imported on July 12, 1989. Thus, EPA's conclusion in the RIA is not refuted. Therefore, EPA concludes that asbestos-containing rollboard was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

4. *Commercial paper.* The 1989 RIA for the rule concluded that there were no longer any manufacturers, processors, or importers of commercial paper in 1986, although one company was selling small amounts out of inventory. Responses to EPA's April 2, 1992, Federal Register notice did not include any comment indicating that asbestos-containing commercial paper was being manufactured, processed, or imported on July 12, 1989. The company that was selling small amounts

out of inventory, Quin-T, did not comment on commercial paper, although it did comment on pipeline wrap. Thus, EPA's conclusion in the RIA is not refuted. Therefore, EPA concludes that commercial paper was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

5. *Specialty paper.* The 1989 RIA for the rule assumed that two companies that were producing asbestos-containing specialty paper in 1981 were still producing specialty paper in 1986 because the companies did not respond to a 1985 survey. The RIA allocated 50 percent of the market for specialty paper to each company, indicating that there was no importation. In response to a phone inquiry from EPA in 1992, both companies reported that they stopped using asbestos before 1986.

In its response to the April 2, 1992, Federal Register notice, AIA expressly declined to address specialty paper, but stated that EPA's 1989 notice in the Federal Register "found [specialty paper] still in commerce," because "specialty paper was noted to still be in production, and cancers avoided by a ban were calculated." The 1989 Federal Register notice did include an estimate of the number of cancer cases avoided that would result from the ban on specialty paper. At the time, EPA assumed, for purposes of analysis, that the two companies that had been producing asbestos-containing specialty paper in 1981, were still producing asbestos-containing specialty paper. However, as indicated above, the companies reported that they actually had stopped using asbestos before 1986.

Responses to EPA's April 2, 1992, Federal Register notice did not provide any evidence that specialty paper was being manufactured, processed, or imported on July 12, 1989. Therefore, EPA concludes that asbestos-containing specialty paper was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

6. *Flooring felt.* The 1989 RIA for the rule concluded that there were no producers, processors, or importers of flooring felt in 1986.

In response to EPA's April 2, 1992, Federal Register notice, the Resilient Floor Covering Institute (RFCI) submitted a letter to EPA stating that its members had not manufactured or imported asbestos-containing products since the mid-80s. RFCI also submitted Department of Commerce import reports for 1989 and 1990 which showed importation of "asbestos vinyl tile" and "sheet vinyl flooring." RFCI asserted that "because vinyl tile containing

asbestos was imported during this time period, it is reasonable to assume that a portion of the sheet vinyl imports contained an asbestos felt backing." RFCI, however, did not submit any information that would support its assertion that that assumption would be reasonable, and EPA is not aware of any such information.

AIA expressly declined to submit information concerning the status of flooring felt. AIA simply alleged that EPA "found [flooring felt] still in commerce" in the preamble to the rule, because the preamble purportedly said that "flooring felt was 'largely' no longer produced in the U.S." The preamble statement referenced by AIA actually referred to several different types of felt product categories, including roofing felt, pipeline wrap and flooring felt, and provided that "these products are largely no longer produced in the U.S." 54 FR 29490. Because the statement was general in nature, referring to the status of several product categories, it cannot logically be relied upon to demonstrate that one particular category of felt product, flooring felt, was actually in production. Moreover, the preamble discussion of felt products specifically provides that there was "no current U.S. manufacture or import" of flooring felt.

EPA was not able to locate any company that manufactured, processed, or produced asbestos-containing flooring felt, and no direct evidence was submitted to show that asbestos-containing flooring felt was, in fact, being manufactured, processed, or imported in July 1989. Therefore, EPA concludes that asbestos-containing flooring felt was no longer being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

B. Products No Longer Subject to the Asbestos Ban

Except as provided in Unit I.A of this document, EPA concludes that all other products originally subject to the ban rule were being manufactured, processed, or imported on July 12, 1989, and are therefore no longer subject to the ban rule. Of the 14 products mentioned in the April 2, 1992, Federal Register notice, the following eight are no longer subject to the ban rule:

1. *Pipeline wrap.* In the 1989 RIA for the rule, EPA concluded that in 1986, one former producer was selling pipeline wrap out of inventory and might restart production if demand warranted it, and that only one company was importing the product.

In response to EPA's April 2, 1992, Federal Register notice, the AIA submitted production summaries from

the Quin-T Company indicating that it had produced asbestos-containing pipeline wrap until the end of 1989. AIA also submitted U.S. Customs Declarations that showed importation of asbestos-containing pipeline wrap after July 1989. Based upon this information, EPA concludes that asbestos-containing pipeline wrap was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

2. *Vinyl/asbestos tile.* The 1989 RIA for the rule concluded that there were no manufacturers, processors, or importers of vinyl/asbestos tile in 1986.

In response to EPA's April 2, 1992, Federal Register notice, RFCI stated that its members had not manufactured an asbestos-containing product since the mid-80s. But RFCI also submitted Department of Commerce import reports for 1989 and 1990 that showed importation of "vinyl/asbestos tile." Therefore, EPA concludes that vinyl/asbestos tile was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

3. *Millboard.* The 1989 RIA for the rule concluded that in 1986 there was one primary processor, one former processor that continued to sell out of inventory, and four secondary processors, but no importers of asbestos-containing millboard.

In response to EPA's April 2, 1992, Federal Register notice, AIA submitted production notes from the Quin-T Company that showed production of asbestos-containing millboard in 1989, 1990, and 1992, and Department of Commerce import reports for 1989 and 1990 that showed importation of "asbestos paper, millboard, and felt." Thus, EPA concludes that asbestos-containing millboard was still being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

4. *Asbestos clothing.* The 1989 RIA for the rule concluded that in 1986 "small quantities of asbestos-containing gloves and mittens have been and continue to be imported from foreign countries . . . but no specific data could be identified."

In response to EPA's April 2, 1992, Federal Register notice, AIA submitted Department of Commerce import reports for 1989 and 1990 that showed importation of "asbestos clothing, accessories, and headgear excl. footwear." Therefore, EPA concludes that asbestos-containing clothing was still being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

5. *Asbestos-cement corrugated sheet.* The 1989 RIA for the rule concluded that asbestos-cement corrugated sheet

was no longer produced in the U.S. and that there was only one importer in 1986.

In response to EPA's April 2, 1992, Federal Register notice, AIA submitted a number of documents to show that asbestos-cement corrugated sheet was still being processed or imported. Among the documents submitted by AIA were: (1) A January 1989, purchase order to Turner Building Products in Mission, British Columbia, Canada, from Western Specialty Products in San Jose, California, for Potlatch Corporation in Lewiston, Idaho, for "cavity deck roofing," (2) a March 1989, Canadian Customs export declaration from Turner to Western for "cavity deck," (3) a December 1990, Material Safety Data Sheet (MSDS) from Turner for "T Deck and Cavity Deck," and (4) undated product literature from Turner for "Asbestos Cement Roof Decks." AIA also submitted Department of Commerce import reports for "Corrugated Sheets of Asbestos Cement or Cellulose Fiber Cement or the like" that show imports in 1989.

One importer, AWMCO, stated that it had imported and fabricated asbestos-cement sheet until August 1990, and continued to sell asbestos-cement sheet out of inventory until 1992, when it resumed importing and fabrication after consultation with AIA. Therefore, EPA concludes that asbestos-cement corrugated sheet was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

6. *Asbestos-cement flat sheet.* The 1989 RIA for the rule concluded that there was one producer of asbestos-cement flat sheet and one importer in 1986.

In response to EPA's April 2, 1992, Federal Register notice, AIA submitted a number of documents to show that asbestos-cement flat sheet was still being processed or imported. Among the documents were: (1) Two 1989 Canadian Customs declarations from Turner to AWMCO, an MSDS from Turner, and product literature from Turner for asbestos-cement sheet products, (2) a 1989 Mexican Export Declaration and shipping papers from Versalite del Noroeste in Mexico to Supralite in the U.S. for asbestos-cement sheet, and (3) Department of Commerce import reports that show imports of "Sheets, Panels, Tiles and Similar Articles [Not Elsewhere Specified or Included] of Asbestos Cement, Cellulose Fiber Cement, or the like" in 1989 and 1990.

In its comments, AWMCO stated that it had imported and fabricated asbestos-cement sheet until August 1990, and

continued to sell out of inventory until 1992, when it resumed import and fabrication after consultation with AIA. Therefore, EPA concludes that asbestos-cement flat sheet was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

7. *Roofing felt.* The 1989 RIA for the rule concluded that, while there were no primary processors, there was one secondary processor, and one importer of asbestos-containing roofing felt in 1986.

The importer, Power Marketing Group, reported that it imported a large stock of asbestos-containing roofing felt before the ban went into effect, and continued to sell out of inventory until the stock was exhausted in 1991.

In response to EPA's April 2, 1992, Federal Register notice, AIA submitted product literature from Kingsley-Falls, Inc., for asbestos-containing roofing felt, and Canadian Customs declarations and shipping papers to show that asbestos-containing roofing felt was being imported in January and August 1989. AIA also submitted product literature from Supradur Manufacturing Corporation, an American manufacturer, that includes asbestos-containing roofing felt. EPA concludes that asbestos-containing roofing felt was still being processed, or imported in July 1989, and is no longer subject to the rule.

8. *Asbestos-cement shingle.* The 1989 RIA for the rule concluded that there was only one remaining domestic producer and one known importer of asbestos-cement shingle in 1986.

In response to EPA's April 2, 1992, Federal Register notice, AIA submitted product literature from the Supradur Manufacturing Corporation for asbestos-cement roofing shingles, and a letter from Supradur to AIA that stated Supradur was manufacturing asbestos-cement shingle in Pennsylvania "as of July 1, 1989" and "continued until 1992," and that asbestos-cement shingle products are "still being sold and applied in the U.S. market." As a result, EPA concludes that asbestos-cement shingles were still being manufactured, processed, or imported on July 12, 1989, and are no longer subject to the rule.

III. Public Record

EPA established a record (docket number OPPTS-62114) for comments submitted pursuant to the April 2, 1992, Federal Register notice, and for the information listed below regarding the July 12, 1989, status of asbestos-containing products received by EPA after the Court's decision. A public version of the record, from which all

confidential business information has been deleted, is available for inspection in the TSCA Nonconfidential Information Center (NCIC), Rm. E-G102, 401 M St., SW, Washington, DC, from 8 a.m. to noon and from 1 p.m. to 4 p.m., Monday through Friday, except legal holidays. These documents include:

1. Decision of the U.S. Court of Appeals for the Fifth Circuit in *Corrosion Proof Fittings vs. EPA*, No. 89-4586 (5th Cir., October 18, 1991).
2. U.S. Fifth Circuit Court of Appeals Clarification of its Decision in *Corrosion Proof Fittings vs. EPA*, No. 89-456 (5th Cir., November 15, 1991).
3. *Regulatory Impact Analysis of Controls on Asbestos and Asbestos Products*, Final Report, Volume III, Appendix F, January 19, 1989.
4. *RM2 Scoping Asbestos: Current Commercial Status of Seven Asbestos Product Categories*, Mathtech, December 20, 1991.
5. *RM2 Scoping Asbestos: Industry/Use Profile*, Mathtech, November 26, 1991.
6. *ABPO Rule Remand Activities*, November 6, 1992, briefing for the Assistant Administrator of the Office of Pollution Prevention and Toxics.
7. Record of phone call to the Bureau of Mines concerning asbestos producer survey, October 1992.
8. Record of phone call to Alsop Engineering and to Beaver Industries concerning asbestos use, September 1992.
9. Memo from ICF Incorporated to Kent Benjamin, EPA, concerning Asbestos Rulemaking Support, August 28, 1992.
10. Record of phone call to Tuxaux Atlas concerning asbestos use, August 1992.

List of Subjects in 40 CFR Part 763

Environmental protection, Asbestos.

Dated: October 22, 1993.

Victor J. Kinn,

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Prevention, Pesticides and Toxic Substances.
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