

Kirkland & Ellis(AIA/AI) TO USEPA
OPTS 62036 Asbestos Ban

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KIRKLAND & ELLIS

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

Chicago Office
200 East Randolph Drive
Chicago, Illinois 60601
Telex 25-4361
312 861-2000

Denver Office
1999 Broadway
Denver, Colorado 80202
303 291-3000

To Call Writer Direct
202 879- 5018

September 15, 1986

Mr. David L. Dull
Deputy Director
Chemical Control Division
United States Environmental
Protection Agency
401 M Street, S.W.
513 East Tower
Washington, D. C. 20460

Re: Dkt. No. OPTS 62036 - Asbestos Ban and Phaseout

Dear Mr. Dull:

By this letter and the attached "Revised List of Disputed Issues of Material Fact," the Asbestos Information Association/North America ("AIA/NA") and the Asbestos Institute ("AI") request that they be afforded the opportunity to cross-examine various present and former EPA employees, outside contractors and independent medical experts in accordance with TSCA Sections 6(c) and 19(c). AIA/NA's and AI's cross-examination Request updates their preliminary request made June 29, 1986, and incorporates by reference that request, as well as the various procedural motions AIA/NA and AI made previously in this proceeding.

This letter addresses: (1) the requirements of TSCA and the nature of the upcoming cross-examination hearings; (2) the specific factual issues for which cross-examination is required under TSCA Sections 6(c) and 19(c); and (3) the additional issues raised by EPA's August 1, 1986 announcement to asbestos hearing participants. We suggest that a prehearing conference be scheduled as soon as possible after you rule on this request, and that counsel for EPA, AIA/NA and AI, and other interested parties meet in advance of the prehearing conference to discuss, and hopefully agree upon, the scheduling of witnesses, numbering of exhibits and similar "housekeeping" matters pertaining to conduct of the hearings.

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1. The Requirements of TSCA and the Nature of the
Upcoming Cross-Examination Hearings.

AIA/NA and AI do not intend to reiterate here their rights under TSCA Sections 6(c) and 19(c) except to emphasize once again that the principal purpose of those provisions is to insure a "full and true disclosure" with respect to disputed issues of material fact so that the Administrator can make a "fair determination" on the administrative record. Given the unprecedented nature and severity of the actions EPA is proposing with respect to asbestos, it is especially important that full procedural protections be afforded here. Accordingly, AIA/NA and AI make the following suggestions regarding the nature and conduct of the cross-examination hearings.

First, AIA/NA and AI support the suggestion of the Swiss Eternit Group ("SEG") that EPA invite internationally known health experts to testify and be cross-examined. See Hearing Transcript ("Tr.") at 878-79, 907-912 (July 21, 1986). As Chairman Dupree and his colleagues from the Royal Commission testified, such a process was extremely successful in bringing out the facts and in encouraging the development of highly protective regulatory alternatives in Ontario. See Tr. at 1179-80, 1242-43 (July 24, 1986). In supporting the SEG proposal, AIA/NA and AI broaden their prior request (originally covering Drs. McDonald, Mossman and Weill) to include those experts listed by SEG as well as any other asbestos health experts EPA may wish to call. See our July 14, 1986 letter.

Second, in addition to the asbestos health issues covered by the SEG proposal, there are disputed issues of material fact concerning: (1) current and projected asbestos exposures, (2) the risks posed by substitute materials, (3) the costs of banning and/or phasing out asbestos, and (4) the benefits and costs of less burdensome alternatives short of a ban or phaseout that might be adopted by EPA. AIA/NA and AI have presented extensive factual evidence and expert testimony on each of these sets of issues and have stressed repeatedly their willingness to have AIA/NA's and AI's evidence and witnesses cross-examined by EPA counsel or other parties. See our letters dated June 29 and July 14, 1986.

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Under TSCA, the burden of proof is on EPA so that the cross-examination hearings should begin with the presentation and cross-examination of EPA's evidence and witnesses. See our June 29 and July 14, 1986 letters. AIA/NA and AI would support proceeding either issue-by-issue (e.g., EPA's exposure case followed by AIA/NA's exposure case) or by presentation of EPA's entire case on the four sets of issues identified above followed by AIA/NA's entire case on the same issues. Presentation and cross-examination of asbestos health experts under the SEG proposal could either precede or follow hearings on the four other sets of factual issues in dispute.

Finally, AIA/NA and AI strongly support efficient and expeditious conduct of the cross-examination hearings. To that end, we have previously requested appointment of an Administrative Law Judge to assure that the hearings remain focused and are conducted in a fair and efficient manner. Those considerations remain critical and accordingly, we ask again that you reconsider your decision denying the appointment of an Administrative Law Judge.

Without impugning EPA's good intentions, AIA/NA and AI understandably question the impartiality of panel members who may be required to appear as witnesses. Moreover, apart from our concern about interest of EPA staff witnesses in the outcome of the hearing, we are concerned about the panel's technical competence to make evidentiary rulings, assemble a proper hearing record, and control the pace of the hearings. As indicated in our previous Motion and correspondence, the FTC, OSHA, and EPA itself have in identical or analogous informal rulemaking proceedings accepted the wisdom of having an Administrative Law Judge preside over cross-examination hearings. See AIA/NA and AI's June 29, 1986 Motion; our July 14, 1986 letter.

2. The Specific Factual Issues Covered by AIA/NA's and AI's Request.

The attached "Revised List of Disputed Issues of Material Fact" sets forth the specific categories of issues and sub-issues for which cross-examination is required at the upcoming hearings. AIA/NA's and AI's Request complies with TSCA Sec-

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tions 6(c) and 19(c) and the spirit of EPA's procedural rules, although in certain respects literal application of the rules may be impracticable or inconsistent with TSCA in this case.

As detailed in AIA/NA's and AI's June 29, 1986 Comments, EPA's case for banning and/or phasing out asbestos rests upon a required TSCA Section 6(a) finding that EPA prove by "substantial evidence" that current asbestos uses present an "unreasonable risk." EPA has attempted to shoulder its burden by calculating the carcinogenic potency and expected exposures from currently marketed asbestos products and then balancing the resulting benefits of ending such exposures against the costs to consumers and producers of a ban and phaseout. In addition to facts bearing on carcinogenic potency, current asbestos exposures, and the costs of a ban or phaseout, other facts upon which EPA's "unreasonable risk" finding depend include the risks (potency and exposure) of asbestos substitutes and the comparative costs and benefits of "less burdensome" regulatory measures than a total asbestos ban or phaseout.

It cannot be denied that the factual evidence presented by AIA/NA and AI differs greatly from the factual evidence on which EPA's proposal purports to be based. Specifically, AIA/NA's and AI's evidence disputes EPA's evidence in the following key respects: (1) EPA's potency calculations average five times higher than those presented by AIA/NA's and AI's experts; (2) EPA's exposure estimates average 40 times higher than those found by AIA/NA's and AI's experts; (3) EPA cost estimates average two times lower than those of AIA/NA's and AI's experts; (4) AIA/NA's and AI's experts present evidence of significant risks from substitutes while EPA finds none; and (5) AIA/NA and AI specify "less burdensome alternatives" while EPA considers only ban and phaseout options. Each of these five areas of factual divergence may be disaggregated and depends, in turn, on disputed factual evidence for specific asbestos product categories, fiber sizes and types, or substitute products.

AIA/NA's and AI's Revised List identifies as specifically as possible each of the particular issues and sub-issues for which cross-examination is required. What AIA/NA and AI wish to probe by cross-examination is, quite simply, what EPA and its references assert to be or not to be, or

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what EPA must prove to be or not to be, before it applies policy judgments. Such questions are inherently factual in contrast to the policy-type issues generally addressed by AIA/NA, AI and other parties in the legislative hearings.

To illustrate, AIA/NA's and AI's purpose in the cross-examination hearings is not to probe, for example, whether scarce automotive engineering resources should be devoted to replacing asbestos in brakes rather than meeting DOT's pending proposal to harmonize domestic and European braking standards. See Tr. at 381-85 (July 16, 1986). Nor do AIA/NA and AI intend to ask EPA witnesses whether the Agency should consider in reaching a final decision whether a ban of asbestos-cement pipe in the United States would effectively deprive persons in developing countries of the same products. See Tr. at 498-501, 507, 523-25, 531 (July 17, 1986); Tr. at 876-77 (July 21, 1986). Instead, the issues covered by AIA/NA's and AI's Request, and the questions we intend to explore, are as straightforward as, for example, how many full-time workers are involved in installation of asbestos-cement products and what are their average exposures.

To categorize such questions as being "of an analytical or policy nature" would provide EPA license to regulate by assumptions -- no matter how divorced from the true facts -- rather than by "substantial evidence" as required by TSCA. Although EPA has yet to reveal the full bases for its estimates on the specific issues contained in AIA/NA's and AI's Revised List, we suspect EPA's estimates are built on assumptions applied to the most general sorts of economic data with little or no account given to the much more precise, product specific factual data upon which AIA/NA's and AI's witnesses rely.

The materiality of these differences and the effect they may have on the costs and benefits of EPA's proposal are demonstrated in AIA/NA's and AI's Comments filed on June 29, 1986. Thus, in contrast to EPA's purported factual finding that its proposal would save approximately 1,000 lives at a cost of \$2 million each, AIA/NA's and AI's evidence demonstrates that EPA's proposal would expend "over 100 million to several billion dollars for each hypothetical life saved." See our June 29, 1986 letter and opening written Comments. Significantly, the Panel acknowledged as much at the legislative hearings, saying that "[t]here are numbers in

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dispute, and we need to know how you arrived at those numbers, and feel that your experts are the best people to give us information on this." Tr. at 482 (July 17, 1986).

In conformance with § 750.8(a)(2) of EPA's rules, AIA/NA and AI have attempted as best they can in their Revised List to identify the persons from whom cross-examination will be necessary on the disputed material fact issues. At this point, we are unable to provide an estimate of the time necessary to cross-examine each witness but expect that cross-examination will "result in a full and true disclosure resolving the issue of material fact involved." The length of cross-examination depends upon a variety of factors including the knowledge of the witness, the responsiveness of witness answers, and the nature and extent of objections interposed by EPA counsel, not to mention the overriding question of whether the proceedings are presided over by an experienced Administrative Law Judge rather than by the panel.

As emphasized since the outset of these proceedings, AIA/NA and AI wish to see these proceedings concluded as promptly as possible. See AIA/NA's March 6, 1986 letter to Administrator Thomas. To that end, AIA/NA and AI will endeavor to complete their cross-examination of EPA's evidence and witnesses within one week, although more time could be required depending upon the factors noted above. (This estimate does not include the time that would be necessary for cross-examination of independent asbestos health experts under the SEG proposal.)

AIA/NA and AI find no authority for EPA to require "alternative means of clarifying the record in lieu of cross-examination," since no such precondition to cross-examination is anywhere mentioned in Section 6(c) of TSCA. In any event, AIA/NA and AI envision no "alternative means" of discovering the facts which is as likely to be as effective as cross-examination. Legal scholars have discounted written depositions as generally inferior to focused oral examination. 1/

1/ F. James & G. Hazard, Civil Procedure 184 (2d ed. 1977).

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Moreover, AIA/NA's repeated attempts to obtain documents and written clarifications from EPA in this proceeding have proved singularly time-consuming and often unsuccessful. ^{2/} Under these circumstances, devoting the relatively short time required for an oral cross-examination of EPA's witnesses should prove more efficient and efficacious than any alternative means of completing the record.

3. The Additional Issues Raised by EPA's August 1, 1986 Announcement.

The above discussion together with the attached Revised List of Disputed Issues of Material Fact constitute AIA/NA's and AI's cross-examination request under TSCA and EPA's rules. On August 1, 1986, EPA attempted to amend its rules by your announcement to the effect that "persons requesting cross-examination [must] specify in writing the precise questions they wish to ask and specifically refer to the appropriate portions of the rulemaking record," and that "[i]t is the Agency's intention to limit cross-examination to the written questions submitted in advance" These additional requirements have no basis in TSCA or EPA's rules, nor were they issued in conformance with the Administrative Procedure Act.

The scheme suggested by your August 1, 1986 Announcement, far from encouraging "full and true disclosure," is likely to produce just the opposite. Cross-examination designed to bring out the facts requires a give and take between counsel and the witness, not canned questions and canned answers without flexibility to depart from the script. The attached Revised List of Disputed Issues of Material Fact is, of course, framed in terms of issues or questions but the questions we intend to pose will be both more specific and far more numerous. Nonetheless, the

^{2/} See AIA/NA's February 12, March 6, 1986 letters; AIA/NA's and AI's June 29, 1986 Motion to Subpoena Documents; AIA/NA's and AI's August 21, 1986 Response to EPA Written Questions (setting forth questions to EPA).

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Revised List may be considered an outline of topics to be covered and a preview of the scope of the questions to be asked.

To the extent that your August 1, 1986 announcement was intended to facilitate witness preparation, AIA/NA's and AI's Revised List should be adequate for that purpose. Apart from questions relating to the witness' professional qualifications and expertise, our questions will all entail data in the administrative record, and will be limited to the witness' personal knowledge. Under the circumstances, AIA/NA and AI have been as specific as possible about their cross-examination plans. We expect EPA counsel to reciprocate if EPA wishes to cross-examine any of AIA/NA's and AI's expert witnesses. The need for a reciprocal disclosure by EPA counsel is another matter that can be dealt with at the prehearing conference suggested at the beginning of this letter.

Sincerely,

Edward W. Warren p.c.
Edward W. Warren, P.C.

Counsel for the Asbestos
Information Association/
North America and the
Asbestos Institute

Attachment

cc: Docket Office (With Attachment)
Alan Carpien (With Attachment)