

Talking Points on EPA's Response to the Court in: Corrosion Proof Fittings v. Environmental Protection Agency, No. 89-4596, slip op. (5th Cir. Oct. 18, 1991)

The Court's Decision:

-On October 18, 1991, the U.S. Court of Appeals for the Fifth Circuit issued a decision that vacated and remanded EPA's Asbestos Ban and Phase-out Rule (ABPR), which prohibits the manufacture, importation, processing, and distribution of certain asbestos-containing products, and requires the labelling of those products.

-The Court held that the rule was not supported by substantial evidence because EPA failed to sustain its burden of showing that the products banned by the rule present an unreasonable risk and that less burdensome regulation would not adequately mitigate that risk.

-Specifically, the Court determined that EPA failed to justify the rule because it: did not have a reasonable basis to conclude that there was an unreasonable risk of injury, failed to adequately evaluate the safety of asbestos substitutes, did not conduct a thorough analysis of each of the other less burdensome regulatory alternatives described in TSCA section 6(a), and did not provide notice and an opportunity for comment on the use of analogous exposure data.

EPA's Response:

Motion for Clarification

-On November 4, 1991, EPA filed with the Fifth Circuit Court of Appeals a "Motion for Clarification," seeking clarification of the Court's decision because ambiguities in the decision suggest that the Court may not have intended to vacate the portion of the rule banning products that were no longer being manufactured.

-In the October 18 decision, the Court had stated that it would "not disturb the agency's decision to ban products that are no longer being produced in or imported into the United States." Nevertheless, the decision appeared to vacate the entire ABPR. Thus, EPA decided to seek clarification.

-On November 15, 1991, the Fifth Circuit Court of Appeals issued an order granting EPA's motion for clarification and clarifying that the portions of the rule that ban asbestos-containing products that were not being manufactured, imported, or processed on July 12, 1989 (the date the final rule was published in the Federal Register) are not vacated.

-Thus, all new uses of asbestos and certain other asbestos-containing products that were not being manufactured, processed, or imported on July 12, 1989 continue to be banned under the ABPR. EPA is currently devising a list of the specific products that continue to be subject to the ban.

Petition for Rehearing

-On November 15, 1991, EPA filed with the Fifth Circuit Court of Appeals a "Petition for Rehearing," which requests that the Court withdraw its October 18, 1991 opinion, order further briefing on certain issues, and issue a revised opinion.

-EPA's petition states that the October 18, 1991 decision contains "serious errors of law" and is "inconsistent with the basic principles of judicial restraint." The petition also maintains that the Court erred by including in its opinion discussions of some issues which were not raised or briefed by the parties, and which EPA had not yet articulated its own interpretations and policy. Moreover, the petition asserts that the Court erred by substituting its interpretation of TSCA and its policy choices for those of the agency.

-EPA's petition focuses on two major aspects of the Court's decision: (1) the Court's interpretation of the requirement in TSCA that EPA use the "least burdensome requirements" in regulating a particular substance; and (2) the Court's interpretation of the factors EPA must consider in determining whether there is an "unreasonable risk" and the precise manner in which EPA is to implement that determination.

-EPA currently is awaiting the Court's decision on the Petition for Rehearing.

Possible Future EPA Actions

-Once the Court rules on EPA's Petition for Rehearing, EPA will have 90 days to determine whether to seek review by the U.S. Supreme Court.

-EPA is currently considering whether to take any further regulatory action on asbestos.