

## TSCA and Asbestos—a New Approach or One That Reveals the Same Old Problems?

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On November 29, EPA announced that it will review the hazard and exposure risks caused by asbestos. Asbestos will be one of the first ten substances to be evaluated under the TSCA amendments commonly referred to as the Lautenberg Act. As we have discussed [elsewhere](#), TSCA now requires EPA to produce a risk evaluation work plan for these substances by June 2017 and complete its evaluation within three years following. If EPA determines any of these substances pose unreasonable risks, then EPA must take further action to mitigate any risks.

Asbestos is different from the other substances on EPA's list and poses different challenges from the others, which all are more traditional industrial chemicals. In contrast to the other chemicals, "asbestos" is not really manufactured itself even when it's used in products because in raw form it exists in nature; has been the focus of massive product liability litigation for a generation; and presents a different set of compliance challenges for industry.

Certain types of "asbestos"—usually defined as a group of silicate minerals with fibrous properties—have historically been component parts of many industrial products because asbestos functions as an insulator. Litigation over asbestos-containing products has driven more than 100 companies bankrupt. Plaintiffs in these cases argue that asbestos in commercial products causes chronic health conditions like asbestosis and mesothelioma.

Yet EPA has never banned asbestos. More than 25 years ago, EPA sought to phase out the use of asbestos in commercial products but was defeated by the Fifth Circuit's decision in *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), which held that EPA had failed to adequately justify the ban. Since then, no regulatory or legislative ban has been enacted.

Instead, as of today, TSCA limits "asbestos-containing materials" to be those containing more than one percent asbestos. See 15 U.S.C. § 2642. TSCA further defines "asbestos" to include only six particular varieties of asbestos, namely chrysotile, crocidolite, amosite, anthophyllite, tremolite, and actinolite. See *id.* § 2642(3). In the most significant criminal litigation about asbestos—*United States v. W.R. Grace et al.*—a primary defense was that the "asbestos" fibers at issue were not among the substances that had been defined as "asbestos" but instead were winchite and richterite (also known as "Libby vermiculite")." See *United States v. W.R. Grace*, 455 F. Supp. 2d 1122 (D. Mt. 2006). While the Ninth Circuit rejected this argument in favor of an undefined yet broader definition of

“asbestos,” see *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007) (rejecting the “six-fiber” definition in favor of one from the Chemical Abstract Service Registry, under which “asbestos” is “a grayish non-combustible material”), the TSCA definition has never been changed.

This creates some confusion surrounding EPA’s November 29 announcement, which refers to just “asbestos.” EPA’s 2014 Work Plan, referenced in the announcement, in turn refers to “asbestos & asbestos-like fibers.”

Should asbestos be regulated by EPA, and if so, how? There are several open questions:

*First*, how should EPA regulate a natural substance like asbestos? By any definition, asbestos is a natural material and is ubiquitous in the environment. That raises questions like how any ban could be implemented. While some substances can be “banned” simply by halting production, the same cannot be said for asbestos. Because asbestos occurs in nature, requiring product manufacturers or producers to certify that their product contains zero asbestos may not be feasible. Other countries have addressed this problem in different ways: European regulations generally ban manufacturers from adding asbestos to products, while Australian regulations specifically exclude naturally occurring asbestos not added for a particular application.

*Second*, how should regulations treat “non-asbestiform” minerals like serpentine, which is the California state rock? When “asbestos” has been regulated in the past, the regulations accounted for the fact that there are some minerals which are chemically similar to asbestos but also occur in different physical configurations or morphologies. In 1992, OSHA determined that non-asbestiform rock particles could be appropriately excluded from the definition of asbestos because they did not pose similar health effects. See OSHA, Final Rule: Occ. Exposure to Asbestos, 57 Fed. Reg. 24310. Legislators have tried and failed to distinguish among these substances. Nine years ago, the Senate passed Senate Bill 742, which included mineral definition criteria that would separate asbestiform from non-asbestiform minerals. It is not clear yet whether these efforts will continue.

*Third*, how will EPA address the “six-fiber” definition of asbestos in TSCA? EPA sought throughout the *Grace* litigation to use a broad definition of asbestos. We don’t now know what precisely will constitute “asbestos” for EPA’s TSCA evaluation.

*Fourth*, how will regulators deal with pressures from parties whose primary interest in asbestos relates to product liability litigation? Regulators should use sound science to decide how to regulate asbestos and other products. And there’s a danger that the medical doctors, geologists, and toxicologists with expertise in asbestos issues who have appeared in asbestos personal injury litigation will be perceived as partial to one side or the other.

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