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By Gary Pasheilich

The US Environmental Protection Agency's (EPA's) December 30, 2020 issuance of its risk evaluation for asbestos under Section 6 of the Toxic Substances Control Act (TSCA) has generated considerable attention and activity, which will likely keep interested parties and the courts busy for quite some time.

As background, TSCA Section 6 requires EPA to prepare risk evaluations for "high priority" chemical substances that "may present an unreasonable risk of injury to health or the environment." Asbestos was selected as one of the "first ten" substances to undergo risk evaluation, as required by the 2016 TSCA amendments, without consideration of costs or other non-risk factors.

The processes for prioritizing and evaluating a chemical substance's risk to health and the environment were set forth in EPA's 2017 Risk Evaluation Rule, which requires evaluation of a chemical's "conditions of use," or "the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of." That rule was challenged and in late 2019, the Ninth Circuit Court of Appeals in *Safer Chemicals, Healthy Families v. EPA*, held that the rule could not exclude "legacy uses" (i.e., uses without ongoing or prospective manufacturing,

processing, or distribution) or “associated disposals” (i.e., future disposal of legacy uses) from the risk evaluations.

In EPA’s asbestos risk evaluation, it concluded (as in the March 30, 2020 draft) that: (1) there is no unreasonable risk *to the environment* under any of the conditions of use, but that (2) there is an unreasonable risk *to workers, occupational non-users, consumers and bystanders* under certain conditions of use. However, after considerable criticism from stakeholders and EPA’s Science Advisory Committee on Chemicals (SACC), EPA characterized the risk evaluation as “Part 1” since it focuses only on chrysotile asbestos, which the agency determined is the only asbestos fiber type imported, processed, or distributed under the conditions of use in the United States. The other five fiber types included in TSCA’s definition of asbestos are subject to an April 25, 2019 significant new use rule (SNUR). EPA has stated that it will conduct “Part 2” of the risk evaluation to address certain “legacy” uses and disposals of asbestos as required by the Ninth Circuit.

On January 26, a group of twelve environmental petitioners filed a Petition for Review with the Ninth Circuit challenging the Part 1 risk evaluation for its alleged failure to “consider the risks of other asbestos fibers, conditions of use, health effects and pathways of exposure that impact public health.” Petitioners will also likely challenge EPA’s finding in Part 1 that 16 of 32 conditions of use did not pose an unreasonable risk to workers, consumers and bystanders, and try to convince the Ninth Circuit to require EPA to reexamine those findings.

Moreover, the environmental groups have mounted a two-front attack on the risk evaluation by separately giving notice on January 26 of their intent to sue under TSCA Section 20, charging that EPA failed to perform its non-discretionary duty to address the use and disposal of legacy asbestos in the risk evaluation, as well as challenging EPA's lack of specifics about a future Part 2 evaluation and failure to set a schedule for completing it. Petitioners' Section 20 challenge would seek to impose a judicially-enforced deadline for evaluation of such legacy uses.

These legal challenges come on the heels of a December 22 decision from the Northern District Court of California, which held that EPA acted unlawfully in denying plaintiffs' TSCA Section 21 citizen petitions asking EPA to require companies importing or using asbestos to report such information on those uses to the TSCA program under the Chemical Data Reporting (CDR) rule. Finding that EPA's rationale was "arbitrary and capricious," the court ordered EPA to quickly amend its CDR rule to address these "deficiencies". However, on February 2, EPA filed a motion asking the Court to rescind its order that EPA amend the CDR rule and instead remand the matter back to EPA to reconsider the petitions in light of the Court's opinion.

A big unanswered question raised in the context of the asbestos risk evaluation is whether — and how — the Biden EPA may alter its chemical risk evaluations moving forward. The CDR rule decision in particular could pave the way for the new administration to revisit and/or supplement reporting

requirements for asbestos. The determination by the Trump EPA to conduct a “Part 2” supplemental risk evaluation of asbestos (instead of revising the initial risk evaluation) also may provide the Biden EPA a basis for “supplementing” the other Trump-era chemical evaluations, potentially evaluating additional conditions of use for those substances and addressing exposures to additional subpopulations (especially in light of the Biden Administration’s focus on environmental justice concerns). In addition, the Biden Administration may utilize the risk-management rulemaking process to impose broader restrictions on substances than the “narrowly tailored” ones signaled by the Trump EPA. President Biden also has ordered EPA to review a number of TSCA-related actions and rules, including the “framework” Risk Evaluation Rule. On February 5, EPA announced that while it is moving forward with the risk management rulemakings for the first ten substances, the Agency is also “actively reviewing the final risk evaluations in light of statutory obligations and policy objectives related to use of the best available science and protection of human health and the environment, in accordance with the Executive Orders and other direction provided by the Biden-Harris Administration.” Consequently, the “first ten” risk evaluations under TSCA may be subject to further revision or unwinding.

Additionally, during a February 3 webinar hosted by EPA, it was clear that whatever action the agency takes regarding asbestos will be contentious. Environmental advocates pushed for a ban on asbestos, while industry representatives challenged EPA’s determination that certain uses posed unreasonable risks,

including highlighting the differences in risk posed by materials with longer or shorter fiber types, claiming that the risk evaluation was overly conservative, and asserting that EPA's cancer potency determinations were not supported by the most recent science.

EPA plans to issue the draft scope document in mid-2021, followed by a final scope document, a draft risk evaluation for public comment, and then a final risk evaluation document. According to EPA, the Part 2 risk evaluation will consider "legacy uses" and associated disposals for the six fiber types of asbestos included within TSCA's definition of asbestos.

The above developments underscore that EPA's asbestos risk evaluation will continue to be the focus of much attention over subsequent months. Interested stakeholders should continue to monitor developments related to Part 1, while also preparing to engage in Part 2 opportunities in the near future.

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