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16 Signature Page*

17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA

19
20 STATE OF CALIFORNIA, by and through
Attorney General Xavier Becerra;
21 COMMONWEALTH OF MASSACHUSETTS,
by and through Attorney General Maura
22 Healey; STATE OF CONNECTICUT, by and
through Attorney General William Tong;
23 STATE OF HAWAII, by and through Attorney
General Clare E. Connors; STATE OF MAINE,
24 by and through Attorney General Aaron M.
Frey; STATE OF MARYLAND, by and
25 through Attorney General Brian E. Frosh;
STATE OF MINNESOTA, by and through
26 Attorney General Keith Ellison;

Case No.: 19-3807

**STATES' COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

1 STATE OF NEW JERSEY, by and through
2 Attorney General Grover Grewal; STATE OF
3 OREGON, by and through Attorney General
4 Ellen F. Rosenblum; and STATE OF
5 WASHINGTON, by and through Attorney
6 General Robert W. Ferguson; and DISTRICT
7 OF COLUMBIA, by and through Attorney
8 General Karl A. Racine,

Plaintiffs,

9 v.

10 UNITED STATES ENVIRONMENTAL
11 PROTECTION AGENCY; and ANDREW
12 WHEELER, Administrator, UNITED STATES
13 ENVIRONMENTAL PROTECTION
14 AGENCY,

Defendants.

15 **INTRODUCTION**

16 1. The State of California, by and through Attorney General Xavier Becerra, the
17 Commonwealth of Massachusetts, by and through Attorney General Maura Healey, and the States
18 of Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, Oregon, Washington, and the
19 District of Columbia (together, Plaintiff States), bring this action for declaratory and injunctive
20 relief to challenge the April 30, 2019 final decision by the Defendant United States
21 Environmental Protection Agency (EPA or Agency). In its decision, EPA wrongfully denied the
22 Plaintiffs' Petition for Rulemaking under Section 21 of the Toxic Substances Control Act (TSCA)
(15 U.S.C. § 2620), dated January 31, 2019 (hereafter, the Petition).

23 2. The Petition submitted by the Plaintiff States sets forth facts showing that it is
24 necessary for EPA to add new provisions to the Chemical Data Reporting regulations (CDR
25 Regulations) (40 C.F.R. Part 711) to require reporting of information regarding asbestos and
26 articles containing asbestos, pursuant to EPA's authority under TSCA Section 8, 15 U.S.C. §
27 2607. A copy of the Petition and of EPA's denial are attached as Exhibit 1 and Exhibit 2,
28 respectively.

1 3. Asbestos is one of the chemicals most harmful to human health in existence and
2 is the known cause of several lung diseases that kill thousands of Americans every year. Yet,
3 EPA is poised to advance a risk evaluation of asbestos under TSCA with unreliable and
4 inadequate information on the quantity of imported asbestos and asbestos-containing articles
5 moving through commerce in the United States, and thus, with unreliable and inadequate
6 information about the exposure pathways that carry a risk to public health. Plaintiff States’
7 Petition urged EPA to proceed in a logical fashion, using the tools available to it to collect
8 adequate information on asbestos volumes and potential routes of exposure for use in its review
9 of this dangerous chemical. As a result of EPA denying the Petition, the Plaintiff States are
10 harmed by not having access to information for the purposes of protecting their residents, by
11 having to undertake additional efforts to regulate to protect their residents, by facing health costs
12 associated with asbestos diseases, and by having our residents subjected to health harms
13 associated with asbestos exposure.

14 4. Specifically, the Petition stated facts showing that data gaps about the amounts
15 of imported asbestos, about asbestos-containing articles, and about products with asbestos
16 impurities, justified EPA adding new provisions to the CDR Regulations that would: (1) eliminate
17 the applicability of the “naturally occurring substance” exemption to asbestos reporting; (2) apply
18 the reporting requirements to processors, as well as manufacturers/importers of asbestos; (3)
19 eliminate the impurities exemption to asbestos reporting; and (4) require reporting about articles
20 that contain asbestos.

21 5. The new regulations the Petition sought would have resulted in the collection of
22 data that currently is not collected, but which accounts for the majority of asbestos/asbestos-
23 containing articles brought into the United States, data required properly to assess the potential
24 hazards and exposure pathways of asbestos. Thus, the new regulations are necessary for EPA to
25 perform a risk evaluation of asbestos pursuant to TSCA Section 6 using information “consistent
26 with the best available science”—meaning information that is “*reliable* and unbiased.” 15 U.S.C.
27 §§ 2605, 2625(h); 40 C.F.R. § 702.33 (emphasis added). In addition, the data that would have
28 resulted from the new regulations would have provided Plaintiff States and their citizens, and

1 others, with more comprehensive and accurate information about the quantity of imported
2 asbestos, articles containing asbestos, and potential asbestos exposure routes; hence, the data
3 would serve an important “right to know” function consistent with TSCA’s intent to provide
4 states and the public with access to information they need to help keep communities safe.

5 6. However, EPA denied the Petition in full. Among its bases for the denial, EPA
6 stated: (1) it already has all of the information about asbestos that it needs to undertake the risk
7 evaluation for asbestos under TSCA;¹ (2) TSCA prohibits it from requesting duplicative
8 information from manufacturers/importers;² and (3) EPA would not have sufficient time to
9 promulgate the requested rulemaking and use the information resulting from it in the asbestos risk
10 evaluation, *even if* it believed the information “would further inform the risk evaluation beyond
11 the information EPA already has.”³

12 7. EPA based its denial of the Petition on inaccurate facts and contradictions of its
13 past statements. Before the Plaintiff States submitted the Petition, EPA issued its “problem
14 formulations,” which was a scoping document for the risk evaluations it intended to undertake for
15 asbestos and certain other chemicals. In its Problem Formulation of the Risk Evaluation for
16 Asbestos (Asbestos Problem Formulation), EPA stated that “[c]onsumer exposures will be
17 difficult to evaluate since the quantities of these [asbestos-containing] products that still might be
18 imported into the United States is not known.”⁴

19 8. Additionally, much of EPA’s information about imported asbestos comes from
20 the U.S. Geological Survey (USGS), which disclaims the completeness of its own information.
21 The USGS notes that its data is only an estimate of total imports,⁵ and that manufactured products
22
23

24 ¹ *See, e.g.*, 84 Fed. Reg. 20,062, 20,066 (May 8, 2019).

25 ² 84 Fed. Reg. at 20,065.

26 ³ 84 Fed. Reg. at 20,066.

27 ⁴ *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, p. 39, available at:
28 https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf (last accessed June 27, 2019).

⁵ USGS Mineral Commodity Summary for asbestos, 2018, p. 26, available at:
<https://www.usgs.gov/centers/nmic/mineral-commodity-summaries> (last accessed June 27, 2019).

1 containing asbestos possibly including brake linings, building materials, tile, wallpaper, and
2 knitted fabric, among others, were imported, but the quantities are unknown.⁶

3 9. TSCA requires EPA to use information consistent with “best available science”
4 defined as science that is “reliable and unbiased.” 15 U.S.C. § 2625(h); 40 C.F.R. § 702.33.

5 10. Consumer/manufactured products represent a broad array of potential exposures
6 that EPA should evaluate for risk under TSCA,⁷ and EPA lacks information about such products
7 with asbestos. Moreover, as noted above, TSCA regulations require that EPA use information
8 that is “reliable.” 15 U.S.C. § 2625(h); 40 C.F.R. § 702.33. Thus, EPA’s assertion that it already
9 has all of the information—much less the reliable information TSCA requires—necessary to
10 generate a risk evaluation of asbestos under TSCA as a reason for denying the Petition is
11 unfounded.

12 11. Additionally, the information about the amounts of asbestos and asbestos-
13 containing articles that the Petition sought is necessary and valuable beyond EPA’s completion of
14 the initial risk evaluation of asbestos under TSCA. EPA’s duty to protect human health and the
15 environment from the harms of dangerous chemicals like asbestos does not end when it issues a
16 risk evaluation or regulatory response as to certain conditions of use of the chemical. Hence,
17 EPA’s assertion that it lacks sufficient time under TSCA to make use of the requested information
18 is irrelevant in light of EPA’s overarching TSCA obligations.

19 12. Furthermore, EPA was aware that the amount of asbestos in consumer goods
20 was unknown in 2018 when it issued the Asbestos Problem Formulation, and should have
21 addressed such lack of information then. Hence, its alleged inability to use any information the
22 Petition sought in time for its TSCA risk evaluation of asbestos is a circumstance of EPA’s own
23 creation.

24 13. EPA’s denial of the Petition deprives the Agency of the data the new
25 regulations requested in the Petition would have provided, perpetuating a status quo where EPA

26 ⁶ USGS Mineral Commodity Summaries for asbestos, 2017, p. 28; 2018, p. 26; 2019, p.
27 26, available at: <https://www.usgs.gov/centers/nmic/mineral-commodity-summaries> (last
28 accessed June 27, 2019).

⁷ See 15 U.S.C. §§ 2605(b)(4)(A) and (b)(4)(F); 40 C.F.R. § 702.33 (defining “conditions
of use”).

1 makes regulatory assessments with unreliable and inadequate information. Without reliable
2 information about the quantity of asbestos and asbestos-containing articles imported into the
3 United States, by whom and for what purpose the asbestos is imported, and the identification of
4 asbestos as an impurity in substances like talc, EPA cannot complete its asbestos risk evaluation
5 in a manner that satisfies TSCA. Consequently, the public, including Plaintiff States, will lack
6 important information about the asbestos and asbestos-containing articles that are still imported
7 and used in the United States.

8 14. Plaintiff States, their citizens, other federal agencies and branches of
9 government, as well the Agency itself, would benefit from the collection of reliable information
10 about the amounts of asbestos and asbestos-containing articles imported domestically. EPA's
11 denial of the Petition deprives Plaintiff States of the information the new regulations requested in
12 the Petition would have provided.

13 15. Undisputed evidence demonstrates that the manufacturing, importation,
14 processing and use of asbestos and asbestos-containing products present an unreasonable risk of
15 injury to human health and the environment. EPA's failure to require the reporting of the
16 information sought by the Plaintiff States impairs its ability to identify and evaluate the universe
17 of potential exposure pathways to asbestos because, as EPA has stated, the "import volumes of
18 products containing asbestos is unknown."⁸ EPA's inability to perform a TSCA-compliant risk
19 evaluation of asbestos will result in an insufficient regulatory response to the unreasonable risks
20 to human health and the environment that asbestos presents. TSCA Section 21 provides that upon
21 a showing that a chemical substance presents an unreasonable risk of injury to health or the
22 environment without consideration of costs or other nonrisk factors, including an unreasonable
23 risk to a potentially exposed or susceptible subpopulation, under the conditions of use, the court
24 shall order the Administrator to initiate the action requested by the petitioner subject to other
25 provisions not raised under the circumstances of this case. *See* 15 U.S.C. § 2620(b)(4)(B)(ii).
26 Thus, this Court must compel EPA to initiate the rulemaking requested by the Plaintiffs in their
27 Petition.

28 ⁸ Asbestos Problem Formation, p. 22.

1 16. By denying the Petition, EPA acted inconsistently with the purposes of TSCA
2 and the CDR Regulations. EPA’s denial of the Petition, therefore, should be set aside as
3 arbitrary, capricious and not in accordance with law.

4 **JURISDICTION AND VENUE**

5 17. Plaintiff States bring this action pursuant to TSCA Section 21(b)(4)(A), 15
6 U.S.C. § 2620(b)(4)(A), which provides that if the Administrator denies a petition under Section
7 21, the petitioner “may commence a civil action in a district court of the United States to compel
8 the Administrator to initiate a rulemaking proceeding as requested in the petition.” Any such
9 action must be commenced within 60 days of the denial. *Id.* Section 21 also specifically states
10 that the “remedies under this section shall be in addition to, and not in lieu of, other remedies
11 provided by law.” *Id.* § 2620(b)(5).

12 18. Plaintiff States also bring this action pursuant to Section 706 of the
13 Administrative Procedure Act (APA), which provides that a reviewing court shall “hold unlawful
14 and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an
15 abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

16 19. This Court has jurisdiction pursuant to 15 U.S.C. § 2620(b)(4) (TSCA Section
17 21) and 28 U.S.C. § 1331 (action arising under the laws of the United States).

18 20. An actual controversy exists between the parties within the meaning of 28
19 U.S.C. § 2201(a), and this Court may grant declaratory, injunctive, and other relief pursuant to 28
20 U.S.C. § 2201-2202. This Court also is empowered to grant Plaintiff States’ requested
21 declaratory and injunctive relief pursuant to 15 U.S.C. § 2620(b)(4) and 5 U.S.C. §§ 705-706.

22 21. Venue is proper in the Northern District of California pursuant to 28 U.S.C.
23 § 1391(e) because this is the judicial district in which one of the Plaintiff States, California,
24 resides, and this action seeks relief against a federal agency and official acting in their official
25 capacity.

26 **PARTIES**

27 22. Plaintiff State of California is a sovereign state in the United States of America.
28 California brings this action by and through Attorney General Xavier Becerra. The Attorney

1 General is the chief law officer of California (Cal. Const., art. V, § 13), and is authorized to file
2 civil suits that either directly involve the State's rights and interests or that are deemed necessary
3 by the Attorney General to protect public rights and interests. Cal. Gov. Code §§ 12600-12;
4 *Pierce v. Superior Court*, 1 Cal.2d 759, 761-62 (1934). California brings this action pursuant to
5 the Attorney General's independent constitutional, statutory, and common law authority to file
6 suit and obtain relief on behalf of the State.

7 23. Plaintiff Commonwealth of Massachusetts, a sovereign entity, brings this action
8 by and through Massachusetts Attorney General Maura Healey. Attorney General Healey is the
9 chief legal officer of the Commonwealth and is authorized to bring this action on behalf of the
10 Commonwealth and its residents pursuant to her statutory authority under Mass. Gen. L. ch. 12,
11 §§ 3 and 11D.

12 24. Plaintiff State of Connecticut is a sovereign state in the United States of
13 America. Connecticut brings this action by and through Connecticut Attorney General William
14 Tong. Attorney General Tong is the chief legal officer of the State of Connecticut and is
15 authorized to bring this action on behalf of the State of Connecticut and its residents pursuant to
16 his statutory authority under Conn. Gen. Stat. sec. 3-125.

17 25. Plaintiff State of Hawaii is a sovereign state in the United States of America.
18 Hawaii brings this action by and through Hawaii Attorney General Clare E. Connors. Attorney
19 General Connors is the chief legal officer of Hawaii and is authorized to bring this action and
20 appear as Hawaii's legal representative, personally or by deputy, to protect the interests of the
21 State and obtain relief on behalf of its residents pursuant to her statutory authority, Chapter 28,
22 Hawaii Revised Statutes.

23 26. Plaintiff State of Maine is a sovereign state in the United States of America.
24 Maine brings this action by and through Attorney General Aaron M. Frey. The Attorney General
25 is a constitutional officer with statutory authority to file civil actions in which the State is a
26 party, and common law authority to institute such actions as he deems necessary for the
27 protection of public rights. Constitution of Maine, Art. IX, § 11; 5 M.R.S. §§ 191, 192 (2015);
28 *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197, 1199 (Me. 1989).

1 27. Plaintiff State of Maryland is a sovereign state in the United States of America.
2 Maryland brings this action by and through its Attorney General, Brian E. Frosh, on behalf of
3 itself and on behalf of its citizens and residents. The Attorney General of Maryland is the State's
4 chief legal officer with general charge, supervision, and direction of the State's legal business.
5 Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the
6 Attorney General has the authority to file suit to challenge action by the federal government that
7 threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2);
8 2017 Md. Laws, Joint Resolution 1, § 7.

9 28. Plaintiff State of Minnesota is a sovereign state in the United States of
10 America. Minnesota brings this action by and through Attorney General Keith Ellison, the chief
11 legal officer of Minnesota, and authorized to file civil suits where the State is directly interested
12 or where, in the opinion of the Attorney General, the interests of the State require it. Minn. Stat.
13 § 8.01.

14 29. Plaintiff State of New Jersey is a sovereign state in the United States of
15 America. New Jersey brings this action by and through New Jersey Attorney General Gurbir S.
16 Grewal. Attorney General Grewal is the chief legal officer of New Jersey and is authorized to
17 bring this action on behalf of New Jersey and its residents pursuant to his statutory authority
18 under N.J.S.A. 52:17A-4(c).

19 30. Plaintiff State of Oregon is a sovereign state in the United States of
20 America. Oregon brings this action by and through its Attorney General, Ellen F. Rosenblum,
21 its chief legal officer. Or. Rev. Stat. § 180.210. Her powers and duties include acting in federal
22 court on matters of public concern to Oregon. Or. Rev. Stat. § 180.060(1)(d).

23 31. Plaintiff State of Washington is a sovereign state in the United States of
24 America. Washington brings this action by and through its Attorney General, Robert W.
25 Ferguson, the chief legal advisor for the State. The Attorney General's powers and duties
26 include acting in federal court on matters in which the interests of the state are involved. Rev.
27 Code Wash. §§ 43.10.040, 43.12.075.
28

1 32. Plaintiff the District of Columbia is a municipal corporation empowered to sue
2 and be sued, and is the local government for the territory constituting the permanent seat of the
3 federal government. The District is represented by and through its chief legal officer, Attorney
4 General Karl A. Racine. The Attorney General has general charge and conduct of all legal
5 business of the District and all suits initiated by and against the District and is responsible for
6 upholding the public interest. D.C. Code §1-301.81.

7 33. Each Plaintiff State is a “person” under TSCA Section 21 (15 U.S.C. § 2620)
8 for purposes of bringing this action.

9 34. Each Plaintiff State relies to a certain extent on federal agencies to execute
10 Congress’s will to protect the health and well-being of, among other things, their residents,
11 natural resources, infrastructure, institutions, and economies. Plaintiff States have special
12 solicitude to sue in matters involving harm to such sovereign and quasi-sovereign interests when
13 a federal agency fails to carry out its statutory obligations. *See Massachusetts v. EPA*, 549 U.S.
14 497, 519 (2007).

15 35. Plaintiff States also have *parens patriae* standing to bring suit against executive
16 agencies to protect the interests of their citizens.

17 36. Defendant EPA is an executive agency of the United States federal government
18 charged with protecting human health and the environment, which includes implementing and
19 enforcing TSCA.

20 37. Defendant Andrew Wheeler is the Administrator of the EPA. The
21 Administrator is charged with implementing and enforcing TSCA, including undertaking risk
22 evaluations of chemicals under TSCA Section 6 that satisfy TSCA’s requirements that the
23 evaluation be based on the “best available science,” among other requirements. 15 U.S.C. §
24 2625(h). Pursuant to TSCA Section 8, the EPA Administrator also is charged with promulgating
25 regulations to require reporting of information about chemicals subject to TSCA by
26 manufacturers and processors of such chemicals, so that EPA may implement TSCA. *See* 15
27 U.S.C. § 2607 (a)(1)(A).
28

1

2 **STATUTORY AND REGULATORY FRAMEWORK**

3 **I. TSCA**

4 38. EPA's duty to obtain adequate information from manufacturers and processors
5 of chemicals so that it can evaluate risks of harm to human health and the environment is at the
6 heart of TSCA. Congress's intent to ensure that the regulatory framework be founded on
7 reliable information is clear in TSCA's preamble. That preamble, unchanged since 1976,
8 specifically states that it:

9 is the policy of the United States that—(1) *adequate information* should be developed
10 with respect to the effect of chemical substances and mixtures on health and the
11 environment and that *the development of such information should be the responsibility*
12 *of those who manufacture and those who process such chemical substances and*
13 *mixtures.*

14 15 U.S.C. § 2601(b)(1) (emphases added).

15 39. Notwithstanding TSCA's responsibility to require industry to provide chemical
16 hazard and exposure data for EPA to use in regulating toxic chemicals so as to act to prevent
17 harm from the hazards associated with them, EPA has adopted a reporting rule shielding
18 manufacturers and processors from having to provide certain information about asbestos to the
19 agency with respect to asbestos.

20 40. In 2016, Congress amended TSCA with the specific purpose of empowering
21 EPA to “actually be able to regulate chemicals effectively,” as President Obama said at the
22 signing ceremony for the Frank R. Lautenberg Chemical Safety for the 21st Century Act on June
23 22, 2016. President Obama's remarks at the signing ceremony included the observation that to
24 date, “our country hasn't even been able to uphold a ban on asbestos—a known carcinogen that
25 kills as many as 10,000 Americans every year.”⁹

26

27

28 ⁹ <https://obamawhitehouse.archives.gov/the-press-office/2016/06/22/remarks-president-bill-signing-frank-r-lautenberg-chemical-safety-2st> (last accessed June 14, 2019).

1 41. EPA designated asbestos as one of the initial ten high priority chemicals subject
2 to the risk evaluation process in TSCA, as amended, based on asbestos' potential for high hazard
3 and exposure risks. 15 U.S.C. § 2605(b)(2); 81 Fed. Reg. 91927 (December 19, 2016).

4 42. As a result of that designation, EPA must conduct a risk evaluation to
5 “determine whether [asbestos] presents an unreasonable risk of injury to health or the
6 environment” under conditions of its use. 15 U.S.C. § 2605(b)(4)(A).

7 43. The term “conditions of use,” as used in TSCA Section 6(b)(4)(A), 15 U.S.C. §
8 2605(b)(4)(A), means “the circumstances, as determined by the Administrator, under which a
9 chemical substance is intended, known, or reasonably foreseen to be manufactured, processed,
10 distributed in commerce, used, or disposed of.” 15 U.S.C. § 2602(4).

11 44. If EPA finds through its risk evaluation that any condition of use evaluated
12 presents an unreasonable risk of injury to health or the environment, EPA is required by Section
13 6 of TSCA to regulate that use to eliminate the risk. 15 U.S.C. § 2605(a) and (c).

14 45. EPA's risk evaluations must “use scientific information, technical procedures,
15 measures, methods, protocols, methodologies, or models, employed in a manner consistent with
16 the best available science.” 15 U.S.C. § 2625(h).

17 46. The term “best available science” as used in TSCA Section 26 means:

18 [S]cience that is *reliable* and unbiased. Use of best available science involves the use of
19 supporting studies conducted in accordance with sound and objective science practices,
20 including, when available, peer reviewed science and supporting studies and data
21 collected by accepted methods or best available methods (if the reliability of the
method and the nature of the decision justifies use of the data). Additionally, EPA will
consider as applicable:

22 [. . .]

23 (3) The degree of *clarity and completeness* with which the data, assumptions,
24 methods, quality assurance, and analyses employed to generate the information are
documented;

25 (4) The extent to which the variability and uncertainty in the information, or in the
26 procedures, measures, methods, protocols, methodologies, or models, are evaluated
and characterized; and

27 (5) The extent of independent verification or peer review of the information or of the
28 procedures, measures, methods, protocols, methodologies or models.

40 C.F.R. § 702.33 (emphasis added).

1 47. TSCA requires that EPA shall, in its risk evaluations, “take into consideration
2 information relating to a chemical substance or mixture, including hazard and exposure
3 information, under the conditions of use, that is reasonably available to the Administrator.” 15
4 U.S.C. § 2625(k).

5 48. TSCA Section 8 requires, in relevant part, that the “Administrator shall
6 promulgate rules under which . . . each person . . . who manufactures or processes or proposes to
7 manufacture or process a chemical substance . . . shall maintain such records, and shall submit to
8 the Administrator such reports, as the Administrator may reasonably require [to implement the
9 law].” 15 U.S.C. § 2607(a)(1)(A).

10 **II. Right to Petition Under TSCA**

11 49. Under TSCA Section 21, any person may petition EPA to “initiate a proceeding
12 for the issuance, amendment, or repeal of a rule under section 2603, 2605, or 2607 of this
13 title. . . .” 15 U.S.C. § 2620(a). “The purpose of citizen petitions is to ensure the EPA does not
14 overlook unreasonable risks to health or the environment.” *Food & Water Watch, Inc. v. United*
15 *States Env'tl. Prot. Agency*, 291 F.Supp.3d 1033, 1048 (N.D. Cal. 2017); *see also Env. Def. Fund*
16 *v. Reilly*, 909 F.2d 1497, 1499 (D.C. Cir. 1990) (“Citizen participation is broadly permitted
17 [under TSCA] to ‘ensure that bureaucratic lethargy does not prevent the appropriate
18 administration of this vital authority.’” (quoting 122 Cong. Rec. 32,857 (1976) (statement of
19 Sen. Tunney)); *Trumpeter Swan Soc. v. E.P.A.*, 774 F.3d 1037, 1039 (D.C. Cir. 2014) (Citizen
20 petitions under Section 21 are intended to be an “unusually powerful procedure[] for citizens to
21 force EPA’s hand.”).

22 50. Congress further empowered citizens to force EPA’s hand by providing a
23 specific right to sue where EPA denies a petition for a new rule or the amendment or repeal of a
24 rule, under TSCA Section 4, 6 or 8: TSCA Section 21 provides that “[i]f the Administrator
25 denies a petition filed under this section [. . .] the petitioner may commence a civil action in a
26 district court of the United States to compel the Administrator to initiate a rulemaking
27 proceeding as requested in the petition.” 15 U.S.C. § 2620(b)(4)(A).

28

1 51. TSCA Section 21 also states, “[i]n an action under subparagraph (A) respecting
2 a petition to initiate a proceeding to issue a rule under section [. . .] 2607 of this title [. . .], the
3 petitioner shall be provided an opportunity to have such petition considered by the court in a de
4 novo proceeding.” 15 U.S.C. § 2620(b)(4)(B).

5 52. Further, TSCA Section 21 states, in pertinent part:

6 If the petitioner demonstrates to the satisfaction of the court by a preponderance of the
7 evidence that—

8 [. . .]

9 (ii) in the case of a petition to initiate a proceeding for the issuance of a rule under
10 section [. . .] 2607 of this title [. . .], the chemical substance of mixture to be subject
11 to such rule or order presents an unreasonable risk of injury to health or the
12 environment, without consideration of costs of other nonrisk factors, including an
13 unreasonable risk to a potentially exposed or susceptible subpopulation, under the
14 conditions of use the court shall order the Administrator to initiate the action requested
15 by the petitioner. 15 U.S.C. § 2620(b)(4)(B).

14 **III. CDR Regulations**

15 53. The CDR Regulations, found at Title 40 of the Code of Federal Regulations,
16 Part 711, specify “reporting and recordkeeping procedures under section 8(a) of [TSCA] (15
17 U.S.C. 2607(a)) for certain manufacturers (including importers) of chemical substances.” 40
18 C.F.R. § 711.1(a).

19 54. In furtherance of its statutory mandate, EPA intended that the CDR Regulations
20 would “enhance the capabilities of the Agency to ensure risk management actions are taken on
21 chemical substances which may pose the greatest concern.” 76 Fed. Reg. 50,818-19 (Aug. 16,
22 2011). Specifically, the agency required “more in-depth reporting of the processing and use data”
23 to “more effectively and expeditiously identify and address potential risks posed by chemical
24 substances and provide improved access and information to the public.”

25 55. The CDR Regulations require manufacturers (including importers) to report an
26 array of information to EPA if they make or import more than a specified amount of a substance
27 in TSCA’s inventory for commercial purposes during the reporting span. 40 C.F.R. § 711.8.
28

1 56. Reports are due every four years for each manufacturing/import site, and must
2 include import/manufacture volume for the reporting period, the number of workers exposed, and
3 information about site operations. *Id.* at § 711.15. The reports must also include information
4 about industrial, commercial and consumer uses of the substance at other sites, and the potential
5 for routes of exposure there. *Id.*

6 57. The CDR Regulations exempt from reporting data about “naturally occurring
7 substances,” defined as substances that are naturally occurring and either unprocessed or
8 processed only with “manual, mechanical or gravitational means” or extracted from air. *Id.* at §§
9 710.4, 711.6.

10 58. Reporting under the CDR Regulations also is not required if the substance was
11 imported as part of an “article,” i.e., a manufactured product that contains the substance. *Id.* at §
12 711.10.

13 59. Additionally, the CDR Regulations do not require processors to report.

14 60. The CDR Regulations do not require reporting about impurities in chemicals,
15 including not requiring reporting of asbestos as an impurity. *See id.* at §§ 711.10(c), 711.5, and
16 720.30(h)(1).

17 **FACTUAL AND PROCEDURAL BACKGROUND**

18 **I. The Hazards to Human Health from Asbestos Exposure Are Devastating and** 19 **Irrefutable**

20 61. In 1989, EPA found that no level of exposure to asbestos is safe for a human,
21 and it banned the use of asbestos by final rule under TSCA Section 6 as then enacted.¹⁰

22 62. EPA’s ban of asbestos was overturned by the Fifth Circuit Court of Appeals in
23 *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991), because, in promulgating the
24 ban, EPA did not evaluate less burdensome regulatory alternatives. However, the Fifth Circuit’s
25 opinion did not undermine EPA’s finding that asbestos poses an unreasonable risk of injury. To
26 the contrary, the court stated, “[m]uch of the EPA’s analysis is correct, and the EPA’s basic

27 ¹⁰ *Asbestos Manufacture, Importation, Processing and Distribution in Commerce*
28 *Prohibitions; Final Rule* (Asbestos Ban Rule), 54 Fed. Reg. 29,460, 29, 467 (Jul. 12, 1989); 40
C.F.R. Part 763.

1 decision to use TSCA as a comprehensive statute designed to fight a multi-industry problem was
2 a proper one that we uphold today on review.” *Id.* at 1216.

3 63. Since 1991, federal agencies have banned some uses of asbestos, and no mining
4 of it has occurred in the United States since 2002; however, it is still legal in the United States to
5 import and process asbestos and various asbestos-containing articles.

6 64. Exposure to asbestos is the sole known cause of mesothelioma, a frequently
7 fatal cancer of the chest or abdominal lining caused by exposure to asbestos fibers.¹¹ Asbestos is
8 also known to cause pulmonary fibrosis (asbestosis) and lung cancer.¹²

9 65. From 2011 to 2015, the CDC reports there were a total of 16,420 new cases of
10 mesothelioma in the United States, resulting in 12,837 deaths, of which 6,582 new cases of
11 mesothelioma, resulting in 5,159 deaths, were in states that joined in submitting the Petition.¹³

12 66. Asbestos harms Plaintiff States and their citizens by significantly increasing the
13 likelihood that any of Plaintiff States’ citizens who are exposed to it will develop lung disease
14 including mesothelioma, pulmonary fibrosis (asbestosis) and lung cancer.

15 67. Plaintiff States and their citizens have experienced and will continue to
16 experience injuries from asbestos exposures resulting in, among other things, death, lost
17 productivity, and continuing costs associated with diseases caused by asbestos exposure.

18 68. Certain of the Plaintiff States have expended significant resources to enact and
19 enforce laws to protect human health from the harms asbestos poses. For example, California
20 regulates exposure to asbestos in construction work,¹⁴ general industry,¹⁵ shipyards,¹⁶ and has
21 prohibited the sale of brake pads with asbestiform fibers above 0.1% weight.¹⁷ Massachusetts
22 comprehensively regulates the handling, transport, and disposal of asbestos within its borders
23 through a set of overlapping state and delegated federal programs involving multiple state

24 ¹¹ See C.R. Roelofs et al., *Mesothelioma and Employment in Massachusetts: Analysis of*
25 *Cancer Registry Data 1988-2003*, 56(9), AM. J. OF INDUSTRIAL MED. 985 (2013).

¹² Asbestos Ban Rule, 54 Fed. Reg. 29,460, 29, 468; 40 C.F.R. Part 763.

¹³ See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed June 26, 2019).

¹⁴ California Code of Regulations, tit. 8, § 1529.

¹⁵ *Id.* tit. 8, § 5208.

¹⁶ *Id.* tit. 8, § 8358.

¹⁷ Cal. Health & Safety Code § 25250.51.

1 agencies.¹⁸ Maryland recognizes that exposure to asbestos “creates a significant hazard to the
 2 health of the people of [Maryland],”¹⁹ has created the Asbestos Worker Protection Fund,²⁰
 3 regulates the disposal of asbestos containing substances,²¹ and limits the airborne release of
 4 asbestos in line with EPA’s National Emission Standard for Hazardous Air Pollutant (NESHAP)
 5 for the chemical.²² In Oregon, a series of regulations²³ apply to “asbestos milling, manufacturing
 6 fabricating, abatement and disposal, or any situation where a potential for exposure to asbestos
 7 fibers exist.”²⁴ New Jersey regulates asbestos exposure in construction work,²⁵ in asbestos
 8 disposal,²⁶ and prohibits the use of surface coating on any building that uses more than .25% by
 9 weight of asbestos.²⁷ Additionally, asbestos is a hazardous substance under New Jersey’s Spill
 10 Act, the State equivalent of CERCLA,²⁸ and is a criteria pollutant for ground water discharges.²⁹
 11 Washington State enforces various regulations to protect its citizens against asbestos exposure,
 12 including regulations to control asbestos air emissions,³⁰ to phase-out asbestos in brake friction
 13 material,³¹ to control the introduction of asbestos fibers into waters of the state,³² to require

14
 15
 16 ¹⁸ See e.g., Massachusetts Clean Air Act, Mass. Gen. Laws ch. 111, §§ 142A-O, and the
 17 federal Clean Air Act, 42 U.S.C. § 7401, *et seq.*, which authorize the Massachusetts Department
 18 of Environmental Protection (MassDEP) to prevent air pollution by regulating asbestos handling,
 19 transport, and disposal; Mass. Gen. Laws ch. 21E by which MassDEP requires notice and
 20 remediation of releases of asbestos to the environment as a hazardous material under the state’s
 “superfund” law; Mass. Gen. Laws ch. 111, § 150A under which MassDEP regulates disposal of
 asbestos under the Massachusetts Solid Waste Management Act; and Mass. Gen. Laws c. 149
 through which Massachusetts Department of Labor Standards (DLS) protects workers in
 Massachusetts by licensing asbestos-related work and requiring the use of proper work practices
 and safety equipment.

21 ¹⁹ MD. Envir. § 6-402.

22 ²⁰ MD. Envir. § 6-425.

23 ²¹ Code of Maryland Regulations (COMAR) § 26.11.21.08.

24 ²² COMAR § 26.11.15.02.

25 ²³ OR. Admin R. ch. 340, div. 248.

26 ²⁴ OR. Admin. R. 340-248-0005.

27 ²⁵ N.J.A.C. 5:23-8.1, *et seq.* (Asbestos Hazard Abatement Subcode of Uniform
 28 Construction Code).

29 ²⁶ N.J.A.C. 7:26-2A.8(1).

30 ²⁷ N.J.A.C. 7:27-17.2.

31 ²⁸ N.J.A.C. 7:1E-1.7, N.J.A.C. 7:1E, Appx. A.

32 ²⁹ N.J.A.C. 7:9C-1.7, N.J.A.C. 7:9C, Appx.

³⁰ Wash. Admin. Code ch. 173-401.

³¹ Rev. Code Wash. 70.285.030.

³² WAC 173-201A-240.

1 labeling of building materials containing asbestos,³³ and to protect workers engaged in asbestos
2 removal and encapsulation.³⁴

3 69. Notwithstanding such regulatory protections enacted by Plaintiff States, they
4 look to EPA to use its broad authority under TSCA to collect the information—most notably via
5 the CDR Regulations—relevant to regulating asbestos at the federal level to eliminate its
6 unreasonable risks to human health, as TSCA requires.

7 70. At both the state and federal levels, effective evaluation of the risks posed by
8 asbestos exposure and regulation to manage those risks requires complete information about the
9 nature of the risk. Developing reliable information about the probability and nature of exposure
10 to asbestos through data on use of the chemical is fundamental to understanding the risk.

11 71. Certain of Plaintiff State agencies have used and relied on the data resulting
12 from the CDR Regulations for their decision-making about toxic chemical substances like
13 asbestos in their states. Thus, it is important that such information be as reliable and
14 comprehensive as possible, and Plaintiff States would suffer harm from incomplete, unreliable
15 information resulting from the CDR Regulations.

16 **II. Recent Discoveries of Asbestos Impurities in Consumer Products**

17 72. Talc, like asbestos, is listed in the TSCA inventory. As such, information
18 about both substances is reportable under the CDR Regulations, unless exclusions in the CDR
19 Regulations apply. 40 C.F.R. § 711.5.

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21
22
23
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27 ³³ Rev. Code. Wash. ch. 70.310.

28 ³⁴ Wash. Admin. Code ch. 296-65.

1 73. The contamination of talc with asbestos has been documented. Consumers
2 and consumer groups have discovered asbestos as impurities in the talc used in cosmetics,³⁵ baby
3 powder,³⁶ and crayons.³⁷

4 74. Despite an apparent lack of required testing of consumer products for
5 asbestos at the federal level,³⁸ some manufacturers test their products for asbestos voluntarily.
6 Also, in the wake of consumer groups discovering talc in cosmetics in 2017, the U.S. Food and
7 Drug Administration tested various cosmetics for asbestos in talc, and confirmed instances of
8 asbestos in certain cosmetics in 2019.³⁹

9 **III. EPA Risk Evaluation of Asbestos**

10 75. In its current risk evaluation of asbestos, EPA has largely relied on data from
11 the USGS to draw conclusions about the quantities of asbestos and asbestos-containing goods
12 imported into the United States.⁴⁰

14 _____
15 ³⁵ U.S. PIRG Education Fund, IN YOUR FACE: MAKEUP CONTAMINATED WITH ASBESTOS
16 3 (March 2018), https://uspirg.org/sites/pirg/files/reports/USP_Asbestos-Claire-Makeup_FINAL.pdf; see <https://www.cbsnews.com/news/study-asbestos-claires-makeup-products-marketed-to-teens/> (both last accessed June 27, 2019).

17 ³⁶ Ronald E. Gordon, *et al.*, *Asbestos in commercial cosmetic talcum powder as a cause of*
18 *mesothelioma in women*, 204(4) INT. J. OCCUP. ENVIRON. HEALTH 318, 318-32 (Oct. 2014),
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4164883/>; see

19 <https://www.nytimes.com/2018/12/14/business/baby-powder-asbestos-johnson-johnson.html> (both last accessed June 27, 2019).

20 ³⁷ U.S. PIRG Education Fund, SAFER SCHOOL SUPPLIES: SHOPPING GUIDE 21 (2018)
https://uspirg.org/sites/pirg/files/reports/Copy%20of%20USP_Toxics-report_Fall2018_PRINTv1b.pdf; see <https://www.nytimes.com/2018/08/08/education/asbestos-crayons-school-supplies.html>

21 (both last accessed June 27, 2019).

22 ³⁸ See *e.g.*, EPA Guidance for Catastrophic Emergency Situations Involving Asbestos
(2009) available at: <https://www.epa.gov/sites/production/files/documents/guidance-catastrophic-emergency-asbestos-200912.pdf> (last accessed June 18, 2019) (“EPA does not regulate asbestos
23 that is a contaminant of a mineral product”); <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-and-susan-mayne-phd-director-center-food-safety-and> (last accessed June 15, 2019) (“there are currently no legal requirements
24 for any cosmetic manufacturer marketing products to American consumers to test their products
25 for safety”).

26 ³⁹ <https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-advises-consumers-stop-using-certain-cosmetic-products> (last accessed June 15, 2019).

27 ⁴⁰ See Asbestos Problem Formulation, pp. 16, 19, 21-25, available at:
https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf (last accessed June 28, 2019).

1 76. USGS states that its data, based on bills of lading collected by a commercial
2 database, are only estimates of total imports.⁴¹ USGS data also does not include data about
3 consumer articles containing asbestos imported domestically.

4 77. USGS acknowledged in its 2017 mineral commodity summary for asbestos that
5 “insufficient data were available to reliably identify” all asbestos markets.⁴²

6 78. Further, in its mineral commodity summaries for 2017, 2018 and 2019, the
7 USGS stated that an “unknown quantity of asbestos was imported within manufactured products.”
8 In 2017, it said these unknown products possibly included “brake linings and pads, building
9 materials, gaskets, millboard, and yarn and thread, among others.” In 2018, it said the products
10 included “asbestos-containing brake linings, knitted fabric, rubber sheets for gasket manufacture,
11 and potentially asbestos-cement pipe.” In 2019, it added “tile” and “wallpaper” to the list of
12 asbestos-containing manufactured products imported into the United States, the quantities of
13 which are unknown.⁴³

14 79. EPA has articulated its position that imported raw asbestos need not be reported
15 under the CDR Regulations. For example, in 2017, EPA informed Occidental Chemical, one of
16 the largest manufacturers of chlorine and one of three importers of raw asbestos for the chlor-
17 alkali industry in the United States, that it need not report its imported asbestos under the CDR
18 Regulations.

19 80. In EPA’s Asbestos Problem Formulation, part of its risk evaluation of asbestos,
20 EPA recognized “[r]eporting of asbestos in the 2016 Chemical Data Reporting (CDR) period was
21 limited.”⁴⁴

22
23 ⁴¹ USGS Mineral Commodity Summary for asbestos, 2018, p. 26, *available at*:
24 <https://www.usgs.gov/centers/nmic/mineral-commodity-summaries> (last accessed June 14, 2019).

25 ⁴² USGS Mineral Commodity Summary for asbestos, 2017, p. 28, *available at*:
26 <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2017-asbes.pdf> (last accessed
27 June 14, 2019).

28 ⁴³ USGS Mineral Commodity Summary for asbestos, 2017, 2018, and 2019, pp. 28, 26,
and 26, respectively, *available at*: <https://www.usgs.gov/centers/nmic/mineral-commodity-summaries> (last accessed June 14, 2019).

⁴⁴ Asbestos Problem Formulation, p. 21. Two of the three chlorine manufacturers in the
United States *voluntarily* reported their imported asbestos under the CDR Regulation.

1 81. In the Asbestos Problem Formulation, EPA further stated “[c]onsumer
2 exposures will be difficult to evaluate since the quantities of these products that still might be
3 imported into the United States is not known.”⁴⁵

4 82. In addition, in the Asbestos Problem Formulation, EPA stated that:
5 certain asbestos containing products can be imported into the U.S., but the
6 amounts are not known. These products are mostly used in industrial
7 processes (e.g. cement products) but could also be used by consumers, and
8 include woven products and automotive brakes and linings.⁴⁶

9 EPA also stated that, “[i]t is important to note that the import volumes of products
10 containing asbestos is [sic] unknown.”⁴⁷

11 83. Without information from the CDR Regulations about the volume of asbestos
12 imported to the United States and quantities of manufactured products containing asbestos, EPA
13 cannot possibly determine each of the potential routes of human exposure.

14 84. Without complete information about the potential exposures from asbestos
15 under conditions of use evaluated, EPA cannot render a well-reasoned decision about the risks
16 such exposures pose to human health.

17 85. Any regulatory response by EPA to eliminate the harms to human health from
18 exposure to asbestos that is based on unreliable risk evaluation information will not reflect the
19 best available science, as required by TSCA, *see* 15 U.S.C. § 2625(h), and will violate the
20 requirements of that section requiring EPA to use best available science, including data, in its risk
21 evaluations.

22 **IV. Plaintiff States’ Petition for Rulemaking to Require Asbestos Data Collection**

23 86. Through the Petition, the Plaintiff States sought to address the infirmities in
24 EPA’s asbestos reporting requirements and requested that EPA initiate rulemaking under TSCA
25 Section 8(a) to issue a new asbestos reporting rule to ensure that data about the importation and
26

27 ⁴⁵ Asbestos Problem Formulation, p. 39.

28 ⁴⁶ Asbestos Problem Formulation, p. 8.

⁴⁷ Asbestos Problem Formulation, p. 22.

1 use of asbestos and asbestos-containing products in the United States is adequately reported to
2 EPA by:

- 3 a. Eliminating the applicability of the “naturally occurring substance”
4 exemption for asbestos reporting;
- 5 b. Applying reporting requirements to processors as well as to manufacturers
6 of asbestos;
- 7 c. Eliminating the impurities exemption applicable to other chemical
8 substances under the CDR Regulations; and
- 9 d. Requiring reporting with respect to articles that contain asbestos.

8 **V. EPA’s Denial of Plaintiff States’ Petition**

9 87. EPA denied the Petition on April 30, 2019, transmitting a letter to the
10 petitioning states.

11 88. EPA published its reasons for denying the Petition in the Federal Register. 84
12 Fed. Reg. 20,062 (May 8, 2019).

13 89. Among its reasons for denying the Petition, EPA stated that it has sufficient
14 information available about the exposure routes of asbestos for its risk evaluation. *See e.g., id.* at
15 20,066.

16 90. However, the Plaintiff States challenge EPA’s assertion that it has sufficient
17 information for its asbestos risk evaluation. In fact, EPA admitted in the Asbestos Problem
18 Formulation that it does not know the amount of asbestos contained in consumer products.⁴⁸

19 91. The USGS, which EPA relies on for information regarding imports of asbestos,
20 also has noted that information regarding the amounts and types of manufactured products
21 imported into the United States is not among its data.

22 92. These statements by EPA and USGS refute EPA’s claim that it has sufficient
23 information, especially given TSCA’s requirement that the information EPA uses be reliable.

24 93. EPA also stated that it “is prohibited by TSCA Section 8(a)(5)(A) from
25 requiring reporting that is ‘unnecessary or duplicative’ and must apply the reporting obligations
26 under TSCA Section 8(a) to those persons who are likely to have the relevant information. 15
27 U.S.C. 2607(a)(5).” 84 Fed. Reg. at 20,065.

28 ⁴⁸ Asbestos Problem Formulation, p. 22.

1 94. However, the information sought by the Petition is not currently being
2 collected, as shown by both the multiple reports of USGS and by EPA's own statements about
3 unknown information and thus this information will not be duplicative.

4 95. EPA stated that where it lacked information, it "has relied on models." 84 Fed.
5 Reg. at 20,066. The information sought by the Petitioners would enable EPA to know whether its
6 models are reliable and thus would generate necessary new information not duplicative of EPA's
7 or the USGS' existing data.

8 96. EPA also stated that even if it lacked sufficient information about asbestos
9 exposure to undertake its risk evaluation of asbestos, it would have insufficient time to initiate
10 and complete the rulemaking requested in the Petition to be able to use the information in the
11 asbestos risk evaluation. 84 Fed. Reg. at 20,066. However, EPA was aware of its lack of
12 knowledge about asbestos since at least 2018 when it issued the Asbestos Problem Formulations
13 and had sufficient time to promulgate an appropriate rule to obtain the adequate and reliable
14 information needed for its risk evaluation.

15 97. EPA's obligation under TSCA to protect human health and the environment
16 from the dangers of a chemical like asbestos does not end when the Agency completes an initial
17 risk evaluation under TSCA. Thus, the information the Plaintiff States sought through the
18 Petition would be useful to EPA in its continuing risk management of asbestos. For example, the
19 information the Petition sought may be crucial in EPA's exercising its TSCA authority under
20 Section 7, 15 U.S.C. § 2606, to seize or otherwise restrict asbestos or any article containing
21 asbestos as an imminently hazardous chemical substance, and providing information necessary
22 for future citizens' petitions under Section 21, 15 U.S.C. § 2620, for EPA to issue, amend, or
23 repeal any asbestos regulation EPA issues under Section 6, 15 U.S.C. § 2605.

24 98. Additionally, Plaintiff States, their citizens, and others would benefit from EPA
25 collecting reliable information about asbestos and articles containing it as sought by the Petition
26 by giving states and the public access to information to help safeguard communities from harm
27 from asbestos exposures.

28

1 99. Plaintiff States are harmed by EPA’s refusal to promulgate the data collection
2 regulations requested in the Petition. Without comprehensive data about imports of asbestos and
3 asbestos-containing articles, EPA will be unable to satisfy TSCA risk-evaluation requirements,
4 and Plaintiff States will be unable to evaluate the sufficiency of EPA’s regulatory response to
5 asbestos exposure.

6 100. EPA’s denial of the Petition deprives Plaintiff States, and the public generally,
7 including those who would peer and publically review EPA’s risk evaluation of asbestos, of the
8 benefits that would have resulted from the reporting the Petition sought about the quantities of
9 raw and processed asbestos and articles containing asbestos that are imported, as well as products
10 containing asbestos impurities.

11 **FIRST CAUSE OF ACTION**

12 ***(Judicial Review under TSCA)***

13 101. The allegations set forth in the foregoing paragraphs are incorporated herein by
14 reference.

15 102. On January 31, 2019, Plaintiff States filed the Petition under Section 21 setting
16 forth the facts necessary for EPA to issue a new rule under Section 8 to require reporting by
17 importers, manufacturers and processors of raw asbestos and asbestos-containing articles. *See*
18 U.S.C. § 2620(b)(1).

19 103. EPA denied the Petition on April 30, 2019.

20 104. TSCA Section 21 provides a right to judicial review in an appropriate district
21 court within 60 days following denial of a petition to initiate rulemaking to require reporting
22 under TSCA Section 8. 15 U.S.C. § 2620(b)(4)(B) (“the petitioner shall be provided an
23 opportunity to have such petition considered by the court in a *de novo* proceeding”); *see also*
24 *Env. Def. Fund v. Reilly*, 909 F.2d 1497, 1504 (D.C. Cir. 1990) (holding that for a petition
25 seeking a new rule under TSCA Section 6 or 8, the standard of review is *de novo*).

26 105. TSCA Section 21(b)(4)(B)(ii) provides that, where the petition seeks
27 promulgation of a rule under Section 8, the district court shall “order the Administrator to initiate
28 the action requested by the petitioner” if the petitioner “demonstrates to the satisfaction of the

1 court by a preponderance of the evidence” that the chemical substance in question “presents an
2 unreasonable risk of injury to health or the environment, without consideration of costs or other
3 nonrisk factors.” 15 U.S.C. § 2620(b)(4)(B)(ii).

4 106. The preponderance of the evidence demonstrates that asbestos “presents an
5 unreasonable risk of injury to health or the environment, without consideration of costs or other
6 nonrisk factors,” and that EPA’s failure to require the reporting of the information sought by the
7 Plaintiff States contributes to such unreasonable risk.

8 107. Therefore, the Court should order EPA to initiate rulemaking under TSCA
9 Section 8 to require the addition of the asbestos reporting requirements under the CDR
10 Regulation requested in the Petition.

11 **SECOND CAUSE OF ACTION**

12 ***(Judicial Review under the APA)***

13 108. The allegations set forth in the foregoing paragraphs are incorporated herein by
14 reference.

15 109. Under section 706 of the APA, 5 U.S.C. § 706, a reviewing court shall “hold
16 unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,
17 capricious, an abuse of discretion, or otherwise not in accordance with law.”

18 110. As alleged in paragraphs 1 through 100, above, EPA’s April 30, 2019 denial of
19 the Petition contains errors of law and fact.

20 111. EPA’s denial of the Petition, which was predicated on those errors of law and
21 fact, was arbitrary, capricious, an abuse of discretion, and not in accordance with law, and thus
22 should be set aside under the APA.

23
24 **PRAYER FOR RELIEF**

25 Wherefore, Plaintiff States respectfully request that this Court enter judgment in their favor
26 and against Defendants upon their claims, and enter judgment against Defendants:

27 1. Declaring that Plaintiff States have demonstrated by a preponderance of the evidence
28 that the manufacturing, importation, processing and use of asbestos and asbestos-containing

1 products present an unreasonable risk of injury to health and the environment, without
2 consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially
3 exposed or susceptible subpopulation, pursuant to 15 U.S.C. § 2620(b)(4)(B)(ii);

4 2. Declaring that Defendants' denial of Plaintiffs' petition was arbitrary, capricious, an
5 abuse of discretion, and otherwise not in accordance with law under 5 U.S.C. § 706;

6 3. Ordering Defendants to initiate rulemaking expeditiously to promulgate TSCA
7 Section 8 reporting requirements for asbestos as requested in the Petition pursuant to 15 U.S.C. §
8 2620(b)(4)(B);

9 4. Awarding Plaintiff States their costs, expenses, and reasonable attorneys' fees; and

10 5. Awarding such other relief as the Court deems just and proper.

11 Dated: June 28, 2019

Respectfully Submitted,

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1 Dated: June 28, 2019

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ATTORNEY GENERAL KARL A. RACINE

2
3 /s/ *David S. Hoffman*

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Exhibit 1

**THE ATTORNEYS GENERAL OF MASSACHUSETTS, CALIFORNIA,
CONNECTICUT, HAWAII, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW
YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON,
AND THE DISTRICT OF COLUMBIA**

January 31, 2019

Via electronic and certified mail

Andrew Wheeler, Acting Administrator
U.S. Environmental Protection Agency
Mail Code:1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
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Re: Petition of the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia under Section 21(a) of TSCA, 15 U.S.C. § 2620(a), for EPA to Issue an Asbestos Reporting Rule to Require Reporting under TSCA Section 8(a), 15 U.S.C. § 2607(a), of Information Necessary for EPA to Administer TSCA as to the Manufacture (including Importation), Processing, Distribution in Commerce, Use, and Disposal of Asbestos

Dear Acting Administrator Wheeler:

On behalf of their respective states and district, the Attorneys General of Massachusetts, California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia hereby petition the Acting Administrator under Section 21(a) of the Toxic Substances Control Act (TSCA)¹ to initiate rulemaking under TSCA Section 8(a)² to issue a new asbestos reporting rule to address infirmities in asbestos reporting under the U.S. Environmental Protection Agency's (EPA) Chemical Data Reporting rule (CDR), 40 C.F.R. Part 711, to ensure that data as to the importation and use of asbestos and asbestos-containing products in the United States that are necessary for EPA to administer TSCA are adequately reported to EPA.³ The facts establishing

¹ 15 U.S.C. § 2620(a).

² *Id.* § 2607(a).

³ On September 25, 2018, the Asbestos Disease Awareness Organization (ADAO), American Public Health Association, Center for Environmental Health, Environmental Working Group, Environmental Health Strategy Center, and Safer Chemicals Healthy Families, submitted their *Petition Under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (NGO Petition, available at <https://www.epa.gov/sites/production/files/2018-10/documents/adao-asbestos-cdr-petition-all.pdf>), seeking similar relief, which petition the undersigned Attorneys General support. By letter dated December 21, 2018, EPA advised

that it is necessary for EPA to conduct a rulemaking as requested herein are set forth below.

The new asbestos reporting rule that this petition seeks is necessary for EPA to comply with its mandate to conduct risk evaluations for asbestos under TSCA Section 6(b)(4)(A)⁴ and to adopt requirements under TSCA Section 6(a)⁵ for the manufacture (including importation⁶), processing, distribution in commerce, use, and disposal of asbestos to prevent unreasonable risks to health and the environment. It also would be an important right-to-know tool to give our states and the public access to information that may be critical for avoiding potentially dangerous exposures to asbestos-containing products.⁷

Specifically, the undersigned Attorneys General petition the Acting Administrator to initiate a rulemaking and issue a new asbestos reporting rule to: (i) eliminate any applicability of the “naturally occurring substance” (NOCS) exemption in the CDR for asbestos reporting;⁸ (ii) apply the CDR reporting requirements to processors of asbestos, as well as manufacturers, including importers, of the chemical substance;⁹ (iii) ensure that the impurities exemption in the CDR does not apply to asbestos; and (iv) require reporting with respect to imported articles that contain asbestos. Without a new rule requiring adequate reporting regarding the manufacture and use of asbestos, EPA will be unable to comply with its statutory mandate to prevent unreasonable risks to health and the environment presented by this highly hazardous chemical that unfortunately continues to be in widespread use in the United States and poses ongoing dangers to the residents of our states.

INTRODUCTION AND SUMMARY OF PETITION

Asbestos is a known human carcinogen and there is no safe level of exposure to this highly toxic material ubiquitous in our built environment.¹⁰ The potential for harm posed by

ADAO counsel that EPA is denying the NGO Petition (*available at* https://www.epa.gov/sites/production/files/2018-12/documents/petition_response.pdf), and EPA issued a prepublication copy of the agency’s reasons for the denial (EPA NGO Petition Response, *available at* https://www.epa.gov/sites/production/files/2018-12/documents/prepublication_copy_of_petition_fr_notice.pdf).

⁴ 15 U.S.C. § 2605(b)(4)(A).

⁵ *Id.* § 2605(a).

⁶ Under TSCA, “manufacture” means “to import into the customs territory of the United States . . . , produce or manufacture.” *Id.* § 2602(9). References herein to “manufacture,” “manufacturing,” and “manufacturer,” thus include import, importing, or importer respectively.

⁷ Under TSCA Section 14(d)(4), a state may qualify for access to reported information even if the information is claimed to be confidential business information. *Id.* § 2613(d)(4).

⁸ In petitioning for this new asbestos reporting rule, the undersigned Attorneys General do not concede that asbestos as imported into the U.S. meets the CDR’s criteria for a “naturally occurring substance” and reserve all claims that asbestos as imported into the U.S. is not such a “naturally occurring substance.”

⁹ The CDR currently does not require processors of asbestos to report and instead relies on manufacturers (importers) to report on processing activities. However, TSCA Section 8(a)(1)(A) unambiguously requires, in relevant part, that the “Administrator shall promulgate rules under which . . . each person . . . who manufactures or processes or proposes to manufacture or process a chemical substance . . . shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require [to implement the law]” See 15 U.S.C. § 2607(a)(1)(A).

¹⁰ See *Safety and Health Topics: Asbestos*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/SLTC/asbestos/>.

asbestos is universally recognized and addressing its risks was a priority in reforming TSCA:

Asbestos, for example, is one of the most harmful chemicals known to humankind, and it takes 15,000 lives a year. It is linked to a deadly form of lung cancer called mesothelioma. People can breathe in these fibers deep into their lungs where they cause serious damage.¹¹

In 1989, EPA concluded that asbestos is a highly potent carcinogen regardless of the type of asbestos or the size of the fiber.¹² And EPA has long possessed an abundance of information that supports aggressive regulatory actions to protect the public from asbestos disease risks.¹³ According to EPA, “asbestos is one of the most hazardous substances to which humans are exposed in both occupational and non-occupational settings . . . [and] [t]here is wide agreement that all types of asbestos fibers are associated with pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma. Gastrointestinal cancer and other cancers at extrathoracic sites, as well as other lung disorders and diseases, have also been associated with asbestos exposure All of these asbestos-related diseases are life-threatening or disabling and cause substantial pain and suffering [These] conclusions regarding the health effects of asbestos exposure represent a widely accepted consensus of opinion of health agencies, scientific organizations, and independent experts.”¹⁴ Accordingly, asbestos is one of the ten chemical substances (Initial Ten TSCA Chemicals) that EPA chose for its initial chemical risk evaluations under the 2016 amendments to TSCA.¹⁵

Robust reporting of the importation and use of asbestos in the U.S. is necessary for EPA to satisfy its statutory mandate under TSCA Section 6(a) to establish requirements to ensure that asbestos does not present an unreasonable risk of injury to health or the environment and for states and the public to have access to data necessary to themselves evaluate such risks.¹⁶ As such, it is critical from a public health perspective, and necessary from a TSCA-compliance perspective, that, in regulating asbestos under TSCA Section 6, EPA: (i) considers the knowable universe of potential exposure pathways presented by the manufacture, processing, distribution in commerce, use, or disposal of asbestos; and (ii) eliminates all human exposure to this uniquely dangerous chemical substance. Neither of these goals can be accomplished if EPA does not possess the necessary comprehensive data with respect to the manufacture (including import) and

¹¹ Sen. Barbara Boxer speaking in support of H.R. 2576, the Frank R. Lautenberg Chemical Safety for the 21st Century Act, 114th Congress, Second Session, 162 Cong. Rec. S3511 (Jun. 7, 2016).

¹² See *Final Rule: Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions*, 54 Fed. Reg. 29,460, 29,467 (Jul. 12, 1989); see also *Corrosion Proof Fittings v. EPA*, 947 F.2d. 1201, 1217 (5th Cir. 1991) (“The EPA . . . [in issuing the rule] believed that there was no asbestos exposure level for which the risk of injury or death was zero.”).

¹³ See *Corrosion Proof Fittings*, 947 F.2d at 1211 n. 9 (noting that EPA did not need to convene panel of experts for its asbestos rulemaking because it already had sufficient information regarding risks).

¹⁴ 54 Fed. Reg. at 29,468-69.

¹⁵ See *Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act*, 81 Fed. Reg. 91,927 (Dec. 19, 2016).

¹⁶ 15 U.S.C. § 2605(a).

use of asbestos in the U.S. on which to act—data that currently EPA is not collecting under the CDR as EPA concedes in the EPA NGO Petition Response.¹⁷

This rulemaking is necessary because the CDR does not generate such comprehensive data. The CDR exempts imported raw asbestos as a “naturally occurring substance,”¹⁸ and exempts asbestos as an impurity¹⁹ and as a chemical substance imported as part of an article²⁰; moreover, the CDR applies to those who manufacture asbestos, but not those who process asbestos.²¹ These limitations deprive the agency of crucial information regarding asbestos exposure pathways necessary for the agency to fulfill its statutory mandate to prevent unreasonable risks of injury. Any TSCA risk evaluation that EPA conducts without access to accurate and complete asbestos data cannot satisfy TSCA’s risk evaluation criteria, including TSCA’s requirement that EPA use the “best available science” in carrying out TSCA’s mandate to eliminate unreasonable risk of injury to health or the environment presented by the manufacture (including importation), processing, distribution in commerce, use, or disposal of a toxic chemical substance. Moreover, without EPA gathering such information about asbestos, our states are hampered in their ability to design and implement programs necessary to protect the public’s health from this highly toxic chemical.

On August 3, 2018, many of the undersigned Attorneys General submitted comments for their respective states (Problem Formulation Comments)²² on EPA’s *Problem Formulation of the Risk Evaluation for Asbestos* (Asbestos Problem Formulation).²³ The comments criticized the Asbestos Problem Formulation as presenting an incomplete array of conditions of use of asbestos contrary to TSCA’s plain language and Congress’ intent that EPA’s risk evaluations assess each chemical in its entirety, based on all identifiable conditions of use, including ongoing and legacy uses such as the ubiquitous continued use of asbestos. The comments also faulted EPA for

¹⁷ See EPA NGO Petition Response, *supra*, pp. 10-12.

¹⁸ See 40 C.F.R. § 711.6(a)(3); see also Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA’s interpretation of NOCS exemption as applying to the importation of asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, *et al.*, available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>.

¹⁹ See 40 C.F.R. §§ 711.10(c), 711.5, and 720.30(h)(1).

²⁰ See *id.* §§ 711.10(b) and 710.3.

²¹ See *id.* § 711.3 (processing not included in definition of “manufacture”); *id.* § 711.8.

²² Comments of the Attorneys General of Massachusetts, California, Hawaii, Maine, Maryland, New Jersey, New York, Oregon, Vermont, Washington, and the District of Columbia, submitted electronically to Charlotte Bertrand, Acting Principal Deputy Assistant Administrator, EPA Office of Chemical Safety and Pollution Prevention, in EPA-HQ-OPPT-2016-0736 (Asbestos), *Re: Notice of Availability on Problem Formulations for the Risk Evaluations to be Conducted Under the Toxic Substances Control Act for Asbestos, 1-Bromopropane, 1,4 Dioxane, Carbon Tetrachloride, Cyclic Aliphatic Bromide Cluster, also known as HBCD, Methylene Chloride, N-Methylpyrrolidone (NMP), Pigment Violet 29, Tetrachloroethylene, also known as Perchloroethylene, and Trichloroethylene (TCE) and General Guiding Principles to Apply Systematic Review in TSCA Risk Evaluations* (83 Fed. Reg. 26,998 (Jun. 11, 2018), Aug. 3, 2018, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0146>. By electronic filing in the EPA docket HQ-OPPT-2016-0736 (Asbestos), the Attorney General of Rhode Island joined the comments (Aug. 15, 2018). Each of the 11 states and the district that joined the Problem Formulation Comments is among the petitioners herein.

²³ *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, available at: https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.

arbitrarily failing to pursue all reasonably available information about the chemicals for its risk evaluations—a point this petition echoes.

As with those conditions of use limitations that EPA has so far proposed for TSCA evaluation purposes, the CDR—without the new reporting requirements that the Attorneys General seek through this rulemaking—will make it impossible for EPA to comply with its statutory mandate to prevent unreasonable risks to health and the environment presented by asbestos.

Accordingly, the Attorneys General petition the Acting Administrator under TSCA Section 21(a)²⁴ to initiate rulemaking under Section 8(a)²⁵ to promulgate a rule to address the deficiencies in the CDR for asbestos reporting. Promulgation of such a rule would ensure that data as to the importation and use of asbestos and asbestos-containing products in the U.S. is adequately reported so EPA will have the information necessary for it to comply with its statutory mandate under TSCA to prevent unreasonable risks to health and the environment from asbestos, and so this crucial information is available to our states and the public.

This petition proceeds as follows. In Part I, we provide a summary of our states' interests with respect to EPA's evaluation and regulation of asbestos. In Part II, we describe EPA's obligations under TSCA for conducting risk evaluations and making regulatory determinations for asbestos in commerce, and for requiring reporting of information as reasonably required by EPA to fulfill its statutory mandate under TSCA to prevent the unreasonable risk of injury to health or the environment. In Part III, we set forth the current data reporting requirements under the CDR and describe the inadequacies of the CDR for the purpose of gathering the information EPA needs properly to evaluate and regulate asbestos. Finally, we suggest how EPA should promulgate a rule for asbestos reporting to enable EPA to fulfill its statutory mandate.

I. The Interests of the Petitioning States

The petitioning states have a significant interest in ensuring that: (a) EPA has the data it needs to fulfill its mandate under TSCA to prevent the unreasonable risk of injury to health and the environment from exposures to asbestos; and (b) our state regulators and other stakeholders have the information regarding the presence of asbestos in commerce to enable them to take appropriate action at the state and local level to protect our residents from asbestos' dangers.

EPA's past conclusions about the unreasonable risks asbestos poses to human health and the environment are undeniable. In 1989, EPA found that asbestos is a potent carcinogen at all levels of exposure, regardless of the type of asbestos or the size of the fiber, i.e., that there is no level of exposure that is safe for a human,²⁶ and it is well-recognized that EPA possesses an abundance of information with respect to asbestos disease risks.²⁷ EPA's findings as to the disastrous human health effects caused by exposure to asbestos are set forth in EPA's *Asbestos*:

²⁴ 15 U.S.C. § 2620(a).

²⁵ *Id.* § 2607(a).

²⁶ See 54 Fed. Reg. at 29,467; 40 C.F.R. Part 763; *Corrosion Proof Fittings*, 947 F.2d at 1217 (“The EPA . . . believed that there was no asbestos exposure level for which the risk of injury or death was zero.”).

²⁷ See *Corrosion Proof Fittings*, 947 F.2d at 1211 n. 9 (noting that EPA did not need to convene a panel of experts for its asbestos rulemaking because it already had sufficient information regarding the risks).

*Manufacture, Importation, Processing and Distribution in Commerce Prohibitions; Final Rule (Asbestos Ban Rule).*²⁸

Asbestos' potential for substantial harm to public health and the environment is the reason why it is among the first candidates for risk evaluation. The consequences of a federal failure to adequately identify and eliminate those unreasonable risks is correspondingly high to petitioner states and their residents, with the potential for even greater risk to susceptible subpopulations, where the failure to perform a full analysis may have the most severe adverse impact. In the absence of sufficient national regulation of asbestos, petitioner states face continued ongoing costs of state-subsidized medical care for diseases caused by asbestos exposure, including pulmonary fibrosis (asbestosis), lung cancer, and mesothelioma, as well as lost productivity resulting from those diseases. Asbestos exposure is the sole known cause of mesothelioma, a rare and highly fatal cancer of the chest or abdominal lining caused by exposure to asbestos fibers.²⁹ From 2011–2015, the CDC reports there were a total of 16,420 new cases of mesothelioma in the U.S., resulting in 12,837 deaths, of which 6,582 new cases of mesothelioma, resulting in 5,159 deaths, were in the petitioning states.³⁰

A failure to properly regulate at the federal level would also harm the petitioning states and district by increasing their own regulatory and enforcement costs. Many of the petitioning states and district have regulations prohibiting various uses of asbestos/asbestos-containing products. For example, Massachusetts and Oregon comprehensively regulate the handling, transport, and disposal of asbestos in its borders through a set of overlapping state and delegated federal programs involving multiple state agencies.³¹ California regulates exposure to asbestos in construction work,³² general industry,³³ shipyards,³⁴ and has prohibited the sale of brake pads with asbestiform fibers above 0.1% weight.³⁵ New Jersey also regulates exposure to asbestos in construction work and general industry in the public sector and regulates the asbestos abatement

²⁸ 54 Fed. Reg. 29,460 (Jul. 12, 1989); 40 C.F.R. Part 763. In *Corrosion Proof Fittings*, the Fifth Circuit remanded the rule to EPA for further proceedings based on the Court's having found that EPA failed to satisfy the "least burdensome" requirement imposed on the agency under the then-applicable language of TSCA for banning asbestos, without challenging EPA's findings regarding the unreasonable risks posed by asbestos absent regulation. See *Corrosion Proof Fittings*, *supra*, 947 F.2d at 1207-1208, 1211 fn. 9. See also EPA's 2014 IRIS Assessment of Libby Amphibole Asbestos (concluding that asbestos "is carcinogenic to humans"), available at https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1026tr.pdf.

²⁹ See C.R. Roelofs et al., *Mesothelioma and Employment in Massachusetts: Analysis of Cancer Registry Data 1988-2003*, 56(9), AM. J. OF INDUSTRIAL MED. 985 (2013).

³⁰ See <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (last accessed Jan. 30, 2019).

³¹ See e.g., Massachusetts Clean Air Act, MASS. GEN. LAWS ch. 111, §§ 142A-O, and the federal Clean Air Act, 42 U.S.C. § 7401, et seq., which authorize the Massachusetts Department of Environmental Protection ("MassDEP") to prevent air pollution by regulating asbestos handling, transport, and disposal; MASS. GEN. LAWS ch. 21E by which MassDEP requires notice and remediation of releases of asbestos to the environment as a hazardous material under the state's "superfund" law; MASS. GEN. LAWS ch. 111, § 150A under which MassDEP regulates disposal of asbestos under the Massachusetts Solid Waste Management Act; and M.G.L. c. 149 through which Massachusetts Department of Labor Standards ("DLS") ensures worker safety in Massachusetts by licensing asbestos-related work and requiring the use of proper work practices and safety equipment. See also Or. Admin. R. 340-248.

³² California Code of Regulations ("Cal. Code Regs."), tit. 8, § 1529.

³³ *Id.* tit. 8, § 5208.

³⁴ *Id.* tit. 8, § 8358.

³⁵ CAL. HEALTH & SAFETY CODE § 25250.51.

industry through a series of comprehensive regulations administered by multiple state agencies.³⁶ And the District of Columbia regulates the removal and abatement of asbestos through its own licensing and permitting requirements to ensure the safe removal and disposal of asbestos-containing material and the safety of asbestos abatement workers and the surrounding community.³⁷ Absent adequate federal regulation, these states will continue to bear the increasing costs of their present reactive approach to protecting their citizens' health from asbestos-caused disease and may be required to promulgate and enforce additional regulations.

II. EPA's Obligations Under TSCA to Evaluate Asbestos

TSCA directs EPA to determine whether certain chemicals pose an unreasonable risk of injury to health or the environment, and if a chemical does present such risk, mandates that EPA eliminate that risk.³⁸ To determine whether a chemical substance presents such unreasonable risks, TSCA requires EPA to evaluate the risks from the full range of exposures in the circumstances under which the chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of, without consideration of costs or other nonrisk factors.³⁹ If EPA determines that an unreasonable risk exists, TSCA directs EPA to issue a rule imposing one or more of a variety of regulatory requirements so that the chemical substance no longer presents such risk.⁴⁰

And under TSCA, EPA is required to prioritize chemical substances for this two-stage agency review, so that EPA first evaluates and regulates the chemicals suspected of presenting the greatest risks.⁴¹ Risk is a function of hazard and exposure, and to evaluate the risks posed by a chemical like asbestos, which has well-documented human health hazards, EPA must consider the full range of potential exposures to the chemical. Despite this, the CDR shields from reporting information regarding the manufacture (including importation) and use of asbestos that the agency must have to be able to identify significant sources of potential chronic exposures to this highly hazardous chemical and to perform TSCA-compliant risk evaluations.

A. Risk Evaluation of Asbestos as One of the Initial Ten TSCA Chemicals

On December 19, 2016, through the prioritization process required by TSCA, EPA identified asbestos as one of the initial ten TSCA chemical substances⁴² to undergo risk evaluation.⁴³ Thus, EPA now must conduct a risk evaluation to determine whether asbestos:

³⁶ N.J.A.C. 8:60, Asbestos Licenses and Permits; N.J.A.C. 5:23-8, Asbestos Abatement Subcode; N.J.S.A. 34:6A-30, Adoption of Standards (provides for the State of NJ to adopt federal standards); N.J.A.C. 7:26, Solid and Hazardous Waste Regulations.

³⁷ See 20 DCMR §§ 800.1, *et seq.*

³⁸ 15 U.S.C. §§ 2605(a) and (b).

³⁹ See 15 U.S.C. §§ 2605(b)(4)(A) and 2602(4).

⁴⁰ See *id.* § 2605(a).

⁴¹ *Id.* § 2605(b)(1).

⁴² See 15 U.S.C. § 2605(b)(2)(A).

⁴³ See *Designation of Ten Chemical Substances for Initial Risk Evaluations Under the Toxic Substances Control Act*, 81 Fed. Reg. 91,927 (Dec. 19, 2016). With asbestos, EPA designated the following chemicals as the Initial Ten TSCA Chemicals for risk evaluation: 1-Bromopropane, 1,4-Dioxane, Carbon Tetrachloride, Cyclic Aliphatic

presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.⁴⁴

B. Regulation of Asbestos under TSCA Section 6(a)

Under TSCA Section 6(a), if in its risk evaluation EPA determines that asbestos presents an unreasonable risk, EPA is required to establish requirements for asbestos to ensure that asbestos does not present “an unreasonable risk of injury to health or the environment.”⁴⁵

The suite of potential requirements that EPA has at its disposal under TSCA to address unreasonable risk of injury to health or the environment posed by asbestos include:

- prohibiting or otherwise restricting manufacturing, processing, or distribution in commerce of asbestos;⁴⁶
- prohibiting or otherwise restricting the manufacturing, processing, or distribution in commerce of asbestos for a particular use;⁴⁷
- imposing labelling requirements for asbestos or for articles containing asbestos;⁴⁸
- imposing records retention, monitoring and testing obligations on manufacturers and processors to assure compliance;⁴⁹
- prohibiting or otherwise regulating the commercial use of asbestos;⁵⁰
- prohibiting or otherwise regulating disposal of asbestos or any article containing asbestos by its manufacturer or processor or by any other person who uses or disposes of asbestos for commercial purposes;⁵¹ and
- directing manufacturers and processors of asbestos to notify distributors and others in possession of asbestos, and the public, of EPA’s regulatory requirements imposed to prevent unreasonable risk of injury to health or the environment, and to replace or repurchase the asbestos.⁵²

Bromide Cluster (also known as HBCD), Methylene Chloride, N-Methylpyrrolidone (NMP), Pigment Violet 29, Tetrachloroethylene (also known as Perchloroethylene), and Trichloroethylene (TCE). EPA announced its designation of the ten priority chemicals, featuring asbestos as one of the first chemicals to be evaluated, in a November 29, 2016 press release, *available at* <https://archive.epa.gov/epa/newsreleases/epa-names-first-chemicals-review-under-new-tsca-legislation.html>.

⁴⁴ *Id.* § 2605(b)(4)(A).

⁴⁵ *Id.* § 2605(a).

⁴⁶ *Id.* § 2605(a)(1).

⁴⁷ *Id.* § 2605(a)(2).

⁴⁸ *Id.* § 2605(a)(3).

⁴⁹ *Id.* § 2605(a)(4).

⁵⁰ *Id.* § 2605(5).

⁵¹ *Id.* § 2605(a)(6).

⁵² *Id.* § 2605(a)(7).

Thus, the scope of restrictions EPA is authorized to impose under TSCA to prevent unreasonable risk of injury from exposure to asbestos includes restricting those who manufacture asbestos, process asbestos, use asbestos, or dispose of asbestos, and those restrictions apply both to the chemical substance asbestos and to articles that contain asbestos.

C. Information Requirements under TSCA for Conducting Risk Evaluations to Determine Whether a Chemical Substance Presents an Unreasonable Risk of Injury to Health or the Environment and for Regulating to Prevent Such Risk

Under TSCA, Congress expressly required EPA to engage in science-based actions to prevent unreasonable risk of injury to health or the environment as a result of exposures to hazardous chemical substances like asbestos, and to consider the information reasonably available to the Administrator regarding, among other things, exposure, in regulating under the Act.⁵³

Section 26 of TSCA provides:

(h) Scientific standards

In carrying out [section 2605] of this title . . . the Administrator shall use scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner *consistent with the best available science*⁵⁴

(i) Weight of scientific evidence

The Administrator shall make decisions under [section 2605] of this title based on the weight of the scientific evidence.⁵⁵

* * *

(k) Reasonably available information

In carrying out [section 2605] of this title, the Administrator shall take into consideration information relating to a chemical substance or mixture, including hazard and exposure information, under the conditions of use, that is *reasonably available* to the Administrator.⁵⁶

⁵³ *Id.* §§ 2625(h), (i), and (k).

⁵⁴ *Id.* § 2625(h) (emphasis supplied).

⁵⁵ *Id.* § 2625(i) (emphasis supplied).

⁵⁶ *Id.* § 2625(k) (emphasis supplied).

Additionally, in conducting the risk evaluations under TSCA, EPA must consider “the likely duration, intensity, frequency, and number of exposures under the conditions of use of the chemical substance”⁵⁷

D. Reporting Requirements under Section 8(a) of TSCA

For EPA to fulfill its mandate under TSCA to regulate substances based on accurate and complete risk evaluations, TSCA Section 8(a)⁵⁸ requires that EPA promulgate rules—that is, the CDR—requiring manufacturers (including importers) and processors of chemical substances to report to the agency the following information about the chemical substance:

- common or trade name, chemical identity, and molecular structure;⁵⁹
- categories or proposed categories of use;⁶⁰
- total amount manufactured or processed and reasonable estimates of amount to be manufactured or processed, with total amount manufactured or processed for each category of use and reasonable estimates of amount to be manufactured or processed for each category of use;⁶¹
- description of the byproducts resulting from the manufacture, processing, use, or disposal;⁶²
- all existing information about the environmental and health effects of the chemical substance;⁶³
- number of individuals exposed and estimate of number of those who will be exposed in their places of employment, including exposure duration;⁶⁴ and
- manner or method of disposal.⁶⁵

The current CDR includes significant exemptions for asbestos from these Section 8(a) reporting requirements.⁶⁶ Without complete reporting under Section 8(a), EPA will not have data that accurately reflects the use and potential exposure to asbestos in the U.S. and as a result will be unable reasonably to comply with its obligations under TSCA to protect the public from asbestos’ risks.

⁵⁷ *Id.* § 2605(b)(4)(F)(iv).

⁵⁸ *Id.* § 2607(a).

⁵⁹ *Id.* § 2607(a)(2)(A).

⁶⁰ *Id.* § 2607(a)(2)(B).

⁶¹ *Id.* § 2607(a)(2)(C).

⁶² *Id.* § 2607(a)(2)(D).

⁶³ *Id.* § 2607(a)(2)(E).

⁶⁴ *Id.* § 2607(a)(2)(F).

⁶⁵ *Id.* § 2607(a)(2)(G).

⁶⁶ *See* Part III, *infra*.

More specifically, the CDR's "naturally occurring substance,"⁶⁷ "impurities,"⁶⁸ and "as part of an article"⁶⁹ exemptions for asbestos reporting, and its failure expressly to provide that processors of asbestos as well as manufacturers are subject to reporting under the CDR,⁷⁰ mean that EPA will be unable both to satisfy TSCA's standards for the data that EPA must consider in preparing its risk evaluation for, and making determinations regarding the regulation of, asbestos,⁷¹ and to meet TSCA's "weight of scientific evidence" standard for decision making under Section 26.⁷²

III. The Information Currently Reported Under the CDR is Inadequate for EPA to Conduct Meaningful, TSCA-Compliant Asbestos Risk Evaluation and Decision Making

As the Problem Formulation Comments reflect, the petitioning Attorneys General believe that in its asbestos risk evaluation process to date EPA has "choos[en] to put on blinders and ignore some of the most meaningful data with respect to risks of exposure to the chemical substance."⁷³ This troubling theme of willfully ignoring available information is also reflected in EPA's approach to using its authority under TSCA Section 8(a) to obtain information necessary to support its regulatory actions.⁷⁴

A. The CDR, 40 C.F.R. Part 711

On August 16, 2011, pursuant to its authority under Section 8(a) of TSCA,⁷⁵ EPA amended the then-existing Inventory Update Rule, re-naming it and enhancing its reporting requirements, resulting in the CDR currently in effect. EPA said it took this action, among other reasons, "[t]o increase its ability to effectively provide public access to the information" and "[t]o improve the usefulness of the information reported."⁷⁶ Further, EPA acknowledged that the data collection regulations pursuant to its Section 8 authority are necessary for fulfilment of its duties to evaluate risk exposures of chemicals subject to TSCA:

The CDR enables EPA to collect and publish information on the

⁶⁷ See 40 C.F.R. § 711.6(a)(3). See also Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA's interpretation of NOCS exemption as applying to the importation of asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, *et al.*, available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>. The Attorneys General do not concede that asbestos as imported into the U.S. meets the CDR's criteria for a "naturally occurring substance" and reserve all claims that asbestos as imported into the U.S. is not such a "naturally occurring substance."

⁶⁸ See 40 C.F.R. §§ 711.10(c), 711.5, and 720.30(h)(1).

⁶⁹ See *id.* §§ 711.10(b) and 710.3.

⁷⁰ See *id.* § 711.3 (processing not included in definition of "manufacture"); *id.* § 710.8.

⁷¹ See 15 U.S.C. §§ 2625(h) and (k).

⁷² See *id.* § 2625(i).

⁷³ See the Problem Formulation Comments, *supra*, at 21-22.

⁷⁴ 15 U.S.C. § 2607(a); see Part II(C), *supra*.

⁷⁵ *Id.* § 2607(a).

⁷⁶ 76 Fed. Reg. 50,816, 50,818 (Aug. 16, 2011).

manufacturing, processing, and use of commercial chemical substances and mixtures . . . on the TSCA Chemical Substance Inventory (TSCA Inventory). This includes current information on chemical substance production volumes, manufacturing sites, and how the chemical substances are used. This information helps the Agency determine whether people or the environment are potentially exposed to reported chemical substances.⁷⁷

* * *

. . . exposure information is an essential part of developing risk evaluations and, based on its experience in using this information, the Agency believes that collecting this exposure information is critical to its mission of characterizing exposure, identifying potential risks, and noting uncertainties for these lower production volume chemical substances.⁷⁸

EPA also highlighted the role the CDR would have in affording the public information about chemicals. In fact, this underscored EPA's renaming of the regulations "to better reflect the distinction between this data collection (which includes exposure-related data) and the TSCA Inventory itself (which only involves chemical identification information)."⁷⁹ It continued:

Identifying this data collection as 'CDR' will make it easier for the public to understand what information is available to them through the data collection. The name change thereby contributes to the Agency's current chemicals management program by increasing transparency and facilitating public access to information about chemical substances.⁸⁰

And EPA recognized "the lower thresholds [of chemicals reported] will provide the public with information on a greater number of chemical substances."⁸¹

Notwithstanding the undeniably crucial role that chemical information plays in enabling EPA to satisfy its mandate under TSCA, and the role it plays in facilitating state and public access to information about chemicals and EPA's aim to increase transparency of that information, the CDR exempts raw asbestos, at least as to imports, from reporting as a "naturally

⁷⁷ *Id.* at 50,816.

⁷⁸ *Id.* at 50,823

⁷⁹ *Id.* at 50,819.

⁸⁰ *Id.*

⁸¹ *Id.* at 50,823.

occurring substance,”⁸² potentially exempts asbestos as an “impurity”⁸³ and as a chemical substance imported as part of an article,⁸⁴ and may fail to include processors of asbestos within the net of required reporters under the statute.⁸⁵ Consequently, as to asbestos, the present CDR does not satisfy EPA’s stated goals of providing useful (*i.e.*, complete) exposure information “essential” to risk evaluations, or complete information about asbestos available to the public. The new reporting rule that the petitioning states seek via this petition, which would enable EPA to present and rely on a complete set of domestic data about the amount, and uses, of asbestos, is consistent with those goals and with the statute’s requirements.

B. The Information That EPA Receives Under the CDR Is Insufficient for EPA to Perform Adequate Risk Evaluations and Make Reasonable Regulatory Determinations Necessary to Prevent Unreasonable Risk of Injury to Health and the Environment Pursuant to Section 6 of TSCA

As EPA recognizes in the CDR, TSCA Section 8(a) authorizes the EPA Administrator to require reporting of information necessary for EPA to administer TSCA.⁸⁶ TSCA aims to ensure that “adequate information [is developed by EPA] with respect to the effect of chemical substances and mixtures on health and the environment and . . . the development of such information should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.”⁸⁷

Accordingly, TSCA provides that the “Administrator shall promulgate rules under which . . . each person . . . who manufactures or processes . . . a chemical substance . . . shall . . . submit to the Administrator such reports, as the Administrator may reasonably require [to fulfill its mandate under TSCA].”⁸⁸ The reports the Administrator may require under Section 8(a) include:

- The total amount of each such substance and mixture manufactured or processed, reasonable estimates of the total amount to be manufactured or processed, the amount manufactured or processed for each of its categories of use, and reasonable estimates of the amount to be manufactured or processed for each of its categories of use or proposed categories of use.⁸⁹
- All existing information concerning the environmental and health effects of such substance or mixture.⁹⁰

⁸² 40 C.F.R. § 711.6(a)(3) provides “**Chemical substances for which information is not required . . . Full exemptions . . . Naturally occurring chemical substances.** Any naturally occurring chemical substance, as described in 40 C.F.R. 710.4(b) And 40 C.F.R. § 710.4(b) provides that naturally occurring chemical substance means “[a]ny chemical substance which is naturally occurring and: (1) Which is (i) unprocessed or (ii) processed only by manual, mechanical, or gravitational means; by dissolution in water; by flotation; or by heating solely to remove water; or (2) Which is extracted from air by any means”

⁸³ See 40 C.F.R. § 711.10(c); 40 C.F.R. § 711.5; and 40 C.F.R. § 720.30(h)(1).

⁸⁴ See *id.* §§ 711.10(b) and 710.3.

⁸⁵ See *id.* § 711.3 (processing not included in definition of “manufacture”) and 840 C.F.R. § 711.8.

⁸⁶ *Id.* § 711.1(a).

⁸⁷ *Id.* § 2601(b)(1).

⁸⁸ *Id.* § 2607(a)(1).

⁸⁹ *Id.* § 2607(a)(2)(C).

⁹⁰ *Id.* § 2607(aa)(2)(E).

- The number of individuals exposed, and reasonable estimates of the number who will be exposed, to such substance or mixture in their places of employment and the duration of such exposure.⁹¹

However, by recognizing a reporting exemption for asbestos as a “naturally occurring substance,” by the “impurities” and “articles” exemptions, and by not making clear that processors of asbestos must report, the CDR falls far short of requiring the robust reporting to EPA that Congress built into TSCA to enable EPA to implement the health-protection measures found in TSCA and without which EPA cannot carry out its mandate under TSCA.

EPA’s stark admissions in the Asbestos Problem Formulation about the woeful lack of information the agency has about the presence of asbestos in commerce in the U.S. demonstrates the pressing need for an asbestos reporting rule that requires manufacturers and processors to inform EPA about the specific quantities and anticipated uses and pathways for human exposure for the asbestos they are bringing into the country and/or are distributing in commerce here. This is equally true whether the form of the asbestos is as the raw mineral, as incorporated into an article, such as car brakes and brake linings, or as an impurity in items such as children’s crayons:

EPA has identified the ongoing use of chrysotile asbestos in: industrial processes in the chlor-alkali industry, asbestos sheet gaskets for use in equipment used in the manufacture of titanium dioxide and asbestos brake blocks in oilfield equipment and aftermarket asbestos brake linings. **In addition, certain asbestos containing products can be imported into the U.S., but the amounts are not known. These products are mostly used in industrial processes (e.g. cement products) but could also be used by consumers, and include woven products and automotive brakes and linings.**⁹²

1. NOCS Exemption

In a July 2017 letter,⁹³ EPA confirmed the agency’s interpretation of the CDR’s “naturally occurring chemical substance” or NOCS exemption that imports of raw asbestos are not subject to reporting under the CDR because of the reporting exemption in 40 C.F.R.

⁹¹ *Id.* § 2607(a)(2)(F).

⁹² EPA Asbestos Problem Formulation, p. 8 (emphasis supplied).

⁹³ Letter from Jeffrey T. Morris, Ph.D., Director, EPA Office of Pollution Prevention and Toxics to Rebecca J. Rentz, Esq., Senior Environmental Counsel, Occidental Petroleum Corp. (Jul. 28, 2017), confirming EPA’s interpretation of NOCS exemption as applying to the importation of raw asbestos, attached to the *Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a)* (Sept. 25, 2018) of the Asbestos Disease Awareness Organization, *et al.*, available at <http://www.asbestosdiseaseawareness.org/wp-content/uploads/2018/09/ADAO-Asbestos-CDR-petition-all.pdf>.

§ 711.6(a)(3).^{94,95,96}

In the Asbestos Problem Formulation, EPA stated that “[r]eporting of asbestos in the 2016 Chemical Data Reporting (CDR) period was limited. Only two companies, both from the chlor-alkali industry, reported importing asbestos and the amounts cannot be publicly disclosed due to company claims of confidential business information (CBI).”⁹⁷ Importantly, those two entities were not required to report under the CDR and did so *voluntarily*: the new reporting rule the petitioning states seek would expand the reporting requirements to capture this important data.

And in the EPA NGO Petition Response, EPA asserts that the agency receives sufficient information about asbestos use and exposure pathways through channels other than CDR reporting, including information received by EPA through voluntary disclosures.⁹⁸ However, such information, which is neither comprehensive nor certified as required for reporting under the CDR,⁹⁹ cannot substitute for the type of comprehensive data regarding quantities of asbestos and exposure pathways that is needed to assess asbestos risks adequately and regulate the chemical to prevent unreasonable injury to health and the environment posed by asbestos.

Further, in denying the NGO Petition, EPA states it “does not believe that the [amendments requested by the NGOs] would result in the reporting of any information that is not already known to EPA” because it has “conducted extensive research and outreach to develop its understanding of import information on asbestos-containing products in support of the ongoing asbestos risk evaluation.”¹⁰⁰ These statements directly contradict those previously made by EPA in its Asbestos Problem Formulation where the EPA specifically identifies its lack of data on the import of asbestos-containing products—for example, “[i]t is important to note that the **import volumes of products containing asbestos is [sic] unknown.**”¹⁰¹

⁹⁴ See 40 C.F.R. §§ 711.6(a)(3) and 710.4(b). In EPA’s letter to Occidental, the agency apparently relied solely on Occidental’s own representation that the imported asbestos had been processed only by mechanical and gravitational means in determining that the NOCS exemption applied, reliance we believe was misplaced and unreasonable under the circumstances.

⁹⁵ In the EPA NGO Petition Response, the agency does not dispute that those who import raw asbestos, whether by the chlor-alkali industry for making diaphragms for chlorine production or by any other industry, are exempt from reporting. Therefore, EPA has no reasonable basis to conclude, as it does, that “the chloralkali industry is the only importer of raw bulk asbestos” and there are no other firms that are importing raw asbestos into the U.S. See EPA NGO Petition Response, pp. 17-18.

⁹⁶ The petitioning states understand that prior to the point of import all raw asbestos exported from its country of origin has only been processed by mechanical and gravitational means. Thus, EPA’s application of the naturally occurring substance exemption is not unique to the raw asbestos imported by Occidental.

⁹⁷ *Id.* at p. 21.

⁹⁸ See *id.* at 7-9; see also Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Asbestos, CASRN: 1332-21-4, Support document for Docket EPA-HQ-OPPT-2016-0736, Office of Chemical Safety and Pollution Prevention, U.S. EPA, February 2017, pp. 4-6, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0005>.

⁹⁹ See 40 C.F.R. §§ 711.15(a)&(b), 711.35 (reporters must complete and submit Form U (EPA Form 7740-8) available at https://www.epa.gov/sites/production/files/2014-02/documents/form_u_2012_sample_report_021412_no_draft_0.pdf.

¹⁰⁰ EPA NGO Petition Response, *supra*, at p. 13.

¹⁰¹ *Problem Formulation of the Risk Evaluation for Asbestos*, p. 22, May 2018 (emphasis supplied), available at: https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf

The identified uses of imported raw asbestos represent pathways of exposure that present risks to health and the environment that EPA must consider in conducting its risk evaluation and regulating asbestos, and accordingly EPA should promulgate an asbestos reporting rule to require reporting of such information. Moreover, the required asbestos reporting must capture information with respect to the quantities imported, and these potential exposure pathways so this information can be made available to inform the states' and the public's knowledge regarding asbestos exposure risks.

Our concern here is heightened by the reported perspective of this administration regarding the risks posed by asbestos. There have been recent widespread reports that a Russian mining company has praised the administration for downplaying the health risks of the cancer-causing mineral. The reports describe the Russian company Uralsbest OJSC's announcing on June 25th in a Facebook post that "Donald is on our side!," with reports that the Facebook post went on to thank "US President Donald Trump for his words in defense of chrysotile-asbestos," and included posted photos of pallets of its chrysotile asbestos product wrapped in plastic emblazoned with President Trump's image.¹⁰²

2. Failure to Require Reporting from Processors

TSCA expressly provides EPA with the authority to require reporting from and impose restrictions on firms that process asbestos, as well as on those that manufacture, including import, the hazardous chemical.¹⁰³

For example, EPA has the authority to: (i) prohibit the processing of asbestos or limit the amounts of asbestos that may be processed;¹⁰⁴ (ii) prohibit the processing of asbestos or limit the amounts of asbestos that may be processed for a particular use or for a particular use in a concentration in excess of a specified level;¹⁰⁵ (iii) impose records retention requirements for processors of asbestos;¹⁰⁶ (iv) prohibit disposal of asbestos or any article containing asbestos by its processor;¹⁰⁷ and (v) direct processors of asbestos to notify distributors and others in possession of asbestos, and the public, of EPA's regulatory requirements imposed to prevent unreasonable risk of injury to health or the environment, and to replace or repurchase the asbestos.¹⁰⁸

Notwithstanding EPA's clear authority to require processors to report and its mandate to regulate processing to the extent necessary to address unreasonable risks posed to human health and the environment by such processing, EPA concedes that it "does not have information

¹⁰² See, e.g., <http://www.newsweek.com/trumps-face-stamped-russian-asbestos-products-tied-putin-donald-our-side-1018327> (last accessed Nov. 19, 2018). This follows from President Trump's apparent longstanding belief that the dangers of asbestos are merely a manifestation of a "mob conspiracy." See, e.g., <https://www.nytimes.com/2018/06/07/us/politics/epa-toxic-chemicals.html>.

¹⁰³ See 15 U.S.C. §§ 2607(a)(1), § 2605(a).

¹⁰⁴ *Id.* § 2605(a)(1).

¹⁰⁵ *Id.* § 2605(a)(2).

¹⁰⁶ *Id.* § 2605(a)(4).

¹⁰⁷ *Id.* § 2605(a)(6).

¹⁰⁸ *Id.* § 2605(a)(7).

pertaining to asbestos processing, as defined under [TSCA].”¹⁰⁹ This is despite the fact that the U.S. Geological Survey (USGS) Minerals Yearbook for 2016 reported that U.S. firms exported and reexported \$35.4 million of manufactured asbestos products in 2016, including asbestos-based friction products like brake linings, clutch linings, and disk pads, and gaskets, packing, and seals, in the amount of 2,710 metric tons.¹¹⁰ Yet even the USGS acknowledges that “insufficient data were available to reliably identify” all asbestos uses and that, in 2016, an “unknown quantity of asbestos was imported within manufactured products, possibly including brake linings and pads, building materials, gaskets, millboard, and yarn and thread, among others.”¹¹¹ Accordingly, to enable EPA to carry out its responsibility to impose requirements on processors to eliminate unreasonable risks of injury to health or the environment arising from exposures to asbestos, EPA must promulgate new regulations to apply the reporting requirements of the CDR to processors of asbestos notwithstanding that the current CDR does not expressly require such reporting. Should EPA fail to do so, EPA would be violating TSCA, acting arbitrarily and capriciously, and abusing its discretion in implementing TSCA.

3. Exemptions for “Impurities” and “Articles”

Similarly, while the CDR exempts reporting with respect to “impurities”¹¹² and for chemical substances imported as “part of an article,”¹¹³ neither of these exceptions should be applied to reporting with respect to the presence of asbestos if EPA is to satisfy TSCA’s mandate to prevent unreasonable risks associated with exposures to this highly toxic chemical.

The application of these exemptions is particularly troubling because as to the products EPA identifies in its *Scope of the Risk Evaluation for Asbestos*¹¹⁴ and Asbestos Problem Formulation,¹¹⁵ that is, asbestos diaphragms, sheet gaskets, oilfield brake blocks, aftermarket automotive brakes/linings, other vehicle friction products, asbestos cement products, other gaskets and packaging, and woven products,¹¹⁶ EPA candidly offers that “[i]t is important to note that the import volumes of products containing asbestos is [sic] unknown.”¹¹⁷

In fact, the Asbestos Problem Formulation provides virtually no information about the amount of asbestos in any of these products, the quantities in which they may be imported, and where they may be used, let alone any information about the extent to which the public may be exposed to these asbestos-containing products.¹¹⁸ And in EPA’s Asbestos Life Cycle Diagram in

¹⁰⁹ EPA Office of Chemical Safety and Pollution Prevention, Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Asbestos, February 2017, Support document for Docket EPA-HQ-OPPT-2016-0736, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0005>.

¹¹⁰ See USGS 2016 Minerals Yearbook: Asbestos [Advance Release], pp. 8.2 and 8.6 (Table 4), available at <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/myb1-2016-asbes.pdf>.

¹¹¹ <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2017-asbes.pdf>.

¹¹² See 40 C.F.R. §§ 711.10(c), 711.5, 720.30(h)(1).

¹¹³ See *id.* §§ 711.10(b), 710.3.

¹¹⁴ *Scope of the Risk Evaluation for Asbestos*, Jun. 2017, available at: https://www.epa.gov/sites/production/files/2017-06/documents/asbestos_scope_06-22-17.pdf.

¹¹⁵ *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, available at: https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.

¹¹⁶ *Id.* at 22.

¹¹⁷ *Id.* (emphasis supplied).

¹¹⁸ *Id.* at 21-26. In particular, EPA admitted that there is no accurate information about the amount of imported

the Asbestos Problem Formulation for asbestos, EPA characterizes as “unknown” the quantity of asbestos contained within import products, such as oilfield brake blocks, aftermarket auto brakes/linings, other vehicle friction products, woven products, cement products, other gaskets and packaging, and asbestos-containing sheet gaskets.¹¹⁹ EPA lacks this information despite its reported discussions with Chemours, a company that currently uses asbestos-containing gaskets imported from China to create chemical containment seals during the production of titanium dioxide, and Branham Corporation, Chemours’ gasket supplier, and with a domestic brake blocks manufacturer that confirmed that it continues to import asbestos-containing brake blocks on behalf its clients for use in oilfield equipment.¹²⁰

EPA acknowledged that consumer exposure *could occur* from “changing asbestos-containing brakes or brake linings” or “using asbestos-containing woven products, and handling of asbestos waste that may result from these activities.”¹²¹ However, EPA simply throws up its hands, stating that “[c]onsumer exposures will be difficult to evaluate since the quantities of these products that still might be imported into the United States *is not known*.”¹²²

Moreover, the petitioning states are aware of no federal law that regulates asbestos in talc. Yet the contamination of talc with asbestos is well-known, having been discovered as impurities in cosmetics,¹²³ baby powder,¹²⁴ and crayons.¹²⁵ Thus, the petitioning states believe that it is reasonable to expect that importers of talc do, and will continue to, test it for asbestos and that the results of such testing constitute “reasonably ascertainable” information for reporting purposes (*i.e.*, “information that a reasonable person similarly situated might be expected to possess, control, or know”).¹²⁶

The presence of asbestos in such consumer products, whether unintentional “impurities” or as an unintended ingredient in the article, dictates that these exemptions cannot apply with respect to the reporting requirements for asbestos in commerce.¹²⁷

asbestos-containing goods, stating “it is important to note that the import volume of products containing asbestos is not known.” *Id.* at 22.

¹¹⁹ See *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, p. 24, available at: https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.

¹²⁰ *Id.* at p. 25.

¹²¹ *Id.* at p. 39.

¹²² *Id.* (emphasis added).

¹²³ <https://www.cbsnews.com/news/study-asbestos-claires-makeup-products-marketed-to-teens/> (last accessed Jan. 22, 2019).

¹²⁴ <https://www.nytimes.com/2018/12/14/business/baby-powder-asbestos-johnson-johnson.html> (last accessed Jan. 22, 2019).

¹²⁵ <https://www.cbsnews.com/news/asbestos-crayons-playskool-consumer-group-finds/> (last accessed Jan. 22, 2019).

¹²⁶ 40 C.F.R. § 720.3(p).

¹²⁷ See, e.g., U.S. PIRG EDUCATION FUND, SAFER SCHOOL SUPPLIES: SHOPPING GUIDE 1,7 (Fall 2018), available at: https://uspirg.org/sites/pirg/files/reports/Copy%20of%20USP_Toxics-report_Fall2018_PRINTv1b.pdf (crayons); ENVIRONMENTAL DEFENSE FUND, SCIENCE REVIEW: ASBESTOS FOUND IN KIDS’ COSMETICS AGAIN (Jan. 2, 2018), available at <https://www.ewg.org/news-and-analysis/2018/01/asbestos-found-kids-cosmetics-again> (cosmetics, noting “experts say talc used to make the cosmetics can be contaminated with asbestos”).

4. Reporting for Asbestos Must Enable EPA to Satisfy the “Best Available Science,” “Weight of the Scientific Evidence,” and “Reasonably Available Information” Requirements for Making Determinations under TSCA

The Problem Formulation for Asbestos is rife with examples of instances where it appears that EPA stopped short of complete data collection, failing to satisfy its statutory obligation under Section 26 to consider the information “reasonably available” to it.¹²⁸ The recent overhaul of TSCA was designed to address the recognized failures of traditional risk assessment to consider the big picture of toxic chemicals exposures and address the landscape of the many uses and exposure pathways affecting different people in different ways.¹²⁹ TSCA, as amended by the Lautenberg Amendments, addresses this by mandating comprehensive risk evaluations in which EPA reviews chemical substances broadly in the context of the chemical substances’ known, intended, and reasonably foreseen uses across the full spectrum of potentially exposed populations. As the Problem Formulation Comments point out, the Problem Formulation for Asbestos, which would restrict EPA’s reviews to certain uses and exposures that do not reflect the pathways through which people and the environment are affected by asbestos, will not meet the express purpose of TSCA as amended and should be abandoned in this regard.¹³⁰

Accordingly, EPA must account for the many tons of asbestos that are imported into the U.S., whether as a raw material or processed, to evaluate adequately the current and likely future risks of exposure to asbestos, and must also account for asbestos in consumer products, whether or not the asbestos is intentionally included in those products. These data, which the agency can collect by appropriately requiring reporting from the firms that possess the information, for example, by promulgating the rule sought by this petition, and are therefore reasonably available to the agency, are needed for EPA to be able to make informed technically complex decisions regarding the regulation of asbestos. Without these data to rely on, the agency will be unable to meet its obligations under TSCA to make its decisions based on the weight of the scientific evidence and using the best available science and will fail in protecting the American public from the deadly risks to human health associated with asbestos. Accordingly, EPA must issue an asbestos reporting rule to ensure that the NOCS, the impurities, and the articles exemptions do not apply to asbestos, and that processors of asbestos are required to report.

CONCLUSION

For the foregoing reasons, the undersigned Attorneys General, on behalf of their respective states or district, respectfully request the Acting Administrator to grant this petition and initiate rulemaking under TSCA Section 8(a) to issue a new asbestos reporting rule to ensure that data as to the importation and use of asbestos and asbestos-containing products in the United States is adequately reported to EPA by: (i) eliminating the applicability of the “naturally occurring substance” exemption for asbestos reporting; (ii) applying reporting requirements to

¹²⁸ See 15 U.S.C. § 2625(k); see also, e.g., *Problem Formulation of the Risk Evaluation for Asbestos*, May 2018, at 21-26, available at https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.

¹²⁹ See Problem Formulation Comments, *supra*, at 22.

¹³⁰ *Id.*

processors as well as to manufacturers of asbestos; (iii) eliminating the impurities exemption applicable to other chemical substances under the CDR; and (iv) requiring reporting with respect to articles that contain asbestos.

We would be pleased to provide further input as the agency works to respond to this petition. Please do not hesitate to contact us if you wish to engage us further in this important effort.

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Exhibit 2



20062

Federal Register / Vol. 84, No. 89 / Wednesday, May 8, 2019 / Proposed Rules

from further review under paragraph L[61] of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 01. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <https://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, visit <https://www.regulations.gov/privacyNotice>.

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <https://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS.

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05-1.

■ 2. Add § 100.T09-0300 to read as follows:

§ 100.T09-0300 Special Local Regulations; Festival of Sail Duluth 2019 Parade of Sail, Lake Superior, Duluth, MN.

(a) *Regulated areas.* (1) This Area includes all waters of Lake Superior and Duluth Harbor bounded by Rice's Point to the west and Duluth to the north, within the following boundaries: Beginning at position 46°46'48.36" N, 092°05'16.44" W, across Duluth Harbor to 46°47'02.76" N, 092°05'17.88" W, turning north toward the Duluth Lift Bridge to 46°47'19.32" N, 092°04'04.80" W, to 46°46'50.88" N, 092°05'17.88" W, out the Duluth Harbor Entrance at 46°46'45.12" N, 092°05'35.16" W, then northwest to 46°46'45.12" N, 092°05'39.84" W back to the north Duluth Entrance Light at 46°47'01.32" N, 092°05'51.00" W, through the canal at 46°47'00.60" N, 092°05'52.08" W, then along Minnesota Point at 46°46'51.60" N, 092°05'46.32" W, entering Minnesota Slip at 46°46'39.00" N, 092°06'03.96" W, encompassing the slip from 46°46'32.16" N, 092°05'38.76" W to 46°46'41.52" N, 092°05'36.24" W and back out the slip at 46°46'42.60" N, 092°05'34.44" W and back to the starting position of 46°46'48.36" N, 092°05'16.44" W.

(b) *Special local regulations.* (1) In accordance with the general regulations in § 100.35 of this part, entry into, transiting, or anchoring within the regulated areas is prohibited unless authorized by the Captain of the Port (COTP) Duluth or on-scene representatives.

(2) Vessels and persons receiving COTP Duluth or on-scene representative authorization to enter the area of this special local regulation must do so in accordance with the following restrictions:

(i) Vessels and persons must transit at a speed not exceed six (6) knots or at no wake speed, whichever is less. Vessels proceeding under sail will not be allowed in this Area unless also propelled by machinery, due to limited maneuvering ability around numerous other spectator craft viewing the Festival of Sail.

(ii) Vessels and persons will not be permitted to impede the parade of sail once it has commenced, as the tall ships are extremely limited in their ability to maneuver.

(3) The Coast Guard will provide notice of the regulated area prior to the event through Local Notice to Mariners and Broadcast Notice to Mariners. Notice will also be provided by on-scene representatives.

(4) The "on-scene representative" of the COTP Duluth is any Coast Guard commissioned, warrant, or petty officer and any Federal, State, or local officer designated by the COTP to act on his or her behalf.

(5) Vessel operators desiring to enter or operate within the regulated area shall contact the COTP Duluth by telephone at (218) 428-9357, or on-scene representative via VHF radio on Channel 16, to obtain permission to do so. Vessel operators given permission to enter, operate, transit through, anchor in, or remain within the regulated areas must comply with all instructions given by COTP Duluth or on-scene representatives.

(c) *Effective date.* These regulations are effective Sunday, August 11, 2019; from 7 a.m. through 1 p.m.

Dated: May 2, 2019.

E. E. Williams,

Commander, U.S. Coast Guard, Captain of the Port Duluth.

[FR Doc. 2019-09421 Filed 5-7-19; 8:45 am]

BILLING CODE 9110-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA-HQ-OPPT-2019-0038; FRL-9992-67]

TSCA Section 21 Petition To Initiate a Reporting Rule Under TSCA Section 8(a) for Asbestos; Reasons for Agency Response

AGENCY: Environmental Protection Agency (EPA).

ACTION: Petition for rulemaking; denial.

SUMMARY: This document provides the reasons for EPA's response to a January 31, 2019, petition it received under section 21 of the Toxic Substances Control Act (TSCA) from the Attorneys General of Massachusetts, California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia ("petitioners"). Generally, the petitioners requested that EPA initiate a rulemaking proceeding under TSCA section 8(a) for the reporting of the manufacture (including import) and processing of asbestos. After careful consideration, EPA denied the petition for the reasons discussed in this document.

DATES: EPA's response to this TSCA section 21 petition was signed April 30, 2019.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Tyler Lloyd, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 564-4016; email address: lloyd.tyler@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of particular interest to those persons who manufacture (which includes import) or process or may manufacture or process the chemical asbestos (general CAS No. 1332-21-4). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I access information about this petition?

The docket for this TSCA section 21 petition, identified by docket identification (ID) number EPA-HQ-OPPT-2019-0038, is available at <https://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

II. TSCA Section 21

A. What is a TSCA section 21 petition?

Under TSCA section 21, (15 U.S.C. 2620), any person can petition EPA to initiate a rulemaking proceeding for the issuance, amendment, or repeal of a rule under TSCA sections 4, 6, or 8, or an order under TSCA sections 4, 5(e), or 5(f). A TSCA section 21 petition must

set forth the facts which it is claimed establish that it is necessary to initiate the action requested. EPA is required to grant or deny the petition within 90 days of its filing. If EPA grants the petition, the Agency must promptly commence an appropriate proceeding. If EPA denies the petition, the Agency must publish its reasons for the denial in the **Federal Register**. A petitioner may commence a civil action in a U.S. district court to compel initiation of the requested rulemaking proceeding either within 60 days of either a denial or, if EPA does not issue a decision, within 60 days of the expiration of the 90-day period.

B. What criteria apply to a decision on a TSCA section 21 petition?

TSCA section 21(b)(1) requires that the petition "set forth the facts which it is claimed establish that it is necessary to issue, amend or repeal a rule." 15 U.S.C. 2620(b)(1). TSCA section 8(a)(1), the section under which petitioners request the EPA to act here, authorizes the EPA Administrator to promulgate rules under which manufacturers (including importers) and processors of chemical substances must maintain such records and submit such information as the EPA Administrator may reasonably require (15 U.S.C. 2607). TSCA section 8(a)(2) outlines the information that the EPA Administrator may require under TSCA section 8(a)(1), insofar as it is known to the person making the report or insofar as reasonably ascertainable. Under TSCA section 8(a), EPA has promulgated several data collection rules, such as the Chemical Data Reporting (CDR) rule at 40 CFR part 711, which covers asbestos.

III. Summary of the TSCA Section 21 Petition

A. What action was requested?

On January 31, 2019, the Attorneys General of Massachusetts, California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia (petitioners) petitioned EPA to initiate a rulemaking proceeding under TSCA section 8(a) for the reporting of the manufacture, import, and processing of asbestos (Ref. 1).

The petitioners requested specific TSCA section 8(a) reporting requirements for asbestos in order to collect information for the ongoing asbestos risk evaluation being conducted under TSCA section 6(b), which is to be completed by December 22, 2019 (15 U.S.C. 2605(b)(4)(G)(i)) and no later than June 22, 2020 if EPA

exercises a six-month extension (15 U.S.C. 2605(b)(4)(G)(ii)), and, if necessary, for any subsequent risk management decisions under TSCA section 6(a). The petitioners specifically requested that EPA:

- Eliminate any applicability of the "naturally occurring substance" (NOCS) exemption in the CDR for asbestos reporting;
- Apply the CDR reporting requirements to processors of asbestos, as well as manufacturers (including importers) of the chemical substance;
- Eliminate any applicability of the impurities exemption in the CDR for asbestos reporting; and
- Eliminate any applicability of the articles exemption in the CDR with respect to imported articles that contain asbestos.

B. What support do the petitioners offer?

The petitioners request that EPA initiate a rulemaking proceeding under TSCA section 8(a) "to address infirmities in asbestos reporting" under EPA's CDR rule at 40 CFR 711. In support of their request, the petitioners state that "[r]obust reporting of the importation and use of asbestos in the U.S. is necessary for EPA to satisfy its statutory mandate under TSCA section 6(a) to establish requirements to ensure that asbestos does not present an unreasonable risk of injury to health or the environment and for states and the public to have access to data necessary to themselves evaluate such risks" (Ref. 1).

The petitioners present their views as to EPA's need for "comprehensive data with respect to the manufacture (including import) and use of asbestos in the U.S." when conducting the asbestos risk evaluation and undertaking any potential subsequent risk management actions. The petitioners conclude that such data are not being collected under the current CDR rule. Several times in their request, the petitioners cite EPA's response to a previous petition filed under TSCA section 21 by the Asbestos Disease Awareness Organization (ADAO) and five other non-governmental organizations. In that petition, which EPA received on September 27, 2018, ADAO and others requested that EPA initiate rulemaking proceedings under TSCA section 8(a) to amend the CDR rule to increase reporting of asbestos to CDR (Ref. 2). EPA denied the petition on December 21, 2018, on the grounds that the petitioners did not demonstrate that it is necessary to amend the CDR rule (84 FR 3396, February 12, 2019) (FRL-9988-56). The petition from ADAO et al. and EPA's response are in Docket ID

No. EPA-HQ-OPPT-2018-0682 at <https://www.regulations.gov>.

The CDR rule, which is one of several reporting rules promulgated under TSCA section 8(a), requires manufacturers (including importers) to provide EPA with information on the production and use of chemicals in commerce, generally 25,000 pounds or more of a chemical substance at any single site, with a reduced reporting threshold (2,500 pounds) applying to chemical substances subject to certain TSCA actions, including, as applicable here, actions taken under TSCA section 6.

While asbestos is already required to be reported under the CDR rule by manufacturers (including importers) meeting certain criteria, the petitioners point out that CDR exempts from reporting chemicals, like asbestos, that are naturally occurring chemical substances, present as an impurity, or incorporated into an article. Additionally, the petitioners note that CDR does not require reporting from processors of chemical substances.

The petitioners assert that “[a]ny TSCA risk evaluation that EPA conducts without access to accurate and complete asbestos data cannot satisfy TSCA’s risk evaluation criteria, including TSCA’s requirement that EPA use the ‘best available science’ in carrying out TSCA’s mandate to eliminate unreasonable risk of injury to health or the environment presented by the manufacture (including importation), processing, distribution in commerce, use, or disposal of a toxic chemical substance” (Ref. 1).

Petitioners contend that the requested action under TSCA section 8(a) “would enable EPA to present and rely on a complete set of domestic data about the amount, and uses, of asbestos, is consistent with those goals and with the statute’s requirements” (Ref. 1).

In their request, the petitioners state that “[a]sbestos is a known human carcinogen and there is no safe level of exposure to this highly toxic material ubiquitous in our built environment” (Ref. 1). The petitioners cite research finding dangers from asbestos and provide a review of asbestos assessments and regulations under federal and state law.

In their petition, they state that in 1989, EPA concluded that “asbestos is a highly potent carcinogen regardless of the type of asbestos or the size of the fiber” and assert that “EPA has long possessed an abundance of information that supports aggressive regulatory actions to protect the public from asbestos disease risks” (Ref. 1).

The petitioners restate their belief that EPA has “chos[en] to put on blinders and ignore some of the most meaningful data with respect to risks of exposure to the chemical substance” (Ref. 1), a view which many of the petitioning Attorneys General first expressed in comments on EPA’s Problem Formulation of the Risk Evaluation for Asbestos (83 FR 26998, June 11, 2018) (FRL-9978-40). Moreover, the petitioners cite language in the Problem Formulation that states that “import volumes of products containing asbestos is [sic] unknown” (Ref. 1). The petitioners assert that EPA’s response to the ADAO Petition directly contradicts what EPA stated in the Problem Formulation.

IV. Background Considerations: Review of EPA Actions, Activities, and Regulations

To understand EPA’s reasons for denying the petitioners’ requests, it is important to first review the details of EPA’s ongoing risk evaluation of asbestos, existing TSCA section 8(a) rules including the CDR rule, general exemptions for TSCA section 8(a) rules, and past reporting of asbestos under TSCA section 8(a). These details are explained in the following units.

A. Risk Evaluation of Asbestos

On June 22, 2016, the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114-182) amended TSCA (15 U.S.C. 2601 *et seq.*). The new law includes statutory requirements mandating that EPA conduct risk evaluations for existing chemicals. On December 19, 2016 (81 FR 91927) (FRL-9956-47), EPA designated asbestos as one of the first 10 chemical substances subject to the Agency’s initial chemical risk evaluations pursuant to TSCA section 6(b)(2)(A) (15 U.S.C. 2605(b)(2)(A)), which required EPA to identify the first 10 chemicals to be evaluated no later than 180 days after the date of enactment of the Act.

EPA is currently evaluating the risks of asbestos under its conditions of use, pursuant to TSCA section 6(b)(4)(A). Through scoping and subsequent research for the asbestos risk evaluation, EPA identified the conditions of use of asbestos, including imported raw bulk chrysotile asbestos for the fabrication of diaphragms for use in chlorine and sodium hydroxide production; several imported chrysotile asbestos-containing materials, including sheet gaskets in chemical manufacturing where extremely high temperatures are needed; brake blocks for oil drilling; aftermarket automotive brakes/linings; other vehicle friction products; and

other gaskets (Ref. 3). In identifying the conditions of use for asbestos and the rest of the first 10 chemicals undergoing risk evaluation under amended TSCA, EPA included use information reported under the CDR rule. In addition to using CDR data to identify the current conditions of use of asbestos, EPA conducted extensive research and outreach. This included EPA’s review of published literature and online databases including Safety Data Sheets (SDSs), the United States Geological Survey’s Mineral Commodities Summary and Minerals Yearbook, the U.S. International Trade Commission’s Dataweb, and government and commercial trade databases. (See Docket ID No. EPA-HQ-OPPT-2016-0736). EPA’s review of these data sources served as the basis for the conditions of use of asbestos. Additionally, EPA worked with its Federal partners, such as Customs and Border Protection, to enhance its understanding of import information on asbestos-containing products in support of the risk evaluation.

EPA also reviewed company websites of potential manufacturers, importers, distributors, retailers, or other users of asbestos and received public comments (1) during the February 2017 public meeting on the scoping efforts for the risk evaluations for the first ten chemicals, (2) when EPA published the Scope of the Risk Evaluation for Asbestos in June 2017, and (3) when EPA published the Problem Formulation of the Risk Evaluation for Asbestos in June 2018, all of which were used to identify the conditions of use. (See Docket ID No. EPA-HQ-OPPT-2016-0736). In addition, to inform EPA’s understanding of the universe of conditions of use for asbestos for the scope document published in June 2017, EPA convened meetings with companies, industry groups, chemical users, and other stakeholders (Ref. 3). Lastly, on June 11, 2018 (83 FR 26922; FRL-9978-76), EPA proposed a significant new use rule (SNUR) under TSCA section 5, in an administrative proposal separate and apart from the ongoing risk evaluation process under TSCA section 6, for certain uses of asbestos (including asbestos-containing products) and specifically asked for public comment or information on ongoing uses of asbestos. In the public comments submitted on the SNUR, EPA received no new information on any ongoing uses. (See Docket ID No. EPA-HQ-OPPT-2018-0159).

In the Asbestos Problem Formulation document, based on the aforementioned outreach and research, EPA did not identify any conditions of use of

asbestos as an impurity. In EPA's Asbestos Problem Formulation for the Risk Evaluation (Ref. 3), the Agency identified the conditions of use as imported raw bulk chrysotile asbestos for the fabrication of diaphragms for use in chlorine and sodium hydroxide production; and several imported chrysotile asbestos-containing materials, including sheet gaskets; brake blocks for oil drilling, aftermarket automotive brakes, linings, and other vehicle friction products; and other gaskets.

The purpose of EPA's risk evaluation is to determine whether a chemical substance presents an unreasonable risk to health or the environment, under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation (15 U.S.C. 2605(b)(4)(A)). As part of this process, EPA must evaluate both hazard and exposure, excluding consideration of costs or other non-risk factors, use scientific information and approaches in a manner that is consistent with the requirements in TSCA section 26 for the best available science, and ensure decisions are based on the weight of scientific evidence. EPA intends to finalize the risk evaluation for asbestos by December 2019, the deadline that Congress set in TSCA. EPA acknowledges the statute provides that EPA may extend the deadline to complete a risk evaluation by six months (15 U.S.C. 2605(b)(4)(G)(ii)). As discussed in Unit V.A., even if EPA were to exercise this extension authority in the case of the ongoing asbestos risk evaluation, that would not affect the Agency's reasons for denying this petition.

B. TSCA Section 5(a) SNUR and Asbestos

On April 17, 2019, EPA signed the SNUR for asbestos and asbestos-containing products (84 FR 17345, April 25, 2019; FRL-9991-33). Section 5(a)(2) of TSCA, as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, authorizes EPA to determine that a use of a chemical substance is a "significant new use." Once EPA determines that a use of a chemical substance is a significant new use, TSCA section 5(a)(1) requires persons to submit a significant new use notice (SNUN) to EPA at least 90 days before they manufacture (including import) or process the chemical substance for that use (15 U.S.C. 2604(a)(1)(B)(i)). TSCA prohibits the manufacturing (including importing) or processing from commencing until EPA has conducted a review of the notice, made an appropriate determination on

the notice, and taken such actions as are required in association with that determination (15 U.S.C. 2604(a)(1)(B)(ii)). Those actions could include a prohibition on a use of that chemical substance.

For that SNUR, the significant new use of asbestos is manufacturing (including importing) or processing for uses that are neither ongoing nor already prohibited under TSCA. The following uses are subject to the SNUR: Adhesives, sealants, and roof and non-roof coatings; arc chutes; beater-add gaskets; cement products; extruded sealant tape and other tape; filler for acetylene cylinders; friction materials (with certain exceptions); high-grade electrical paper; millboard; missile liner; packings; pipeline wrap; reinforced plastics; roofing felt; separators in fuel cells and batteries; vinyl-asbestos floor tile; woven products; any other building material; and any other use of asbestos that is neither ongoing nor already prohibited under TSCA.

The asbestos SNUR prohibits these discontinued uses of asbestos from restarting without EPA having an opportunity to evaluate each intended use (*i.e.*, significant new use) for potential risks to health and the environment and take any necessary regulatory action, which may include a prohibition. The SNUR ensures that the conditions of use that are in the scope of the risk evaluation and not subject to the SNUR are the only ongoing uses of asbestos and asbestos-containing products in the United States.

C. TSCA Section 8(a) Rules

Section 8(a)(1) of TSCA authorizes the EPA Administrator to promulgate rules under which manufacturers and processors of chemical substances must maintain such records and submit such information as the EPA Administrator may "reasonably require." 15 U.S.C. 2607. The Agency is prohibited by TSCA section 8(a)(5)(A) from requiring reporting that is "unnecessary or duplicative" and must apply the reporting obligations under TSCA section 8(a) to those persons who are likely to have the relevant information. 15 U.S.C. 2607(a)(5).

EPA has promulgated several data reporting rules under TSCA section 8(a); the CDR rule is the largest data collection rule, in terms of the number of entities subject to reporting under the rule.

The CDR rule requires U.S. manufacturers (including importers) of chemicals on the TSCA Chemical Substance Inventory, with some exceptions, to report to EPA every four

years the identity of chemical substances manufactured (including imported) for all years since the last principal reporting year (40 CFR 711.8(a)(2)). Generally, reporting is required for substances with production volumes of 25,000 pounds or more at any single site during any of the calendar years since the last principal reporting year. However, a lower threshold (2,500 pounds) applies for chemical substances that are the subject of certain TSCA actions (see 40 CFR 711.8(b)). The CDR regulation generally exempts several groups of chemical substances from its reporting requirements, *e.g.*, polymers, microorganisms, naturally occurring chemical substances, certain forms of natural gas, and water (see 40 CFR 711.5 and 711.6). Asbestos is subject to the lower production volume reporting threshold of 2,500 pounds; thus, manufacturers and importers of asbestos are required to report asbestos under the CDR rule unless they qualify for an exemption.

D. Exemptions From Reporting Under the TSCA Section 8(a) Rules

EPA has specified general reporting and recordkeeping provisions for TSCA section 8(a) information gathering rules at 40 CFR 704 and has promulgated general exemptions to reporting at 40 CFR 704.5 using the Agency's broad discretion in TSCA section 8(a) to fashion reporting schemes "as the Administrator may reasonably require." (15 U.S.C. 2607(a)(1)(A)). However, also utilizing this discretion, EPA can revise, remove, or add to these exemptions. The exemptions at 40 CFR 704.5 are for articles, byproducts, impurities, non-isolated intermediates, research and development, and small manufacturers and importers.

If the chemical substance is imported solely as part of an article, the chemical substance is generally exempt from being reported under TSCA section 8(a). An article is defined in 40 CFR 704.3 as "a manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end-use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design."

Impurities are also generally exempt from reporting under rules promulgated pursuant to TSCA section 8(a). An impurity is defined as a chemical substance unintentionally present with another chemical substance (40 CFR 704.3). Impurities are not manufactured for distribution in commerce as chemical substances per se and have no commercial purpose separate from the substance, mixture, or article of which they are a part.

The exemption from reporting naturally occurring chemical substances under the CDR rule, found at 40 CDR 711.6(b), is one example of an exemption that has been added to TSCA section 8(a) reporting requirements under EPA's broad discretion to fashion reporting schemes "as the Administrator may reasonably require".

While TSCA section 8(a) provides EPA with the authority to collect information from processors, EPA has used its discretion to not require processors to report under the CDR rule. Processing information is reported by the manufacturers: If a manufacturer reports a chemical under the CDR rule, it must also report processing and use information for the chemical substance unless it is exempted from this reporting by 40 CFR 711.6(b).

E. Recent Asbestos Reporting Under TSCA Section 8(a)

Two companies, both from the chloro-alkali industry, reported importing raw asbestos during the 2016 CDR reporting cycle (Ref. 4) and did not claim the exemption for naturally occurring chemical substances. Both companies claimed their reports as confidential business information. Because asbestos has not been mined or otherwise produced in the United States since 2002 (Ref. 5), all raw asbestos currently in commerce in the U.S. is imported.

V. Petition Response

A. What was EPA's response?

After careful consideration, EPA has denied the petition. A copy of the Agency's response, which consists of a letter to the signatory petitioner from the State of California (Ref. 6), is available in the docket for this TSCA section 21 petition. In accordance with TSCA section 21, the reasons for the denial are set forth in this **Federal Register** document.

EPA agrees that knowledge of which entities are importing and using asbestos and asbestos-containing products, where and how these activities occur, and the quantities of asbestos involved is important for identifying exposed populations, and

characterizing pathways of exposure. EPA already has this information, which it has obtained through reporting, voluntary submission, and modeling. EPA has used information currently reported under the CDR rule and other sources of data to identify and characterize the conditions of use for asbestos, and is using this information as part of the ongoing risk evaluation for asbestos under TSCA section 6(b).

EPA does not believe that petitioners have demonstrated that it is necessary to initiate a rulemaking proceeding under TSCA section 8(a) to obtain additional information in order to conduct its risk evaluation on asbestos and any potential subsequent risk management. While the petitioners assert that EPA's response to the ADAO Petition directly contradicts what EPA stated in the Problem Formulation regarding EPA's acknowledgement of a lack of certain data, EPA disagrees. EPA believes that the Agency is aware of all ongoing uses of asbestos and already has the essential information that EPA would receive if EPA were to grant the petition. Since asbestos was announced in December 2016 as one of the first ten chemicals for evaluation under TSCA, the Agency has conducted market research, public outreach, voluntary data collection, collaborative work with other Federal and State agencies, and stakeholder engagement. Given EPA's understanding of asbestos and reporting under TSCA section 8(a), as a result of implementation of the CDR rule and other TSCA section 8(a) rules, EPA does not believe that the requested reporting requirements would collect the data the petitioners believe the Agency lacks. Where EPA lacks information, the Agency has relied on models. This use of modeled data is in line with EPA's final Risk Evaluation Rule (Ref. 7) and EPA's risk assessment guidelines. Furthermore, EPA will provide opportunity for peer and public review of the draft Asbestos Risk Evaluation, which EPA will use to refine the risk evaluation of asbestos.

Further, even if EPA believed that the requested reporting requirements would collect new and useful information, EPA would not complete the rulemaking proceeding in time to collect data to inform the ongoing risk evaluation. The petitioners' request does not factor in the necessary timeframes for any rulemaking proceeding that would be required to propose and then finalize such amendments. To allow for the notice and comment period for the public and regulated community required under the Administrative Procedure Act (5 U.S.C. 553) and for appropriate internal deliberation prior

to proposal and after the close of the comment period, EPA typically needs at least 18 months to finalize the promulgation, amendment, or repeal of a rule. EPA would then need to provide time for implementation, data collection, and data review prior to making use of the reported information. EPA intends to finalize the risk evaluation for asbestos in December 2019, but EPA notes that it has statutory authority to extend that deadline by up to six months. If EPA finds unreasonable risk for a condition of use, risk management must promptly be initiated with a proposed rule issued one year after EPA makes such a determination.

While it is possible that the requested rulemaking proceeding itself could be completed prior to any potential subsequent risk management decision(s) being finalized, EPA does not believe that the requested section 8(a) reporting requirements on asbestos would collect information useful for any necessary risk management, for the reasons explained in Unit V.B. Given the statutorily required timing for finalizing the asbestos risk evaluation and initiating risk management, if unreasonable risk exists for a condition of use, the requested TSCA section 8(a) reporting requirements on asbestos would not provide timely or useful information to inform either the ongoing asbestos risk evaluation or any potential subsequent risk management action. EPA believes that this would still be the case even were it to exercise its statutory authority to extend the deadline to complete the asbestos risk evaluation for six months, because the requested section 8(a) reporting requirements would likely not collect that would further inform the risk evaluation beyond the information EPA already has, as explained in Unit V.B.

B. What are the details of the petitioners' requests and EPA's decision to deny each of the requests?

This unit provides the reasons for EPA's decision to deny the petition asking EPA to initiate rulemaking proceedings under TSCA section 8(a) for the reporting of the manufacture, import, and processing of asbestos.

1. Eliminate Exemption for Naturally Occurring Chemical Substances for Asbestos

a. Petitioners' request. The petitioners ask that the requested TSCA section 8(a) reporting requirements for asbestos remove any exemption for naturally occurring chemical substances. The petitioners state that the import of raw asbestos represents "pathways of

exposure that present risks to health and the environment that EPA must consider in conducting its risk evaluation and regulating asbestos” (Ref. 1). In support of this request, the petitioners question EPA’s prior assertion that the Agency has sufficient information about asbestos use and exposure, as obtained through CDR and other “voluntary disclosures” (Ref. 1). The petitioners believe that EPA contradicted itself in that in the response to the earlier ADAO petition the Agency stated it has sufficient information for the risk evaluation, while in the Problem Formulation EPA said “[i]t is important to note that the import volumes of products containing asbestos is [sic] unknown” (Ref. 1).

b. *Agency response.* Raw asbestos is the only type of asbestos to which the naturally occurring substance exemption could apply. As defined by the CDR-specific rules in 40 CFR 711.6(a)(3), a naturally occurring chemical substance is:

Any naturally occurring chemical substance, as described in 40 CFR 710.4(b). The applicability of this exclusion is determined in each case by the specific activities of the person who manufactures the chemical substance in question. Some chemical substances can be manufactured both as described in 40 CFR 710.4(b) and by means other than those described in 40 CFR 710.4(b). If a person described in § 711.8 manufactures a chemical substance by means other than those described in 40 CFR 710.4(b), the person must report regardless of whether the chemical substance also could have been produced as described in 40 CFR 710.4(b). Any chemical substance that is produced from such a naturally occurring chemical substance described in 40 CFR 710.4(b) is reportable unless otherwise excluded.

A chemical substance qualifies as naturally occurring only if it is: (1)(i) Unprocessed or (ii) processed only by manual, mechanical, or gravitational means; by dissolution in water; by flotation; or by heating solely to remove water; or (2) extracted from air by any means (40 CFR 710.4(b)). Articles containing asbestos would not be considered a naturally occurring chemical substance, given the processing required to create the article.

EPA does not believe that the requested elimination of the exemption for naturally occurring chemical substances would result in the reporting of any information that is not already known to EPA, for several reasons. EPA’s understanding is that the chloro-alkali industry is the only importer of raw bulk asbestos, and the Agency has sufficient volume, import, use, and hazard data from that industry to conduct the risk evaluation. EPA has no

reason to believe there are other importers of raw asbestos. Raw asbestos generally refers to asbestos as a naturally occurring chemical substance. Implementing TSCA section 8(a) asbestos reporting requirements for manufacturers (including importers) of asbestos as a naturally occurring chemical substance, therefore, would not provide any additional useful or timely information to EPA on the use of raw asbestos.

Because the purpose of domestic manufacturing or importing of raw asbestos is to make asbestos diaphragms, for which EPA already has use and exposure information, the request to require reporting on naturally occurring substances for asbestos would not provide any additional data to EPA. EPA already has this information obtained through extensive outreach and research (as described in Unit IV.A.), and the Agency is prohibited by TSCA section 8(a)(5)(A) from requiring reporting that is unnecessary or duplicative.

EPA disagrees that there is a contradiction between what EPA stated in the Asbestos Problem Formulation and what EPA stated in the petition response to ADAO. While EPA did state in the problem formulation that the imported volumes of products containing asbestos are unknown, the requested reporting of naturally occurring substances would not provide imported volumes of products containing asbestos, given that articles are not considered naturally occurring substances. As used in the asbestos Problem Formulation, the term “products containing asbestos” refers to asbestos articles. For more information on the data availability and evaluation of asbestos in articles, see Unit V.B.iii. for EPA’s response to the request for reporting of imported asbestos articles.

EPA finds that petitioners have failed to set forth sufficient facts to establish that it is necessary for the Agency to use its discretion to no longer exempt naturally occurring asbestos from reporting requirements under TSCA section 8(a).

2. Apply the CDR Reporting Requirements to Processors of Asbestos

a. *Petitioners’ request.* The petitioners note that EPA has the authority to require that processors report under TSCA section 8(a), but EPA does not require processors to report to CDR. The petitioners believe a rulemaking proceeding to subject CDR reporting requirements on the processing of asbestos is needed in order “to enable EPA to carry out its responsibility to impose requirements on processors to

eliminate unreasonable risks of injury to health or the environment arising from exposures to asbestos” (Ref. 1). In support of their request, the petitioners cite the U.S. Geological Survey (USGS) Minerals Yearbook for 2016 (Ref. 5) and state that “U.S. firms exported and reexported \$35.4 million of manufactured asbestos products in 2016, including asbestos based friction products like brake linings, clutch linings, and disk pads, and gaskets, packing, and seals, in the amount of 2,710 metric tons” (Ref.1).

b. *Agency response.* EPA knows of two ongoing uses of asbestos that constitute processing: (1) The processing of raw asbestos into diaphragms and (2) the fabrication of gaskets from imported asbestos-containing sheets. Information on these uses is well understood by EPA as a result of direct communication with these processors (see Problem Formulation of the Risk Evaluation for Asbestos (Ref. 3, pg. 25)).

To support a claim that there is ongoing processing of articles that EPA is unaware of, the petitioners cite the export and reexport of articles described in the USGS Minerals Yearbook for 2016 (Ref. 5). The petitioners, however, neglect to note that the same report states that these shipments were likely misclassified and that “[s]hipments reported under these categories may have been reexports and (or) exports of products that were similar but did not contain asbestos.” In identifying the conditions of use for asbestos during the TSCA risk evaluation process, EPA reviewed the U.S. International Trade Commission’s Dataweb and other government and commercial trade databases. EPA was unable to confirm any processing of asbestos beyond processing of raw asbestos into diaphragms and the fabrication of gaskets from imported asbestos-containing sheets.

Since asbestos is not mined in the United States, raw asbestos is imported solely by the chlor-alkali industry; because sheet gaskets are the only imported asbestos-containing products that may involve processing, EPA does not believe there are additional, unknown processors of asbestos in the United States. Accordingly, EPA does not believe that requiring reporting from processors of asbestos under TSCA section 8(a) will provide useful information not already in the Agency’s possession. The petitioners have failed to indicate what additional information EPA would collect by requiring asbestos processors to report under section 8(a) and the Agency is prohibited by TSCA section 8(a)(5)(A) from requiring

reporting that is unnecessary or duplicative. Therefore, EPA finds that petitioners have failed to set forth sufficient facts to establish that it is necessary for the Agency to use its discretion to require TSCA section 8(a) reporting for processors of asbestos.

3. Eliminate Exemption for Reporting of Imported Articles Containing Asbestos

a. *Petitioners' request.* In support of their request to eliminate the reporting exemption for imported articles containing asbestos, the petitioners state that "the Asbestos Problem Formulation provides virtually no information about the amount of asbestos in any of these products, the quantities in which they may be imported, and where they may be used, let alone any information about the extent to which the public may be exposed to these asbestos-containing products" (Ref. 1). Furthermore, the petitioners state that "EPA simply throws up its hands, stating that '[c]onsumer exposures will be difficult to evaluate since the quantities of these products that still might be imported into the United States is not known'" (Ref. 1).

b. *Agency response.* EPA has relied on extensive outreach and research to determine the conditions of use of asbestos (as described in Unit IV.A.). The Agency does not believe that requiring TSCA section 8(a) reporting on imported articles for asbestos would be helpful in collecting additional import information on asbestos-containing articles because the Agency has identified the articles that are imported into the United States and promulgated a significant new use rule under TSCA section 5 to require notification to the Agency of any new uses, including different or new articles. The Agency is prohibited by TSCA section 8(a)(5)(A) from requiring reporting that is unnecessary or duplicative. Even if EPA were to require reporting on imported articles for asbestos, EPA does not believe that potentially useful information for EPA's ongoing asbestos risk evaluation would be "reasonably ascertainable" by importers and thus EPA could not require this information to be reported under TSCA section 8(a). Nor would EPA be able to collect new data in time to inform the risk evaluation, which EPA intends to complete in December 2019. EPA, however, acknowledges the statute provides that EPA may extend the deadline to complete a risk evaluation by six months (15 U.S.C. 2605(b)(4)(C)(ii)). As discussed in Unit V.A., even if EPA were to exercise this extension authority in the case of the ongoing asbestos risk evaluation, that

would not affect the Agency's reasons for denying this petition. If EPA finds unreasonable risk for a condition of use, risk management must promptly be initiated with a proposed rule issued one year after EPA makes such a determination.

EPA has sufficient information on imported articles containing asbestos to conduct the risk evaluation and inform any potential risk management decisions based on the risk determination. The only asbestos-containing articles that EPA has identified that are currently imported into the United States are asbestos-containing sheet gaskets, other gaskets, aftermarket automotive brakes/linings, other vehicle friction products, and brake blocks. Furthermore, the final Asbestos SNUR, published on April 25, 2019, ensures that no significant new uses of asbestos, including as an article, can begin without EPA first evaluating the significant new use and then, if necessary, taking action to prohibit or limit the activity.

The petitioners state that EPA lacks information on the quantity of asbestos contained in articles and assert that the Agency "lack[s] this information despite" communication with Chemours, a company that uses asbestos-containing gaskets, and Branham Corporation, the gasket supplier to Chemours (Ref. 1). Yet, as stated in the Asbestos Problem Formulation, Chemours notified EPA of their current use of imported gaskets from China (Comment identified by Document ID No. EPA-HQ-OPPT-2016-0736-0067). Chemours stated that these sheet gaskets are composed of 80% (minimum) chrysotile asbestos, encapsulated in Styrene Butadiene Rubber, and used to create tight chemical containment seals during the production of titanium dioxide. Furthermore, as stated in the Asbestos Problem Formulation, on October 30, 2017, EPA met with Chemours and Branham Corporation, who provided EPA with additional information on the fabrication and use of the gaskets (Ref. 3).

Similarly, the petitioners stated that EPA lacks information on asbestos-containing brake blocks, even though a domestic brake block manufacturer confirmed the continued import of these products (Ref. 1). However, EPA believes that it is able to conduct scientifically rigorous risk evaluations even without the information to which petitioners refer. For the asbestos risk evaluation, in instances where the specific use information on asbestos is unknown, EPA has made use of best available science. EPA's assumptions,

uncertainty factors, and models or screening methodologies used when assessing risks associated with the conditions of use of asbestos-containing articles will be peer and publicly reviewed. It is standard practice for EPA to make conservative assumptions in the absence of complete information. Considering the extensive outreach and research conducted since December 2016, EPA has no reason to believe there are ongoing imports of articles containing asbestos that are unknown to EPA.

Additionally, information reported under TSCA section 8(a) is limited to that which is "known to or reasonably ascertainable" by the reporter. Thus, even if EPA were to require the reporting of asbestos-containing articles under TSCA section 8(a), importers would rely on information readily available to them, such as Safety Data Sheets or other documentation provided by their foreign supplier. As a result, EPA does not believe that the requested reporting requirement would result in importers reporting articles that are not already known to EPA because the Agency has conducted its own research to analyze Safety Data Sheets and other evidence in order to determine the conditions of use of asbestos for the risk evaluation. Requiring importers of asbestos-containing articles to report under TSCA section 8(a), therefore, would not provide any new use information that would inform the ongoing risk evaluation or any subsequent risk management decisions, if needed, and the Agency is prohibited by TSCA section 8(a)(5)(A) from requiring reporting that is unnecessary or duplicative.

For these reasons, EPA believes that the petitioners have failed to set forth sufficient facts to establish that it is necessary for the Agency to use its discretion to require reporting from importers of asbestos-containing articles under section 8(a).

4. Eliminate Impurities Exemption for Asbestos.

a. *Petitioners' request.* In support of their request to eliminate the impurities exemption for asbestos, the petitioners state that "contamination of talc with asbestos is well-known, having been discovered as impurities in cosmetics, baby powder, and crayons" (Ref. 1). As such, the petitioners assert that the "presence of asbestos in such consumer products, whether unintentional 'impurities' or as an unintended ingredient in the article, dictates that these exemptions cannot apply with respect to the reporting requirements for asbestos in commerce" (Ref. 1).

b. Agency response. Even if EPA were to eliminate the impurities exemption for asbestos, it is unlikely that requiring this reporting would yield any new information because rules under TSCA section 8(a) do not require submitters to perform chemical analyses of products containing the chemicals they manufacture. Instead, the standard for all information required to be reported under TSCA section 8(a)(2) is that it be “known or reasonably ascertainable.” EPA is aware that testing by a small number of importers of talc or products such as crayons has shown that some of these products are contaminated with asbestos as an impurity. However, EPA cannot compel importers who have not tested their imports to conduct this kind of testing under TSCA section 8(a). EPA can only compel reporting of testing information that is known or reasonably ascertainable to the reporter. While the petitioners “believe that it is reasonable to expect that importers of talc [. . . will . . .] test it for asbestos and that the results of such testing constitute ‘reasonably ascertainable’ information for reporting purposes” (Ref. 1), the petitioners provide no support for the belief that importers are testing for asbestos. EPA is not aware of routine testing of imports for impurities of asbestos. Thus, it is unlikely that EPA would receive new information that would change its understanding of the conditions of use for asbestos that can be addressed under TSCA.

EPA does not believe that issuing the requested TSCA section 8(a) reporting requirements would result in reporting of asbestos as an impurity, to the extent that the presence of asbestos as an impurity in these articles generally is not known or reasonably ascertainable to the importer. EPA finds that the petitioners have failed to set forth sufficient facts to establish that it is necessary for the Agency to use its discretion to require manufacturers (including importers) of asbestos as an impurity to report under section 8(a).

5. Enable EPA To Satisfy Requirements for Best Available Science

a. Petitioners’ request. As overall support for their petition, the petitioners state that EPA must grant their request to satisfy its statutory obligation under TSCA section 26 to consider the information “reasonably available” to it. Additionally, since the petitioners believe that if EPA were to require reporting on asbestos as a naturally occurring chemical substance, asbestos-containing articles, asbestos as an impurity, and from asbestos processors, that this data is “reasonably available to the agency” and thus “needed for EPA

to be able to make informed technically complex decisions regarding the regulation of asbestos” (Ref. 1).

b. Agency response. TSCA section 26 requires that, to the extent that EPA makes a decision based on science under TSCA sections 4, 5, or 6, EPA must use scientific standards and base those decisions on the best available science and on the weight of the scientific evidence. 15 U.S.C. 2625(h) and (i). In the final Risk Evaluation Rule (Ref. 7), EPA defined “best available science” as science that is reliable and unbiased. This involves the use of supporting studies conducted in accordance with sound and objective science practices, including, when available, peer reviewed science and supporting studies and data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data).

Additionally, in the final Risk Evaluation Rule, EPA defined weight of scientific evidence as a systematic review method, applied in a manner suited to the nature of the evidence or decision, that uses a pre-established protocol to comprehensively, objectively, transparently, and consistently, identify and evaluate each stream of evidence, including strengths, limitations, and relevance of each study and to integrate evidence as necessary and appropriate based upon strengths, limitations, and relevance (Ref. 7 at pg. 33733). EPA sees weight of the scientific evidence approach as an interrelated part of systematic review, and further believes that integrating systematic review into the TSCA risk evaluations is critical to meet the statutory requirements of TSCA.

TSCA section 26(k) (15 U.S.C. 2625(k)) states that in carrying out risk evaluations, EPA shall consider information that is “reasonably available,” but the statute does not further define this phrase. In the final Risk Evaluation Rule (Ref. 7), EPA defined “reasonably available information” to mean information that EPA possesses, or can reasonably obtain and synthesize for use in risk evaluations, considering the deadlines for completing the evaluation. While EPA prefers high quality data, where available, EPA recognized in the Risk Evaluation Rule that data is not always necessary to reach a scientifically grounded conclusion on the potential risks of a chemical substance, within the timeframes dictated by the statute (Ref. 7 at pg. 33739).

As outlined in the previous units, EPA does not believe that the requested asbestos reporting requirements would

collect information that is either new or useful in informing the ongoing asbestos risk evaluation. EPA believes that it already has sufficient information to conduct the risk evaluation. Moreover, even if EPA were to initiate the requested action, EPA would not collect information in a timely manner to inform the ongoing risk evaluation nor any potentially subsequent risk management activities, if unreasonable risk for the asbestos uses being evaluated is determined. EPA intends to finalize the risk evaluation for asbestos no later than December 2019, EPA acknowledges the statute provides that EPA may extend the deadline to complete a risk evaluation by six months (15 U.S.C. 2605(b)(4)(G)(ii)). As discussed in Unit V.A., even if EPA were to exercise this extension authority in the case of the ongoing asbestos risk evaluation, that would not affect the Agency’s reasons for denying this petition. If EPA finds unreasonable risk for a condition of use, risk management must promptly be initiated with a proposed rule issued one year after EPA makes such a determination.

Thus, EPA finds that the petitioners have failed to set forth sufficient facts to establish that it is necessary to grant their request in order to meet its obligations under TSCA section 26 to make its decision under TSCA section 6 based on the weight of the scientific evidence, using reasonably available information, and using the best available science.

VI. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. The Attorneys General of Massachusetts, California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia to Andrew Wheeler, Acting Administrator, U.S. Environmental Protection Agency. Re: Petition of the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia under Section 21(a) of TSCA, 15 U.S.C. 2620(a), for EPA to

Issue an Asbestos Reporting Rule to Require Reporting under TSCA Section 8(a), 15 U.S.C. 2607(a), of Information Necessary for EPA to Administer TSCA as to the Manufacture (including Importation), Processing, Distribution in Commerce, Use, and Disposal of Asbestos. Received January 31, 2019.

2. Asbestos Disease Awareness Organization, American Public Health Association, Center for Environmental Health, Environmental Working Group, Environmental Health Strategy Center, and Safer Chemicals Healthy Families to Andrew Wheeler, Acting Administrator, Environmental Protection Agency. Re: Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a). Received September 27, 2018.
3. EPA. Problem Formulation of the Risk Evaluation for Asbestos. May 2018. Washington, DC: US Environmental Protection Agency, Office of Pollution Prevention and Toxics. https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.
4. EPA. Public database 2016 chemical data reporting (May 2017 release). Washington, DC: US Environmental Protection Agency, Office of Pollution Prevention and Toxics. Retrieved from <https://www.epa.gov/chemical-data-reporting>.
5. Flanagan, DM. (2016). 2015 Minerals Yearbook. Asbestos [advance release]. In US Geological Survey 2015 Minerals Yearbook. Reston, VA: U.S. Geological Survey. <https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/myb1-2015-asbes.pdf>.
6. EPA. Response to Petition to Initiate Rulemaking Under Section 8(a) of TSCA for the Reporting of the Manufacture, Import, and Processing of Asbestos. Letter. 2019.
7. EPA. Final Rule; Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act. **Federal Register**. 82 FR 33726, July 20, 2017 (FRL-9963-38).

List of Subjects in 40 CFR Chapter I

Environmental protection, Asbestos, Flame retardants, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: April 30, 2019.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2019-09335 Filed 5-7-19; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2018-0042; FRL-9993-30-Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of a state implementation plan (SIP) submission from Maryland for the 2010 sulfur dioxide (SO₂) National Ambient Air Quality Standard (NAAQS or standard). Whenever EPA promulgates a new or revised NAAQS, states are required to make a SIP submission showing how the existing approved SIP has all the provisions necessary to meet the requirements of the new or revised NAAQS, or to add any needed provisions necessary to meet the revised NAAQS. These SIP submissions are commonly referred to as “infrastructure” SIPs. The infrastructure requirements are designed to ensure that the structural components of each state’s air quality management program are adequate to meet the state’s responsibilities under the Clean Air Act (CAA). EPA is proposing to approve Maryland’s submittal addressing certain infrastructure requirements for the 2010 SO₂ NAAQS in accordance with the requirements of section 110 of the CAA, with the exception of the portion of the submittal pertaining to interstate transport.

DATES: Written comments must be received on or before June 7, 2019.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R03-OAR-2018-0042 at <https://www.regulations.gov>, or via email to spielberger.susan@epa.gov. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment.

The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT:

Marilyn Powers, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2308. Ms. Powers can also be reached via electronic mail at powers.marilyn@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On June 22, 2010 (75 FR 35520), EPA promulgated a revised NAAQS for SO₂ at a level of 75 part per billion (ppb), based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1), states must submit “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof),” a plan that provides for the “implementation, maintenance, and enforcement” of such NAAQS. The statute directly imposes on states the duty to make these SIP submissions, and the requirement to make the submissions is not conditioned upon EPA’s taking any action other than promulgating a new or revised NAAQS. Section 110(a)(2) includes a list of specific elements that “[e]ach such plan” submission must address to meet the infrastructure requirements.

II. Summary of SIP Revision and EPA Analysis

On August 17, 2016, Maryland, through the Maryland Department of the Environment (MDE) formally submitted a SIP revision to satisfy the infrastructure requirements of section 110(a) of the CAA for the 2010 SO₂ NAAQS. The SIP submittal addressed the following infrastructure elements for the 2010 SO₂ NAAQS: CAA section 110(a)(2)(A), (B), (C), (D)(i)(I), (D)(i)(II),