

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ASBESTOS DISEASE AWARENESS
ORGANIZATION, et. al,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and MICHAEL
REGAN¹, Administrator, U.S.
Environmental Protection Agency,

Respondents.

No. 21-70160

JOINT MOTION FOR ABEYANCE

Petitioners, Asbestos Disease Awareness Organization, American Public Health Association, Center for Environmental Health, Environmental Information Association, Safer Chemicals Healthy Families - A Program of Toxic-Free Future, Vermont Public Interest Research Group, Barry Castleman, ScD, Raja Flores, MD, Arthur Frank, MD, PhD, Philip Landrigan, MD, MSc, Richard Lemen, PhD, MSPH, and Celeste Monforton, DrPH, MPH, and Respondents, U.S.

¹ Pursuant to Fed. R. App. P. 43(c)(2), Michael S. Regan is substituted for Andrew Wheeler. Michael Regan assumed the position of Administrator of the U.S. Environmental Protection Agency on March 11, 2021.

Environmental Protection Agency and Michael Regan, Administrator, U.S.

Environmental Protection Agency (collectively “EPA”) ask the Court to hold this matter in abeyance pursuant to an agreement between the parties that sets forth EPA’s approach for conducting Part 2 of its risk evaluation of asbestos (Legacy Uses and Associated Disposals of Asbestos).

In further support of this motion, the parties state as follows:

1. This petition for review was filed on January 26, 2021. Petitioners seek review of EPA’s “Risk Evaluation for Asbestos Part 1: Chrysotile Asbestos” determining the risks of certain conditions of use of chrysotile asbestos fibers under section 6(b)(4) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2605(b)(4). EPA published a notice of availability of the risk evaluation of chrysotile asbestos and the associated information required to be provided publicly with each risk evaluation on January 4, 2021. 86 Fed. Reg. 89 (Jan. 4, 2021).

2. At the same time, the Agency announced that it would conduct a Part 2 risk evaluation addressing legacy uses and associated disposal of asbestos and indicated that, together, the two Parts would comprise the full risk evaluation for asbestos under TSCA.

3. On June 22, 2021, the Court granted the parties’ joint motion for a 90-day extension of time to file the opening brief to afford the parties additional time to negotiate potential resolution of this matter without protracted litigation. *See*

Docket Entry Nos. 12151349, 12151273. Under this extension, petitioners' opening brief is due on October 27, 2021.

4. The parties have reached an agreement for the purpose of resolving this petition for review, which would hold the case in abeyance under certain conditions while EPA develops Part 2 of the risk evaluation for asbestos. Under the agreement, EPA agrees to address in Part 2 of the risk evaluation legacy uses and associated disposals of the six fiber types included in the TSCA Title II, Section 202, 15 U.S.C. § 2642, definition for asbestos—the asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite and actinolite—plus richterite-asbestos and winchite-asbestos fiber types.

5. Under the agreement, EPA also agrees to issue a draft scoping document for the Part 2 risk evaluation in accordance with 15 U.S.C. § 26056(b)(4)(D) and 40 C.F.R. § 702.41(c), which provides that, based on reasonably available information as that term is defined at 40 C.F.R. § 702.33, the risk evaluation will include consideration of the following elements: the human health hazard endpoints and exposures associated with all six asbestos fiber types; any evidence of associations between exposure to asbestos and cancer; any evidence of non-cancer human health hazard endpoints; risks of human health hazard endpoints resulting from all environmental pathways of exposure and

inhalation, dermal, and ingestion routes of exposure to asbestos; the association between exposure to asbestos in talc and talc-containing products and human health hazard endpoints; risks of human health hazard endpoints for potentially exposed or susceptible subpopulations; and any circumstances of known, intended, or reasonably foreseen manufacture, processing, distribution in commerce, use, or disposal not evaluated in Part 1.

6. The agreement provides that if the draft risk evaluation includes all of elements described above, the parties will file a joint motion to dismiss the petition for review with prejudice. It further provides that if either the final scope document or the draft risk evaluation does not include all of these elements, allowing for consideration of public comments and the requirements of, TSCA sections 6(b), 15 U.S.C. § 2605, and sections 26(h), (i), and (k), 15 U.S.C. § 2625, Petitioners' sole remedy is to terminate the agreement and move to lift the abeyance, following an informal dispute resolution process. If, for any reason, the court should decline to grant an abeyance, the agreement is void.

7. EPA's commitments described above and as set forth in the agreement reflect statements of EPA's intent. The parties agree that the agreement is fair, reasonable, in the public interest, and consistent with TSCA, 15 U.S.C. §§ 2601-2697.

8. EPA currently anticipates that it will publish a draft scope document for Part 2 of the risk evaluation for asbestos by December 31, 2021; and the final scope document by June 30, 2022. Subsequent to finalizing the scope document, EPA will develop Part 2 of the risk evaluation for asbestos.

9. The parties have also reached agreement on a proposed consent decree to resolve parallel litigation in the matter captioned *Asbestos Disease Awareness Organization et al v. Regan et al*, 4:21-cv-03716-PJH (N.D. Cal.). If approved by the court, the proposed consent decree would resolve the district court litigation by setting a deadline for EPA to complete Part 2 of its risk evaluation of asbestos by December 1, 2024.

10. An abeyance is warranted here because it would preserve resources both for the parties and the Court. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). It is possible that EPA could take action that may obviate the need for judicial resolution of some or all of the disputed issues. Further, holding this matter in abeyance will aid this Court’s consideration of the instant petition for review and contribute to the efficient administration of this Court’s docket.

11. Counsel for EPA contacted counsel for intervenor The Chlorine Institute, who indicated that intervenor does not oppose this motion.

For the foregoing reasons, the parties respectfully request that the Court issue an order (1) holding the instant matter in abeyance while EPA conducts Part 2 of its risk evaluation of asbestos; and (2) directing EPA to file status reports every 180 days.

Dated: October 13, 2021

Respectfully submitted,

/s/ Debra J. Carfora

Debra Carfora

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Motion for Abeyance was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

So certified this 13th day of October, 2021 by

/s/ Debra J. Carfora
Debra J. Carfora
Counsel for Respondents