



2021 ADAO v. EPA Settlement FAQs October 12, 2021

1. How is asbestos an ongoing and imminent threat to public health?

The human cost of asbestos exposure has been staggering and the death toll enormous. From 1991 to 2017, more than 1 million Americans died from preventable asbestos-caused diseases. These deaths represent only a snapshot in time; the total number of deaths during the 100+ years of asbestos use is much larger.

For over a century, asbestos has been known to cause widespread disease and death. In a monograph on asbestos published in 2012, the International Agency for Research on Cancer (IARC) found the following cancers in humans to be causally related to asbestos exposure: lung cancer, malignant mesothelioma, ovarian cancer, and cancer of the larynx. There is considerable evidence in the scientific literature of causal associations with gastrointestinal cancers and kidney cancer. Non-malignant diseases are also caused by asbestos. These include asbestosis and asbestos-related pleural thickening. Scientists and agencies recognize that there is no safe level of exposure to asbestos.

Despite the elimination of many asbestos products due to corporate liability, asbestos deaths – calculated to be nearly 40,000 per year – remain high, demonstrating that millions of Americans have been significantly exposed to asbestos in the past and many others continue to be exposed now. Most asbestos use is still lawful in the US, in contrast to the nearly 70 countries worldwide who have banned asbestos.

2. What is EPA doing to address the risks of asbestos under the Toxic Substances Control Act (TSCA) ?

In 1989, EPA banned most uses of asbestos under TSCA but the ban was thrown out in court in 1991. Asbestos became the poster child for the failings of TSCA when Congress considered strengthening the law after 2010. The TSCA amendments of 2016 create a new process for addressing dangerous chemicals like asbestos. Under that process, EPA first conducts a risk evaluation to determine whether a substance presents an unreasonable risk to health or the environment and, if it does, takes regulatory action to reduce the risk. In 2016, asbestos was selected as one of the first 10 chemicals to go through this process. EPA completed a Part 1 risk evaluation for asbestos in January 2021 and is now preparing for a risk management rulemaking to restrict those asbestos conditions of use determined to present an unreasonable risk in the Part 1 evaluation. EPA has also announced a Part 2 evaluation to address legacy uses of disposal of asbestos and other issues but it is at a very early stage.



3. How do the settlements fit into EPA’s overall approach to asbestos under TSCA?

The first settlement resolves ADAO’s January 26, 2021 challenge in the Ninth Circuit Court of Appeals to the Agency’s Part I asbestos risk evaluation, issued in the last days of the Trump Administration. ADAO and leading scientists filed this case because the many gaps and omissions in the evaluation violated TSCA, ignored the best available science and failed to provide the public with a full picture of the risks of this deadly carcinogen. In its settlement agreement with ADAO, EPA has agreed to expand its planned Part 2 asbestos risk evaluation to address the deficiencies in Part 1.

In the second settlement, EPA and ADAO entered into a consent decree to resolve ADAO’s May 18, 2021 suit in the U.S. District Court for the Northern District of California to require the Agency to evaluate the risks of “legacy” asbestos found in millions of buildings and in consumer products across the United States. The Trump EPA announced that it would conduct a Part 2 risk evaluation of legacy asbestos but failed to set a schedule for completing it. The consent decree that the parties have now approved requires completion of the evaluation by December 1, 2024.

4. Do the settlements define the asbestos fibers that will be addressed in the Part 2 evaluation?

Yes. Paragraph 1 of the settlement agreement states that “EPA will address in Part 2 of the risk evaluation asbestos legacy uses and associated disposals of the six fiber types included in the TSCA Title II, Section 202 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. Do these settlements mean that the EPA will ban asbestos?

No. The settlements address the Part 1 and 2 risk evaluations of asbestos. They do not address how EPA will regulate asbestos in the risk management process that is just getting underway for the chrysotile asbestos conditions of use found to present an unreasonable risk in the Part 1 evaluation. While we hope EPA will take the strongest possible actions on these conditions of use, we don’t know whether they will be banned or allowed to continue subject to conditions. There is also the possibility of litigation challenging the risk management rule, which may delay its effectiveness. Right now, we don’t expect a final rule until 2023 at the earliest and it could be delayed beyond that. When the restrictions in the rule would actually take effect is hard to predict.

6. Do these settlements reduce the need for ARBAN legislation banning asbestos?

Not at all. While strengthening and expanding the TSCA asbestos risk evaluation represent major steps forward and are critical to protecting public health, they don’t restrict the importation and use of asbestos, which is the focus of the upcoming EPA risk management process. The goal of ARBAN is to impose an across-the-board ban on importation and use of asbestos and asbestos-containing products as expeditiously as possible. We don’t know whether EPA will ban asbestos in its risk management rulemaking and even if it does, the ban might not take effect for years. By contrast, the ban in ARBAN would be in place one year after enactment, with a fixed transition



period for asbestos-using chlor-alkali plants. ARBAN would also eliminate current asbestos products that EPA has failed to identify and prevent the return to commerce of asbestos products that were previously phased out. EPA's TSCA risk management rulemaking is unlikely to take these steps.

7. Does ADAO believe the Biden EPA is doing a better job on asbestos than the Trump EPA?

Yes. We are pleased that the Biden EPA has come to the table to negotiate these settlements and resolve litigation we filed to fix the flaws in the Trump EPA's actions on asbestos. In agreeing to a more robust and comprehensive approach to risk evaluation in Part 2, the Biden EPA is showing a greater willingness to be guided by the best science and greater sensitivity to the need to protect public health.

8. Since EPA will now be subject to a court order to complete the legacy asbestos evaluation, is it necessary to address legacy risks in the ARBAN legislation?

ARBAN legislation in the last Congress would have mandated a study of the risks of legacy asbestos by the National Academy of Sciences (NAS), the nation's premier body of independent scientists. As we have repeatedly emphasized, legacy asbestos use and disposal are important and dangerous pathways of asbestos exposure for millions of Americans. As such, no risk evaluation under TSCA would be complete without understanding the contribution of legacy exposure to the large burden of death and disease that asbestos continues to impose. Thus, EPA's commitment to finally address legacy asbestos in Part 2 is overdue and welcome. However, this is a complex and challenging undertaking and EPA needs to take advantage of the great expertise which the NAS has to offer. The advisory role of NAS established in last year's ARBAN remains critically important and should be retained in any new legislation to assure that the nation's leading scientists are working closely with EPA on the Part 2 evaluation.

9. What were the flaws in the EPA Part 1 evaluation?

The Part 1 evaluation was dangerously incomplete and overlooked numerous sources of asbestos exposure and risk. Among its many flaws, the evaluation:

- Only addresses chrysotile asbestos, ignoring the 5 other asbestos fiber types;
- Fails to consider known asbestos health effects, such as asbestosis and ovarian cancer;
- Does not address environmental pathways of exposure or risks from dermal and ingestion routes of exposure;
- Makes no effort to assess asbestos contamination of widely used consumer and industrial products containing talc; and
- Is based on incomplete information about current asbestos exposure and use.

These are all omissions that were emphasized by EPA's Science Advisory Committee on Chemicals (SACC), which said in its August, 2020 report that the draft evaluation "was not considered adequate and resulted in low confidence in the conclusions."

10. How does the settlement fix the flaws in Part 1?

Under paragraph 2 of the settlement agreement, EPA commits to issuing a draft scoping document for the Part 2 evaluation that, based on reasonably available information, will:

- include all of the six asbestos fiber types rather than only chrysotile asbestos;
- examine all the cancer and non-cancer diseases linked to asbestos exposure, including asbestosis, laryngeal cancer and ovarian cancer;
- assess risks to human health from all environmental pathways of exposure;
- assess health risks from inhalation, ingestion and dermal contact with asbestos;
- evaluate the association between exposure to asbestos in talc and talc-containing products and human health hazard endpoints;
- assess health risks to potentially exposed or susceptible subpopulations, including individuals who may be more susceptible to the hazards of asbestos; and
- address any known, intended, or reasonably foreseen conditions of use of asbestos that were omitted from the Part 1 evaluation.

These commitments will go far to fill the gaps in the Part 1 evaluation that were of concern to ADAO, its scientific advisors and the SACC.

11. Can EPA wriggle out of the commitments it is making for the Part 2 evaluation?

The settlement agreement recognizes that, by law, EPA has discretion to determine the contents of its final scoping document and draft risk evaluation for Part 2. Thus, it is possible that the final scoping document and draft risk evaluation could diverge from the agreement based on public comments or TSCA requirements. Should this happen, ADAO and its co-petitioners could withdraw from the settlement agreement and reactivate their Ninth Circuit challenge to the Part 1 evaluation. We believe this scenario is unlikely and that the elements of the Part 2 evaluation identified in the agreement will be maintained throughout the Part 2 risk evaluation process.

12. Why isn't EPA redoing Part 1 if it was so flawed?

EPA believes, and we agree, that the best approach is to address the deficiencies of Part 1 in the Part 2 evaluation, so that the Agency is not delayed in proceeding to risk management for the chrysotile-only conditions of use that it found present an unreasonable risk of injury in Part 1.

13. Why is it important to evaluate the risks of legacy asbestos?

A wide range of asbestos-containing products—including attic and wall insulation, pipes and boilers, floor tiles, gaskets, roofing, shingles and siding and brake pads and linings—were distributed in commerce for several decades during the 20th century. Although sales started declining in the 1980s, these products were heavily used over several decades in constructing homes, schools, apartments, public buildings, offices, stores, and factories, remaining in place in millions of structures across the country. Much of this asbestos is in friable form and can be released into the air when disturbed during routine building maintenance and upkeep. Exposure can also occur when building materials



are broken or torn apart during renovation, repair and demolition projects and the collection, removal and disposal of construction debris.

We know from studies of firefighters and teachers that the incidence of asbestos-related disease is elevated in populations with exposure to legacy asbestos. While OSHA standards apply to worker exposure to legacy asbestos, OSHA has recognized that these standards do not eliminate significant risks to workers.

No assessment of legacy asbestos exposure has been conducted in the last 35 years despite the ongoing contribution of this exposure to asbestos-related disease and death. The TSCA risk evaluation is a critical tool to update our understanding of the prevalence of legacy asbestos and the magnitude of exposure and risk it poses to the American public.

14. Why wasn't legacy asbestos included in the Part 1 evaluation?

When it began its asbestos risk evaluation in 2017, the Trump EPA claimed that the risks of legacy asbestos to millions of workers, consumers, school children and teachers were beyond its authority under TSCA. As a result, it excluded legacy asbestos from the scope of its risk evaluation. However, EPA's interpretation of the statute was squarely rejected by the U.S. Court of Appeals for the Ninth Circuit. In its November 14, 2019 decision, the Ninth Circuit held that the ongoing use and disposal of chemicals no longer distributed in commerce are "conditions of use" as defined in section 3(4) of TSCA and must be included in TSCA risk evaluations. *Safer Chemicals, Healthy Families v USEPA*, 943 F.3d 397, 421 (9th Cir. 2019).

The Trump EPA issued its final risk evaluation for asbestos on December 30, 2020 and announced its availability in the Federal Register on January 4, 2021. 86 Federal Register 89. Despite the Ninth Circuit decision in 2019, the evaluation did not address the health impacts of legacy asbestos uses and associated disposal. Describing the evaluation as "Part 1," evaluation, EPA stated its intent to conduct a future "Part 2" evaluation focused on legacy asbestos but provided no specifics about how it would be conducted and failed to set a schedule for completing it. ADAO and its co-plaintiffs sued EPA on May 18, 2021 to force EPA to perform its duty under TSCA to evaluate legacy asbestos use and disposal. The consent decree that the parties have agreed to would achieve this goal by setting a court-ordered deadline of December 1, 2024 to complete the Part 2 evaluation.

15. How can we be sure that EPA will meet the deadline in the consent decree for completing the legacy evaluation?

The deadline is an order of the court and imposes legally-enforceable obligations on EPA. If EPA fails to meet the deadline, it will be in violation of the court order and could be subject to sanctions and other requirements. EPA must report to the court on its progress in conducting the Part 2 evaluation and ADAO plans to monitor this progress to satisfy itself that the evaluation is on track.

16. How does the settlement deal with asbestos contamination of talc and talc products?

Studies by the Food and Drug Administration (FDA) and others have documented the presence of asbestos in a variety of personal care products and cosmetics based on talc. These include baby powder and a wide range of talc-based makeup products sold by Claire's and Justice. There are also data confirming asbestos contamination of TSCA-regulated talc-based crayons and other consumer products to which infants and children are exposed. In addition to these products, talc has numerous industrial applications subject to TSCA and there are many workplaces where exposure to industrial talc occurs.

EPA's Part I risk evaluation failed to address the documented presence of asbestos contamination in TSCA-regulated talc-based based products and raw materials. It is known that exposure to asbestos-contaminated talc can cause mesothelioma and ovarian cancer. The SACC report on the Part 1 evaluation was critical of its failure to consider the health risks of asbestos from talc-related pathways of exposure.

The settlement of ADAO's challenge to the Part 1 risk evaluation will close this gap by assuring that the Part 2 evaluation will address "[a]ny reasonably available information concerning the association between exposure to asbestos in talc and talc-containing products and human health hazard endpoints."

17. How will the earlier 2021 settlement between EPA and ADAO committing the Agency to initiate rulemaking to require reporting on asbestos under TSCA section 8 affect the new settlements?

The June 7, 2021 settlement agreement between the Biden EPA and ADAO ended a long legal battle under Section 21 of TSCA after EPA had denied petitions by ADAO and several states seeking asbestos reporting in 2018. The settlement agreement implemented the sweeping December 22, 2020 [decision](#) of Judge Edward Chen of the Northern District of California which determined that EPA petition denials were contrary to law, arbitrary and capricious. Judge Chen's opinion recognized that a lack of reporting had deprived EPA of the basic use and exposure information necessary to perform a sound risk evaluation on asbestos. He ordered the EPA to initiate rulemaking under TSCA's reporting authorities to fill these information gaps.

The settlement agreement carried out this directive by committing EPA to propose a rule under section 8(a) of TSCA requiring "the maintenance of records and submission to EPA of reports by manufacturers, importers and processors of asbestos and mixtures and articles containing asbestos (including as an impurity) that address the information-gathering deficiencies identified in the Court's Summary Judgment Order." Under the agreement, EPA is obligated to publish a proposed rule by early March 2022 and take final action by early December of that year.

Reports submitted under the rule will inform the Part 2 evaluation in several ways. For example, they will identify asbestos-containing articles and mixtures imported into the US in recent years and provide information on how they were used and processed and pathways of exposure. Under the new settlement agreement, conditions of use that are disclosed under the reporting rule would then need to be addressed in the Part 2 risk evaluation if they were not included in Part 1. In addition, because the rule would require the submission of reports on mixtures, articles and substances in



which asbestos is present as an impurity, EPA would obtain information about asbestos contamination of TSCA-regulated talc and other products. In accordance with the new settlement agreement, the risks associated with this contamination would likewise be addressed in the Part 2 evaluation.