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Via Federal eRulemaking Portal

Michael S. Regan
Administrator
U. S. Environmental Protection Agency
EPA Docket Center
Existing Chemicals Risk Management Division
Mail Code 7405M
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OPPT-2021-0057

Re: Regulation of Certain Conditions of Use Under Section 6(a) of the Toxic Substances Control Act (Docket ID: EPA-HQ-OPPT-2021-0057)

Dear Administrator Regan:

On behalf of the States of Texas, Arkansas, Florida, Idaho, Indiana, Louisiana, Mississippi, Montana, Nebraska, Oklahoma, South Carolina, and Utah, the undersigned attorneys general respectfully submit the following comments in response to the Environmental Protection Agency's (EPA) proposed rule addressing Chrysotile Asbestos. Texas and the co-signing states support the efforts of EPA to address the use of Chrysotile Asbestos in the United States. However, on its face, the proposed rule admits gaps in EPA's knowledge of affected industries and cites studies that are decades old. To ban a substance that has been used for decades based on data that is at the same time both underdeveloped and obsolete reflects a rush to judgment that we fear will have long-term consequences, not just on the economy but on the safety of Americans. Below is an illustrative, but not exhaustive, list of areas where further consideration is warranted.

1. Major-questions doctrine

As an initial matter, the notice of proposed rulemaking fails to account for whether EPA has statutory authority to impose a flat ban on Chrysotile Asbestos. The Rule cites the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(a), which permits the agency to limit or prohibit the distribution of dangerous substances under certain circumstances. However, the Rule also acknowledges that Congress has passed several other statutes that more specifically address the

regulation of asbestos.[1] As Congress has decided to take a measured approach to the regulation of Chrysotile Asbestos notwithstanding its known health risks, it is hard to see how EPA can use the general language of the TSCA to impose a flat ban on all commercial uses of the substance.

Under the so-called major-questions doctrine, agencies and courts "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic . . . magnitude to an administrative agency."[2] As the Supreme Court just reaffirmed, even where "regulatory assertions ha[ve] a colorable textual basis," they will not stand absent a clear delegation of authority by Congress.[3] "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[4] And Congress does not "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[5]

A flat ban on the use of asbestos is a question of major economic significance. Asbestos has been used in the commercial production of heat-resistant materials for well over a century.[6] Although the undersigned coalition of states do not dispute the agency's conclusion that health concerns associated with the substance have (rightly) led to the dramatic reduction of its use,[7] the industries where it remains used—particularly in the chlor-alkali and petrochemical industries[8]—remain of enormous economic significance and political salience. After all, the petrochemical industry contributes nearly $600 billion and 3 million jobs to the U.S. economy across 33 states.[9] In addition to being vital to the provision of safe, potable drinking water (discussed below at 4), chlorine is used to produce plastics, numerous consumer goods, pharmaceuticals, and medical supplies. A regulatory change that would significantly impact the efficiency or safety of the chlorine or petrochemical industries is one of considerable significance to many Americans (and, by extension, Congress).

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[1] 87 Fed. Reg. 21706, 21710 (Apr. 12, 2022).
[2] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).
[3] *West Virginia v. EPA*, No. 20-1530, 2022 WL 2347278, at *12 (June 30, 2022).
[4] *Id.* (quoting *Whitman v. Am. Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001)).
[5] *Id.* (quoting *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994)).
[6] *E.g.*, *Bell S. Telecomms., Inc. v. W.R. Grace & Co.-Conn*., 77 F.3d 603, 606 & n.1 (2d Cir. 1996) (noting that asbestos has existed since antiquity but began to be commercially employed in the United States in fire retardant materials in 1866).
[7] 87 Fed. Reg. at 21707 (citing that "domestic consumption of raw asbestos is less than 0.1% of peak consumption in the early 1970s").
[8] *Compare* 87 Fed. Reg. at 21707 (listing "[c]hlor-alkali producers" as "the only industry in the U.S. known to fabricate products from raw chrysotile asbestos"), *with id.* (acknowledging the use of chrysotile asbestos in producing brake blocks for the oil industry).
[9] *See* AFPM, *Economic Impact*, https://www.afpm.org/industries/contributions/economic-impact#:~:text=The%20fuel%20and%20petrochemical%20industries,in%20state%20and%20local%20taxes (last visited July 10, 2022).

Congress has opted not to ban the use of Chrysotile Asbestos in the production of either chlorine or petrochemicals despite knowing the downsides. After all, the respiratory dangers of asbestos—and, by extension, the need to take precautions against inhalation of the substance—have been known and litigated about since at least the 1970s.[10] But, as the proposed Rule implicitly recognizes, Congress has declined to ban the use of Chrysotile Asbestos outright.[11] Instead, Congress has taken a more measured approach in requiring the removal of asbestos from areas where its health risks outweigh the benefits of its heat-resistance properties.[12] It has, by contrast, permitted asbestos to continue to be used in industries where the risks associated with even the low probability of equipment failure or fire create a different cost-benefit analysis.[13] The Rule makes no effort to explain how it finds authority to reassess that balance.

2. Inadequacies in data

Assuming that EPA has the authority to impose an outright ban on Chrysotile Asbestos, the current rule reflects that it has done so in haste and without considering—or even the ability to consider—all of the potential impacts of the proposed ban. EPA acknowledges it had no data on the cost impact a ban on Chrysotile Asbestos has on any industry other than the production of chlorine.[14] EPA should adequately investigate the effects on other industries (*i.e.*, automotive, pharmaceutical, and petrochemical) before implementing a rule that bans Chrysotile Asbestos. An outright ban on Chrysolite Asbestos may have limited benefits when the economic costs are unknown. Unless EPA prepares a cost/benefit analysis for the remaining uses subject to the Rule, EPA's decision to implement the Rule may be considered arbitrary and capricious.

EPA proposed an alternative to an outright ban on the use of Chrysotile Asbestos. Effective engineering controls and protective equipment can protect workers from exposure. It appears EPA's justification for the Rule is work-place safety, but that is the domain of the Occupational Safety and Health Administration (OSHA). EPA emphasizes the need/desire to ban the use of Chrysotile Asbestos, but it fails to acknowledge that OSHA can most appropriately protect

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[10] *E.g.*, Stephen Kazan, *History of Asbestos Litigation*, Blog (Aug. 22, 2013), https://www.kazanlaw.com/history-asbestos-litigation/#:~:text=The%20modern%20history%20of%20asbestos,in%20July%20of%20that%20year (suggesting that the first modern asbestos lawsuit was filed in 1966).
[11] *Cf.* 87 Fed. Reg. at 21709.
[12] *E.g.*, Asbestos Hazard Emergency Response Act of 1986, Pub. L. 99-519, 100 Stat. 2970.
[13] For the risks to both the environment and human life associated with fire at chlorine plants, see Steven Mufson & Darryl Fears, *Wind, rain and a chemical fire. Hurricane Laura has gone but the crisis wasn't over*, Wash. Post (Aug. 27, 2020), https://www.washingtonpost.com/climate-environment/2020/08/27/hurricane-laura-fire-biolab/ (describing health effects of burning chlorine gas). For accidents that can result from faulty brakes on oil rigs, see Metropolitan Consulting Engineering & Forensics, Accident Investigation Report - Deepwater Nautilus Drops Traveling Block Causing Rig Damage, https://sites.google.com/site/metroforensics3/accident-investigation-report---deepwater-nautilus-drops-traveling-block-causing-rig-damage; U.S. Dep't of the Interior, Minerals Management Service, Incidents Associated with Oil & Gas Operations: Outer Continental Shelf 64 (1998).
[14] 87 Fed. Reg. at 21708.

workers, through improved engineering controls and protective equipment if appropriate. An outright ban on Chrysotile Asbestos is unnecessary when the rate of disease associated with asbestos exposure is declining.[15]

3. Effects on the availability of clean drinking water

The Rule also fails to account for the need to balance the risks of workers exposed to asbestos in the production of chlorine with the necessity to continue chlorinating drinking water supplies throughout the state. The proposed rule's arbitrary timeframe is unworkable and will lead to inevitable and major supply-chain issues. Currently one-third of chlorine production relies upon the use of asbestos in the production process. A one-third reduction of the overall chlorine supply will inevitably have a negative effect on the ability of water systems to provide safe drinking water. While this issue will be felt in a variety of industries, it will be particularly acute for public drinking water systems. Water systems will be left with the choice of being out of compliance because they are unable to comply with an almost immediate deadline or no longer being able to properly treat drinking water. This problem will be especially highlighted in rural areas.

A two-year deadline for compliance with the proposed rule unreasonably fails to afford the associated industries sufficient time to implement asbestos-free infrastructure and meet the continued need for chlorine use,[16] a vital component to many industries, including, but not limited to, consumer products, drinking water systems, and the automotive, medical, and agricultural industries.[17] The undersigned coalition of states urge EPA to provide additional time for industry participants to implement the ban on Chrysotile Asbestos to avoid continued supply-chain disruptions, which have already been identified.[18] Two years is simply not enough time.[19]

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[15] Clare Gilham et al., Past and current asbestos exposure and future mesothelioma risks in Britain: The Inhaled Particle Study (TIPS), *International Journal of Epidemiology*, Vol. 47, Issue 6, pp. 1745-1756 (Dec. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6280925/.

[16] Bobby Magill, *Chlorine Shortage Spurs Unprecedented Requests for EPA Help*, Bloomberg Law (Aug. 16, 2021), https://news.bloomberglaw.com/environment-and-energy/chlorine-shortage-leads-u-s-water-systems-to-seek-epas-help; Government of Canada, Prohibition of Asbestos and Products Containing Asbestos Regulations: frequently asked questions, https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/prohibition-asbestos-products-regulations-questions.html#q4.

[17] The American Chemical Council created a Chlorine Product Tree demonstrating the significant role chlorine plays in the manufacturing of thousands of products used daily. https://chlorine.org/wp-content/uploads/2017/08/chlorine-tree.pdf.

[18] Canada recently banned products containing asbestos, but it allowed manufacturers 11 years to phase out asbestos. Government of Canada, https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/prohibition-asbestos-products-regulations-questions.html#q4.

[19] EPA failed to address the increased risk of a potential environmental release/discharge of asbestos following the total shutdown and restart of chlorine production facilities.

EPA has long permitted the use of chlorine as an appropriate treatment for drinking water supplies.[20] And chlorine has been used to successfully treat a variety of major water borne illnesses. Texas's rules relating to public water systems are found under Chapter 341, Subchapter C of the Texas Health and Safety Code. This chapter along with rules of the Texas Commission on Environmental Quality (TCEQ) set forth sanitary standards for drinking water and establishes the TCEQ as Texas' regulatory authority for adopting and enforcing rules to implement the federal Safe Drinking Water Act.[21] The unreasonably short two-year deadline proposed by EPA was made without considering relevant factors that will make chlorine unavailable and place drinking water providers in conflict with state and federal laws regarding drinking water and, most troublingly, prevent proper disinfection of drinking water sources.[22]

Further, EPA's proposed rule fails to analyze the disproportionate effects that will occur to rural communities and those without the necessary financial ability to make major infrastructure changes over a very abbreviated timeline. As of 2017, approximately sixty percent of Texas's public water systems serve populations of 500 people or fewer.[23] Financial constraints, many due to an inadequate customer base, are a significant impediment to compliance. The decrease in chlorine production caused by this rule will create a significant threat to smaller communities and their ability to comply with the Safe Drinking Water Act.[24] In addition, the further limit of chlorine production, particularly over such a short timeframe, will lead to inevitable increases in not only prices to water system ratepayers but to the population as a whole.

EPA's proposed rule appropriately recognizes that threats to human health and the environment associated with asbestos diaphragms can be addressed though effective engineering controls and protective equipment. But it fails to recognize the heavy and unreasonable burden such a short timeline will have on all industry participants. Industry participants must be given a more reasonable timeline with which to comply.

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[20] Since the passage of the Safe Drinking Act of 1974 and before, water systems have applied some type of treatment to their water, including, but not limited to, chlorine. EPA, The History of Drinking Water Treatment (Feb. 2000), https://archive.epa.gov/water/archive/web/pdf/2001_11_15_consumer_hist.pdf. To prevent contamination with germs, water companies add a disinfectant—usually either chlorine or chloramine—that kills disease-causing germs such as *Salmonella*, *Campylobacter*, and norovirus. Texas rules regarding Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements can be found in Title 30 of the Texas Administrative Code Chapter 290, Subchapter F. Disinfectants, including chlorine, are discussed in Section 290.110. Surface Water Treatment standards are discussed in Section 290.111.

[21] 30 Tex. Admin. Code § 290.42(c)(1), (d)(1). Additionally, specific requirements for drinking water standards governing drinking water quality and reporting can be found in chapter 290, subchapter F.

[22] 42 U.S.C. § 300f, et seq. (1974); 30 Tex. Admin. Code § 290.42(c)(1), (d)(1). Additionally, specific requirements for drinking water standards governing drinking water quality and reporting can be found in chapter 290, subchapter F.

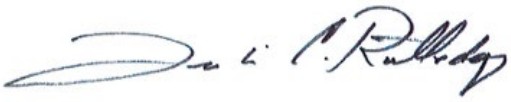
[23] Tex. Leg. Budget Bd., Staff Reports - ID: 4830, Improve Viability of Small Drinking Water Systems, S. 86-5464, 86th Leg., R.S. (Apr. 2019) at 1. Texas had approximately 6,977 public water systems, and 4,159 of those systems serve populations of 500 or fewer. *Id*., https://www.lbb.texas.gov/Documents/Publications/Staff_Report/2019/5464_Water_Systems.pdf.

[24] 30 Tex. Admin. Code § 290.110(c).

State industries need more time to consider effective alternatives to ensure that chlorine production can continue to meet the demands of numerous industries, from medical to drinking water, not only in Texas, but across the United States. The undersigned coalition of states urge EPA to reconsider its proposed rule.

Respectfully,

Ken Paxton
Attorney General of Texas



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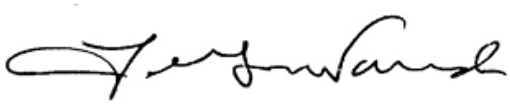

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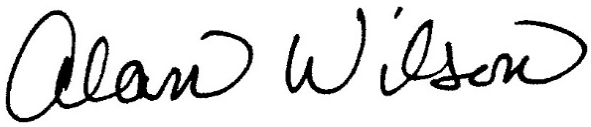

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