



Is asbestos making a comeback?

Design Professional

The EPA may allow some new uses of asbestos, but liability fears will likely deter its use by design professionals.

This past June, the U.S. Environmental Protection Agency (EPA) announced a proposed “significant new use rule” (SNUR) on asbestos.

The proposed rule, which was open for public comment until mid-August, would require manufacturers to notify the EPA if they’re introducing new uses of one of more than a dozen product categories. The agency says “new uses” are “asbestos product categories where manufacturing (including importing) and processing for the use is no longer ongoing.” (See the sidebar, “Resources.”)

The announcement ignited a debate over whether it will make it easier for asbestos to return to widespread use. The EPA [says](#) that the SNUR proposal broadens asbestos regulation, adding more oversight to uses that are [not currently illegal](#).

But critics, including the American Institute of Architects (AIA), say the proposed rule—which followed major [controversial](#) changes to the EPA’s safety and security risk evaluation process earlier this year—could open the door to new or revitalized asbestos uses and ignores “legacy” uses, despite years of research into health risks arising from those uses.¹ In a [statement](#), the AIA voiced “strong opposition” to the SNUR, saying, “The EPA should be doing everything possible to curtail asbestos in the United States and beyond—not providing new pathways that expose the public to

its dangers.” More than 60 countries have [banned](#) asbestos; the U.S. is not among them. In Canada, proposed [regulations](#) to ban asbestos are expected to go into effect by the end of 2018.

Liability concerns a deterrent

Randy Lewis, Vice President, Loss Prevention and Client Education for AXA XL’s Design Professional team, believes it’s highly unlikely that design professionals will specify new asbestos-containing products. “The health risks to the public and on the jobsite are so great and the liability so unmanageable,” he says, “that I can’t see contractors, owners or designers touching asbestos.” Lewis says that the risks, together with insurance exclusions and safety regulations, will continue to deter the use of asbestos in the design and construction industry.

“The risk to design professionals is unmanageable,” Lewis says. “We all remember that when asbestos products were determined to be hazardous, some plaintiff lawyers tried to hold A/Es at least partially responsible for damages or injuries caused by these materials, even though everyone considered them safe when they had been specified.”

More than 50 years since the first asbestos-related lawsuit was filed, asbestos litigation is still a multibillion-dollar industry. Trial lawyers compete to represent victims and there’s been a dramatic

increase in the number of defendants named on complaints or petitions, in a practice called “over-naming.” It’s not unheard of for plaintiffs to name over 100 defendants on an asbestos claim.

Lewis says insurance exclusions will also impede new asbestos use. “All the A/E professional liability insurance policies I’ve seen exclude claims based on or arising out of an A/E’s specification of any asbestos-containing materials or products, in any form,” he says. General liability (CGL) policies also exclude asbestos claims. “These exclusions alone should give A/Es pause before considering any new asbestos products, even if they’re thought to be safe,” Lewis says. “Why assume the risk of an uninsured claim?”

Lewis says the Occupational Safety and Health Administration (OSHA) could also block proposed new uses of asbestos, at least regarding the workplace. The Chemical Safety Act² requires the EPA to consult with OSHA “prior to adopting any prohibition or other restriction relating to a chemical substance with respect to which the Administrator has made a determination to address workplace exposures.” While critics worry that OSHA sometimes fails to enact regulations in a timely fashion, the agency has recently taken a tough stance on related issues such as silica. “It’s hard to imagine them retreating,” Lewis says.

Still, even if A/Es don’t knowingly specify a product that contains asbestos, there’s some cause for concern. Lewis worries that the trend toward product transparency may mean increased liability for architects and engineers if they’re expected to do more independent investigation regarding materials in products they specify (or that the contractor proposes as a substitution). “To what extent can an A/E rely on a manufacturer’s data about a product?” he says. “What if it’s false or incomplete? If someone claims to have been harmed by asbestos in a building product an A/E specified, the injured party will likely claim that the A/E knew—or should have known—that the product contained asbestos.”

Mitigating risks

“We don’t know if new asbestos-containing construction products will find their way to the market,” Lewis says, “but the EPA proposal is a good reminder to A/Es that they need adequate protections when they specify products, both foreign and domestic.” He offers some suggestions:

- Don’t knowingly specify or agree to the use of any product that contains asbestos, even if you’re convinced of its safety. “If there’s a claim, your insurance policies may not protect you,” Lewis says.
- Do your homework, and if you’re unsure what’s in a product, don’t specify it. In the event of a dispute, you must be able to demonstrate you exercised due diligence in your design selections, i.e., that you made a reasonable, professional effort to explore the suitability, performance and reliability of the products or technologies selected. Thoroughly document your research efforts and correspondence. If you have concerns about a product recommended by the owner, contractor, supplier, manufacturer or other party, make them clear to the owner.

Make sure your contract addresses hazardous materials, including asbestos. In every agreement you negotiate, insist on a clause that provides for the possibility of the discovery of hazardous materials on the jobsite. While standard professional association agreements published by the AIA and the Engineers Joint Contract Documents Committee (EJCDC) have such a clause, the Design Professional group suggests you also carefully define “hazardous materials” to include asbestos. “We consider this one of the most important clauses in your contract, a must-have,” Lewis says.

Federal rules aside, Lewis says that A/Es will play an important role in whether approved new uses of asbestos are ultimately employed in construction. “Architects and engineers are licensed to protect the public health, safety, and welfare,” he says. “Why put the public—as well as the financial well-being of their own firms—at risk by specifying one of these products?”

Resources:

EPA. [“Asbestos; Significant New Use Rule.”](#)

EPA. [“Problem Formulation of the Risk Evaluation for Asbestos.”](#)

Fact Check.org. [“Did the EPA Just Approve Use of Asbestos in the U.S.?”](#) accessed 9/5/18.

Scientific American. [“Trump’s EPA May Be Weakening Chemical Safety Law,”](#) accessed 9/6/18.

Contact

Design Professional team

US

+1 610 968 9413

designprofessionalUSA@axaxl.com
axaxl.com/dp

Canada

800 820 2721 x8682

designprofessionalCAN@axaxl.com
axaxl.com/dp-ca

1. The EPA defines “legacy uses” as those that are not ongoing, although they “remain in older buildings or are part of older products but for which manufacture, processing and distribution in commerce are not currently intended, known or reasonably foreseen.”
2. The Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amends the Toxic Substances Control Act (TSCA), the nation’s primary chemicals management law.

The information contained herein is intended for informational purposes only. Insurance coverage in any particular case will depend upon the type of policy in effect, the terms, conditions and exclusions in any such policy, and the facts of each unique situation. No representation is made that any specific insurance coverage would apply in the circumstances outlined herein. Please refer to the individual policy forms for specific coverage details. AXA XL is a division of AXA Group providing products and services through four business groups: AXA XL Insurance, AXA XL Reinsurance, AXA XL Art & Lifestyle and AXA XL Risk Consulting. In the US, the AXA XL insurance companies are: AXA Insurance Company, Catlin Insurance Company, Inc., Greenwich Insurance Company, Indian Harbor Insurance Company, XL Insurance America, Inc., XL Specialty Insurance Company and T.H.E. Insurance Company. In Canada, insurance coverages are underwritten by XL Specialty Insurance Company - Canadian Branch and AXA Insurance Company - Canadian Branch. Coverages may also be underwritten by Lloyd’s Syndicate #2003. Coverages underwritten by Lloyd’s Syndicate #2003 are placed on behalf of the member of Syndicate #2003 by Catlin Canada Inc. Lloyd’s ratings are independent of AXA Group. Not all of the insurers do business in all jurisdictions nor is coverage available in all jurisdictions. Information accurate as of November 2018.