



Episode Title: Asbestos Reporting Rule -- A Conversation with Richard E. Engler, Ph.D.

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Lynn L. Bergeson (LLB): Hello, and welcome to *All Things Chemical*, a podcast produced by Bergeson & Campbell, P.C. (B&C[®]), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I discuss with my colleague, Dr. Rich Engler, Director of Chemistry here at B&C and our consulting affiliate, the U.S. Environmental Protection Agency's (EPA) important and recently issued first final risk management rule, for chrysotile asbestos. Those of us in the Toxic Substances Control Act (TSCA) community know asbestos occupies a very special place in TSCA's checkered past, and EPA's final rule is a very important chapter in this book. Whether you care about asbestos or not, by any independent standard, this final rule is a big deal for several reasons, and there is no better expert than Rich Engler to discuss with me what this rule does, what it tells us about EPA's approach to risk management under TSCA, why it is relevant to any chemical undergoing review by EPA and not just asbestos, why in all probability neither industry nor the non-governmental organization (NGO) community is happy about it, and why litigation may well be in our future. Now here is my conversation with Dr. Rich Engler.

Rich, welcome back to the studio. Always a pleasure to have you here.

Richard E. Engler (REE): I really enjoy these, Lynn.

LLB: I know you do. We have a lot of fun, and we're going to have a lot of fun today talking about our favorite substance: the final risk management rule relating to chrysotile asbestos. Thank you for joining me. To get us started, we know that EPA issued the final risk management rule under TSCA Section 6 for Part 1 chrysotile asbestos on March 14. As of this recording, it's not yet in the *Federal Register*, but we expect it any day. Asbestos really has a very special place in the law and lore of TSCA. Let's pull the lens way back. Put this in a context, because this is a milestone event. It's a very important event, and one that has long been in the making. But why is this so historic, Rich?

REE: We need to look back at ancient history. If we go back to the '80s, when EPA was first undertaking -- under old TSCA -- they were first undertaking regulation of asbestos, and EPA sought to ban asbestos. When EPA lost the *Corrosion Proof Fittings* decision in the Fifth Circuit in 1991, if I remember correctly, it was viewed as substantially weakening EPA's ability to regulate substances. The court concluded that EPA was only permitted to use the least burdensome option to control against the risks that were identified, and that was seen as really undermining EPA's ability to work on things, and EPA was very gun shy after that, and there were very few instances where EPA actually sought to take regulatory action in the face of industry opposition. Most of the Section 6 actions after that were with industry's agreement that the changes could be made. But many of the uses of asbestos were in fact banned, and a handful were allowed to continue. Of those that were allowed to continue, many of those have already ceased.

People think that -- there's a narrative that *Corrosion Proof* totally overturned all the regulatory actions on asbestos, but that's not true. There were still a lot of restrictions on asbestos, but the narrative was, "Old TSCA is so weak that EPA couldn't even ban asbestos under it." That was the marker of the inability or the weakness of old TSCA.

LLB: Yes, it was rendered a toothless tiger.

REE: Right. That was part of the driver for TSCA reform. In 2016, in the Lautenberg Chemical Safety for the 21st Century Act, the least burdensome language was removed. It removed one of those key weaknesses, or one of those key limiting factors in EPA's Section 6 authority. Now EPA is required, to the extent necessary, to mitigate the risk identified in a risk evaluation, and that is the threshold. I think it's going to be a key threshold here.

But the reason this is so historic is this is the first final rule, so it's the first opportunity for legal challenge of many of the provisions of TSCA Sections 6 and 26 and how EPA's implementing new TSCA, where there really hasn't been final Agency action that's been amenable to legal challenge before. I think we're finally going to get at what some of these key terms are. And as you've said in the past, when you have new language from a new statute, at some point, these terms need to get litigated so that everybody that's part of the stakeholder community understands what the terms mean.

LLB: Exactly. Well, you correctly noted that *Corrosion Proof* was issued way back in 1991. The asbestos story, as being a bad actor in the chemical community, has really come a long way, with lots of twists and turns. Asbestos was one of the first ten chemicals identified by Congress to review under the 2016 amendments, and here we are almost eight years later, from when the 2016 amendments were first signed into law. We're seeing, just now in March, a final risk management rule for one of those ten. Others will follow later this year. The risk management process, clearly, given that long arc of regulatory process, is a very detailed administrative procedure. Maybe for our listeners, you can tell us a little bit about chemical is selected for prioritization, goes through risk evaluation, then goes into risk management to address whatever reasonable risk EPA has identified, and now those risk management provisions are amenable to judicial challenge. This is the first opportunity, as it were, to do that. Maybe you can provide a little bit of a narrative over what is that process like? Why does it take so long? And what might we expect?

REE: You summed it up nicely. The first step is prioritization. EPA essentially nominates a substance for prioritization. EPA has nine or potentially 12 months. They're required to do actually several -- or at least two -- notice and comment opportunities. They say, "We are proposing this substance to be high priority for risk evaluation." There's an opportunity for

stakeholders to provide comment whether that substance should or should not be evaluated, but at the end of prioritization, if EPA concludes that a substance *may* present an unreasonable risk, then EPA is *required* to take it forward for risk evaluation, so that substance would be high priority for risk evaluation.

I doubt, at least for the foreseeable future, maybe for decades, that anything that EPA proposes for high prioritization would not go forward to a risk evaluation. I think that would be a pretty extraordinary set of circumstances, but it's possible.

Once something is nominated to be high priority, it is extraordinarily likely that it's going to go forward to risk evaluation. Then in risk evaluation, EPA's taking the information that it has, gathering more information, looking at the conditions of use, and determining whether or not the substance -- or the substance under its conditions of use (and that's another potentially controversial topic) -- presents an unreasonable risk, or not. Does it present, or does it not present an unreasonable risk? The prioritization finding is "may present an unreasonable risk." The risk evaluation findings are "conditions of use do or do not present an unreasonable risk." EPA presumably had enough information to draw that conclusion.

That process is supposed to take three to five years. It has been quite protracted with the first ten. Now the next 20, they've been lingering for quite some time, but the outcome of the prioritization and the outcome of the risk evaluation, if EPA finds it *may* present an unreasonable risk or if, during prioritization, or that it *does* present an unreasonable risk during risk evaluation, those are not final Agency action. Each one triggers another step. Anything where EPA concludes that a condition of use *does* present an unreasonable risk, EPA must then go forward with risk management and to mitigate the unreasonable risk identified in the risk evaluation to the extent necessary to mitigate that risk. That final rule is the first final Agency action related to all the decisions: the "may present" finding, the "presents" finding, and then the risk management, that final risk management tool.

That's where we are now with asbestos. That's why this is the first opportunity to challenge all those decisions, going all the way back to when it was selected as one of the first ten. Not that that's going to be challenged, but I think there's some -- I think there's some questions about the risk evaluation that might be challenged.

LLB: Going back. No, I suspect you're right. That's been one of the concerns that industry stakeholders in particular have been sensitive to. We go for a very long time with the chemical, during the rebuttable presumption that there's reason to believe that it may pose unreasonable risk --

REE: --or that it *does*.

LLB: Or it could or it does, right. The market is not indifferent to that decision-making process, even if it's one that is ongoing. The market will respond to chemicals that are undergoing strict EPA review, and all the inferences that flow from that course of conduct, and, of course, the commercial community, not just industry stakeholders.

During the rulemaking process, as long and detailed as it is, Rich, I'm aware that commenters expressed a lot of concern with the proposed phaseout times. Asbestos, for all of its warts, does exhibit some pretty unique properties and has been used in the commercial sector for many, many years. Maybe you can help our listeners understand what all that debate is about, why there was initial concern with the proposed phaseout time periods, and where did we end up?

REE: EPA's initial proposal was two years, a two-year phaseout period and then a full ban. Everybody had two years to get out of -- to manufacture, import, process, use asbestos.

LLB: For all uses.

REE: For all uses. The alternative was five years and then a ban. They said, "You can have two years and a ban or five years and a ban." In particular, the chloralkali facility -- industry -- looked at that. Oh, and another key part of the rule proposal is that EPA required compliance with an existing chemical exposure limit, an ECEL, during the phaseout periods. EPA stated in the risk evaluation that the ECEL was sufficient to protect against the unreasonable risk that was identified, so that there were unreasonable risks identified under under some conditions of use in the risk evaluation, and then in the risk management rule proposal, they said, "As long as the ECEL is in place, people are protected, but you can only use asbestos for two years, or maybe five years."

LLB: This ECEL, for our listeners, an existing chemical exposure limit, is different from a PEL [Occupational Safety and Health Administration (OSHA) permissible exposure limit (PEL)].

REE: It's similar; it has a similar effect. It's an enforceable limit. It's just it's not under the OSHA Act enforced by OSHA. It's under TSCA, enforced by EPA.

LLB: And it might involve respiratory control, workplace controls.

REE: Generally, ECELS are a level to which you must -- below which there's not an unreasonable risk. It's possible that EPA could impose a limit, plus respiratory protection, if the limit is not sufficient to get to "no unreasonable risk," and you need an additional level of protection, then it could be a respirator, plus an ECEL. Generally, EPA tries to set the ECEL at the "no unreasonable risk" level. Then if you're above the ECEL, you would apply respiratory protection.

LLB: Got it. Okay.

REE: That's the way that EPA prioritizes engineering controls over PPE (personal protective equipment) in the risk management hierarchy. The chloralkali industry in particular was very concerned about that phaseout period because they've got giant facilities that continue to rely on asbestos diaphragms in chloralkali production, which is an extraordinarily chemically active and corrosive process. You need something that's very recalcitrant, and asbestos *is* that. It's chemically unreactive, it's thermally very stable. So asbestos has been used in these diaphragms for decades, but companies have been moving away from them as their equipment reaches the end of its service lifetime. The companies decommission the diaphragm equipment, and they build something else. But many of the facilities that still rely on diaphragms -- something like one third of the chlorine capacity still relies on diaphragms -- and these companies would need more time to get their old -- decommission their old facilities, build new ones. They need a substantial amount of time to transition away from their current asbestos diaphragm technology to something else. That was a key industry input to EPA to help EPA understand the potential extraordinary consequences in terms of availability of chlorine, which if listeners are not aware, is essentially required in public drinking water.

LLB: That's what the chloroalkyl community produces in large part, lots and lots of chlorine.

REE: Yes. This is a process to make chlorine. It also makes caustic soda, sodium hydroxide, but chlorine is the primary product of the chloralkali process. And its predominant use is for water, for drinking water safety.

LLB: Yes, right. A two-year or longer phaseout period really raised five-alarm fire --

REE: Absolutely. It probably would have been impossible to transition all of that diaphragm capacity. That was the argument that the companies made, that they could not transition that quickly, and they needed more time. We see in this final rule that EPA is giving basically facility-by-facility timeframes. Certain facilities have a certain number of years, and for one of the producers, there's basically sequential transitioning. So one facility gets a certain number of years, the next facility gets a similar number of years. But they're not done in parallel; they're done in sequence, because the capacity that's needed to change one needs to be available to change the next. There are really not the specialists, the engineers, the materials, everything that you need. You can't change them all at once. You can't go through all those facilities all at the same time, so they're laid out sequentially in order -- and the timeframes are built out that way.

LLB: It sounds like the import and manufacture of asbestos, as defined under TSCA, is going to cease much sooner.

REE: Yes. Interesting that the chloralkali facilities have represented to EPA that they already have now enough capacity, enough asbestos --

LLB: On hand.

REE: -- on hand, that they no longer need to import more asbestos. The rule does include a very short limit on manufacture or import of asbestos. If that sticks, then no more asbestos will be imported. But there is an allowance for additional processing, use, and disposal of asbestos for these facilities going out several years.

LLB: That's a big deal, just to have the hard stop on the import business.

REE: Although interestingly, in the risk evaluation, EPA did not conclude that the import of asbestos leads to an unreasonable risk.

LLB: Interesting. That might have been one of the reasons why, but it is what it is. To my ear, Rich, to the extent EPA really did a deep dive in each of the facilities' needs and processing requirements, and I would imagine each of the entities that participated in the rulemaking made a substantial factual showing regarding the ability to transition to a new technology. It sounds like there's kudos all around. The industry did a good job in making the case, and EPA did an equally good job of being receptive to the unique variables in each commercial setting.

REE: Right. The extraordinary circumstances, the extraordinary requirements. I forget now the total number of billions of dollars that will be required to transition from the asbestos to the alternative technologies.

EPA did point out, and my understanding is that it's true, that these other technologies are more efficient, they're more energy efficient, so there is a benefit. There is a benefit to the companies to switching, but when you're spending -- it's not enough -- the benefit of switching, the economic benefit of switching is not enough to justify switching prior to the

service lifetime of the chloralkali facility. That's why they haven't switched already. They're probably accelerating those timelines to meet, in this negotiation with EPA. But they clearly made the case that this is what's necessary for, the minimum that's necessary to switch away.

LLB: Are there opportunities to get additional time if, despite how hard we try, we have commercial hold -- look what happened in Baltimore recently.

REE: Oh my goodness. It's tragic. Yes.

LLB: It just means that commercial movement of material is no doubt going to take a hit.

REE: Bad things happen, and EPA did -- for one of the facilities -- there were some inconsistent representations in sort of how I read the rule, that one of the companies said, "We can be out in two years." Later, they said, "Oh, no. We need five years," or some longer period of time. EPA is like, "We don't have the facts to make a decision here, but if you bring those facts forward later, we'll reconsider." I think if there were something extraordinary that happened, that EPA would be amenable. We've seen it with the PBT [persistent, bioaccumulative, toxic] rules that --

LLB: Absolutely.

REE: EPA was like, "Yes, here's an extraordinary circumstance." They crack open the rule again, and they allow for more time. I think EPA is open to that. I think they recognize the criticality, but they're trying to do their job under the statute and manage the risks together.

LLB: And that stuff happens, despite best laid plans.

REE: Yeah, storms, earthquakes, volcanoes, bridge collapses.

LLB: You name it. Well, as we talk about often, Rich, there's an expression, "The first through the wall always gets banged up." Is that true, especially here with regard to asbestos? My question is, "Is asbestos an anomaly, because of its very unique and checkered past? Or is it really an exemplar of what industry can expect going forward with regard to final risk management rules?"

REE: I think, in a way, it's both. It is unique in a lot of ways. It's unique politically. It's got a unique, checkered history.

LLB: It's the scarlet letter of chemicals, right?

REE: Yes. It's among the most notorious. It's hard to watch TV certain times of day without seeing mesothelioma litigation ads.

LLB: Right. The plaintiffs are hard at work.

REE: This is, again, the first. Asbestos is the first. It was the first one to go through risk evaluations, the first one to go through risk management, so it is precedent setting. Even if you're not in the asbestos business, you need to pay attention to this because the terms that are being identified -- this is -- it will be, to a certain extent, how EPA is going to implement TSCA Section 6 going forward. The underlying facts are one thing; the underlying interpretations by EPA are another. They're both important here.

EPA has -- I mean, the asbestos process -- has been banged up a bit. After the initial risk evaluation, there was -- more information came forward to inform the final risk evaluation. Then there was more information after that that came forward, and EPA had to do an additional notice and comment --

LLB: Yes, I remember that.

REE: -- for all the additional information that they received, and then that was incorporated in -- I'm sorry, that was in response to the proposed risk management rule, two year, five year. There was a lot more information, and EPA did notice and comment on the information that they received, all the facts that they received from the chloralkali industry and others that went through another round of notice and comment. This has been rough. I think it's been rough on everybody.

One of the lessons learned -- and this was a theme yesterday at Global Chem -- it's critically important to be communicating with EPA earlier in the process, even *before* prioritization, if that's possible, to get more facts on the record, to get EPA aware of conditions of use, and what are the critical uses, all that. The earlier you have that conversation, the better it is for industry, for the regulated community, the better it is, I think broadly for stakeholders, and certainly the better it is for EPA. EPA's review is going to be more efficient.

LLB: I do want to linger on that for a minute, because EPA takes a lot of guff for missing deadlines. The truth of the matter is these are hard issues, and designing the risk management playbook has been an iterative work in progress for years. To your point, you might not have anything to do with asbestos, now or ever.

REE: Right.

LLB: But if you're in the industrial chemical community, you need to be mindful of this risk management playbook.

REE: Yes, I totally agree.

LLB: It's a blueprint for how EPA intends to interpret TSCA Section 6 with regard to risk deemed to be unreasonable. It bears noting how EPA interprets certain issues, how generous it is in giving more time, the level of factual effort that will need to be adduced to bring EPA to understand an industry, the uses. I think industry is to be complimented for its diligence in providing EPA with the requisite level of information to make hard choices, and EPA is to be commended for its ability to listen, to do it right, and to make hard decisions. Win, lose, or draw, they're hard decisions for everybody.

REE: Sure.

LLB: But I know to people more distant from the TSCA community, it's like, "What the heck took so long? Asbestos is bad, bad, bad. Get rid of this stuff."

REE: Right. They should have banned it. They should have banned it seven years ago.

LLB: It is not easy. Dr. Freedhoff and everybody else at EPA OPPT [Office of Pollution Prevention and Toxics] worked their tails off to get this job done.

That brings us to, if you can easily and as non-legally as is possible, what are the two, three, four really critical issues that are going to be driving either any forthcoming litigation or continuing controversy regarding how EPA is discharging its risk management authority under Lautenberg, in the context of this rule?

REE: I think one of the biggest issues that we'll see litigated is "What is the meaning of extent necessary?" EPA is required to issue regulations to manage the risks identified in the risk evaluation to the extent necessary to mitigate those risks.

LLB: That really is a limit on EPA's authority under Section 6.

REE: The question is, is it a floor? And as long as EPA meets that floor, it can go further? Or is it both a floor and a ceiling? Those issues have already come up in discussions. There's been some trade press back and forth, with different stakeholders who are like, "No, it's only a floor. EPA can go farther than that. It doesn't limit what EPA can do. It's just a minimum of what EPA can do."

LLB: How else would you interpret "to the extent necessary"? If it gave EPA unbridled authority, why would that language exist?

REE: I know. I don't know. I think it's -- no, we're debating. I think it is both a floor and a ceiling. It's like once they reach the extent necessary, they're done, their job is done and that they are not permitted to go further. If an ECEL is sufficient to mitigate the risk identified, then the job is done. The ECEL, or whatever risk management provisions that they identify, that a ban is not justified, because the risks can be mitigated by engineering controls, PPE, administrative, all the risk management hierarchy.

Yes, substitution is the preferred thing in the risk management hierarchy, but it's not clear that substitution is necessary to mitigate the risk. That, I think, is a politically charged issue. There may be people who say TSCA reform was a failure, so if "extent necessary" is litigated and EPA loses, and the courts conclude that as long as the risk management provisions -- short of a ban -- meet the extent necessary, then a ban is not justified, and EPA can't make an asbestos ban stick, will that be seen as a failure of Lautenberg? Again, TSCA is not strong enough for EPA to ban Lautenberg -- or ban asbestos.

LLB: Right, that refrain continues.

REE: I don't know how that's going to play out politically, but the "extent necessary" is going to be a key provision that I think -- I'm almost positive -- will be litigated here. Maybe by both sides. In fact, in this risk proposal, EPA is not banning the use of asbestos brakes in the NASA [National Aeronautics and Space Administration] -- in the brakes in the NASA heavy-lift aircraft.

LLB: Ever.

REE: There's no -- right. There's no provision for phaseout. EPA found it wasn't an unreasonable risk, and there's -- at least I haven't found it yet. Again, we haven't seen the final, it's not in the final *Federal Register*. The *Federal Register* notice isn't out, so maybe it's buried in the record somewhere, but as far as I can see, that's allowed to continue. Other uses have shorter phaseout times and I think are more justified. The brake use -- the aftermarket brakes. I think EPA has a much stronger fact set to support a ban.

Chloralkali -- EPA concluded that the conditions of use, for the information that they had, between the engineering controls and the PPE, that it was not an unreasonable risk, and yet EPA is seeking a ban. Granted, with a generous phaseout period, but EPA is still seeking a ban. It's not clear to me that they can justify that under the extent necessary, but this is what I think the courts will decide. I think there's also questions about EPA's use of best available science that could come into play here. There were some weaknesses in the ECEL. There's so much --

LLB: --in the science? Yes.

REE: Yes. In the underlying, in what's called the point of departure, the hazard endpoint that EPA used. There are also some questions about EPA departing from its own guidance on the use of the exposure metrics. What do you substitute when you have non-detects, when you do industrial hygiene monitoring and you find no asbestos at the level of detection, what do you substitute? Do you substitute the level of detection? Do you substitute half the level of detection? The square root of the level of detection divided by the square root of two? EPA's best guidance from, I believe, 2008, is for asbestos -- which EPA recognizes is different -- non-detects are treated as zero. But that's not what EPA did in its risk evaluation. EPA -- OPPT is not being consistent with other EPA decisions about how to interpret non-detects for asbestos. Which one's the best available science there? That's not clear. Some of these issues could come into play. Another issue is that EPA's -- this was based on EPA's 2018 systematic review, which the National Academies basically said was -- it was --

LLB: Deficient.

REE: -- was deficient. So if EPA has not redone the systematic review, if there has not been an adequate systematic review, what is EPA's evidence that it *is* relying on the best available science? They also had very narrow charge questions to the review committee, so there wasn't a wholesale review of EPA's risk evaluation. There are a bunch of things in here that they could undermine: reasonably available information, best available science, the weight of scientific evidence. Again, this is the first opportunity for the regulated community to challenge EPA's implementation of those provisions of TSCA Section 26.

LLB: It's like any forthcoming judicial challenge -- assuming there is one, and I think most betting people believe there will be because the issues are fluid, definitions are porous. How they are applied here is going to be very precedent setting for the program. It sounds like a lot of these issues could be in play, and this could be kind of *Corrosion Proof* revisited.

REE: It could.

LLB: Amazing. If you had to summarize, what are the two or three big tells about how EPA is implementing its Section 6 authority? What do you think those takeaways are?

REE: One of the things that we've seen is EPA is relying heavily in the five -- I believe now? -- risk management rules? EPA is relying very heavily on bans. They're basically seeking to ban things but allow narrow uses to go forward if there are facts supporting ongoing use as critical uses. Is EPA going to do that whenever -- because with EPA's whole chemical approach, which is a term apparently they're not using anymore, but it's still, the substance as a whole presents an unreasonable risk. And EPA is basically always going to find that, at least for the foreseeable future, everything that EPA prioritized is going to be an unreasonable risk. If the whole chemical's an unreasonable risk, then that seems to justify a

ban. The chemical's an unreasonable risk, so it must be banned. And then you say, but there's some critical uses, so okay, it's going to be banned but for these uses.

But this comes back to the "extent necessary" question. If exposure -- if engineering and administrative and PPE controls are sufficient to protect against the unreasonable risk, is that sufficient? Does that meet EPA's obligation and not allow more? But the ban seems to be the preferred --

LLB: -- option of choice.

REE: Option. A ban with some carve-outs seems to be the preferred option in the risk management rules, at least for these first few. As we get to lower hazard substances, maybe that won't be EPA's first option, but it's going to be a while before we get there.

LLB: Agree. It sounds like the petitions for review that might be filed in whatever circuit -- and some stand out more prominently than others -- might include concerns about the derivation of the existing chemical exposure limit, the length of the phaseout, Section 26 best available science questions, administrative process --

REE: -- reasonably foreseen.

LLB: Reasonably foreseen, right.

REE: One of the things that surprised me is in the risk evaluation, EPA did not identify unreasonable risk for the chloralkali conditions of use using the engineering and PPE controls. In the risk management -- in the *final* risk management rule -- EPA slipped in this, like "There's evidence that not everybody uses the PPE correctly, and therefore they are not sufficiently protected." That's their justification for the ban. That wasn't in the risk evaluation, and it wasn't even in the proposed rule, so now it's popping up now. Is EPA allowed to manage risks that have not been previously identified? The risk management rule is supposed to mitigate the risk identified in the risk evaluation.

LLB: Right, in the record.

REE: If it wasn't -- in the record of the risk evaluation, if it's not there, is EPA allowed to manage risks that weren't previously identified? Or is EPA allowed to incorporate new facts, place them on the record during risk management, and then include them?

LLB: The fluidity between risk management and risk evaluation -- that's going to be probably a key topic of inquiry by the court.

REE: But in this particular case, where they based -- EPA concludes that the potential misuse of PPE is within what is reasonably foreseen and therefore necessitates not just a requirement to use PPE, but the PPE -- it's basically -- if -- one interpretation -- and I don't know that EPA would do this across the board, but for any substance, if EPA finds any evidence that PPE is misused and that PPE is necessary to mitigate risk, if it's ever misused, is that justification for a ban because somebody *might* not use PPE properly?

LLB: No, noncompliance is a reasonably foreseeable consequence, whether through inadvertence, misunderstanding, or downright intent not to comply. But can you bootstrap that into a justification for a ban?

REE: In the *Congressional Record*, in the -- I believe it was the -- Senate report on Lautenberg, the Senate said that misuse is not within the meaning of reasonably foreseen for conditions of use. Is the misuse of PPE reasonably foreseen, not in terms of does it happen, but does it meet the legal definition of what is reasonably foreseen for purposes of TSCA Section 6, or Section 5, which has the same term?

LLB: Same thing.

REE: That might slip in here. I don't --

LLB: I hope so.

REE: I do too. I think reasonably foreseen --

LLB: Bring clarity to a very important concept that continues to vex us, in Section 5 contexts as well.

What is the next phase of asbestos rulemaking? What happens next?

REE: This is final rule. It'll come out in the *Federal Register*, and then there'll be --

LLB: -- what there will be.

REE: It'll be what it'll be. And then, there will be -- I think we agree there will be legal challenge.

LLB: I think so.

REE: I think we'd both be very surprised.

LLB: I got 20 bucks riding up.

REE: I would bet more than that. What are the odds? What's the -- we can go to the sportsbook and see what the odds are. I think that's very likely, and then that'll play out however that plays out. But we've also got asbestos Part 2. That risk evaluation is under way.

LLB: That's for legacy uses?

REE: That's for other forms of asbestos and legacy uses, and do those present an unreasonable risk. That's going to be interesting, because all that's already banned. This is asbestos that's in place, in buildings, and ships, and wherever it is. When it's discovered and it has to be remediated, what controls are required? There are already controls required. All EPA can do at this point is turn up those controls. You can't *ban* asbestos from being out in the world.

LLB: Too late.

REE: Yes, and a lot of those were viewed as too hazardous, and so people just got out of that business. I don't know how that's going to play out. We have asbestos Part 2 coming, and we'll just have to see how that -- what the risk evaluation says and what sort of risk management --

LLB: The RE is not out on that --

REE: The final risk evaluation is not out on that yet. It's expected later this year.

LLB: Right. More is in our future regarding asbestos, but in a different form. And you had noted, Rich, earlier that we're expecting other risk management rules in calendar year 2024, before the end of EPA's fiscal year in end of late September. What are those rules, and what can you tell us about what to look for in each of them?

REE: Methylene chloride was the next one proposed, and there was at one point in the reg[ulatory] agenda that trichloroethylene had moved up, moved ahead of methylene chloride for the final risk management rule. But now, based on conversations yesterday, it seems methylene chloride is likely to be the next one out.

LLB: Okay.

REE: Methylene chloride is next. That will -- some of the same issues will pop up in methylene chloride. I think their ECEL -- their basis for an ECEL -- is much stronger, based on the discussions we've had internally. Their science is stronger there, but there's still "extent necessary" questions, and there's still -- I don't know if "reasonably foreseen" will play out in the methylene chloride ECEL -- or in the methylene chloride rule -- but methylene chloride.

We've got carbon tetrachloride is coming. There they've got some -- there are some questions about the best available science. TCE [trichloroethylene] has some, I think, some significant weaknesses on the best available science. And there was a big departure between the risk evaluation and the risk management rule in terms of the ECEL. EPA used one study to make its risk conclusion for risk evaluation, and they selected a different study as the basis for the ECEL and the risk management rule. There are not really the underlying facts to support --

LLB: -- the rationale --

REE: -- the rationale to support that change. There are some weaknesses there that we might see play out. Then methylene chloride, TCE, carbon tet --

LLB: -- our favorite, NMP!

REE: NMP will be coming out as a proposed rule relatively soon.

LLB: I'm guessing, even if there is litigation filed on asbestos Phase 1, and even if the issues are identified either generally or with greater particularity in any petition for review, the court's disposition of those issues will have an impact on the ongoing risk management rules in play now.

REE: I assume so. Yes.

LLB: I suspect EPA is going to say, "What will be, will be. We can't hold up the train to see how these issues are resolved by the court." These are always in circuit courts, and petitioners might seek, obviously, venues that are more preferential to their view than others. It's going to be a while before the legal landscape resolves.

REE: That's my expectation. There will probably be more risk management rules that come out before these issues are resolved, and then whatever the resolution is will presumably flow back through those other rules.

LLB: Yes. I know, we talked about this in other podcasts. This is an election year. I don't see any play for the election cycle to materially impact EPA's rolling out of these rules.

REE: No. I think they do want to get as many out as they can before the Congressional Review Act --

LLB: -- which is fast approaching.

REE: -- which is fast approaching, although nobody really knows exactly when it is.

LLB: It's a unicorn.

REE: It's sometime between now and November.

LLB: Depending upon who you talk to.

REE: Who you talk to, and how -- is Congress in session, right? Or is it one of those fake -- like, there are three people there just to keep it in session to make those count? Those are things that are unpredictable and we can't control. But certainly the Administration wants to get as many out as possible, as soon as possible. Then, the outcome of the litigation will be what it'll be. Then presumably, things will change based on the outcome of that litigation.

LLB: Right. There *will* be a response to the outcome of the litigation. Whether it changes or not is the stuff of another podcast. Rich, where can our listeners find more information on all of these -- I know we're going to sound nerdy here, but *really* intriguing topics?

REE: Of course, we've got lots of our e-mail lists, our memoranda, and blog posts that -- those are freely available. We're writing all the time on these issues. I'm sure you and I will be back to talk about this again after the --

LLB: Just after the first petition is filed.

REE: After the first petition is filed, and we've looked through what the arguments are. If you don't already subscribe to the podcast, subscribe to the podcast so that's sure to be in your feed. But this is going to be big news; it's going to be national news for quite some time.

LLB: Oh yes. No, it's seldom the day when a TSCA initiative is front page news, but banning asbestos, the use of asbestos by the chloroalkyl facility, it's essentiality for purposes of chlorine production. These are real-world, very important issues. For those of us in the TSCA community, the resolution of some of these issues will bring much-needed clarity. We may not like the decision, but it will at least *be* a decision.

REE: Right.

LLB: Rich, thank you so much for joining me today. As always, you've clarified very technical issues in a very approachable, understandable way, and I and our listeners appreciate it.

REE: My pleasure.

LLB: Thanks again to Rich for speaking with me today about EPA's banning of chrysotile asbestos and why, even if you don't have a dog in that fight, it is a really important rule to understand.

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