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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-004G]

Occupational Exposure to Lead; Effective Date of Compliance Plan Requirements for Certain Industries

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: Pursuant to court order, OSHA's administrative stay of 29 CFR 1910.1025(e)(3)(ii) (B) and (E) of the lead standard for the primary and secondary smelting and battery manufacturing industries is vacated as of June 1, 1984. These provisions require employers to develop detailed written compliance plans to achieve the lead standard's permissible exposure limit through engineering and work practice controls. As proposed, OSHA hereby requires that employers in the primary and secondary smelting and battery manufacturing industries develop compliance plans containing all information in their possession by July 1, 1984 and that they come into full compliance with paragraphs (e)(3)(ii) (B) and (E) by August 1, 1984. While these dates should be feasible for most

affected employers, various statutory and enforcement vehicles will be available to address individual compliance problems.

EFFECTIVE DATES: The administrative stay of § 1910.1025(e)(3)(ii) (B) and (E) is vacated as of June 1, 1984. Primary smelters, secondary smelters and battery manufacturers are required to complete compliance plans under § 1910.1025(e)(3)(ii) (B) and (E) by July 1, 1984, using information in their possession. They are further required to come into full compliance with paragraphs (e)(3)(ii) (B) and (E) by August 1, 1984.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, Room N-3641, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. Telephone: (202) 523-8148.

SUPPLEMENTARY INFORMATION: The lead standard (29 CFR 1910.1025) requires that employers reduce employee exposures to lead to the permissible exposure limit (PEL) of 50 µg/m³, or to the lowest level feasible, through the use of engineering and work practice controls. The standard also requires that employers establish and implement a written compliance program to reduce employee exposures in accordance with the implementation schedule found in paragraph (e)(1) of the standard. Pursuant to paragraph (e)(3)(ii), written compliance plans must include the following elements:

(A) A description of each operation in which lead is emitted, e.g., machinery used, material processed, controls in place, crew size, employee job responsibilities, operating procedures and maintenance practices;

(B) A description of the specific means that will be employed to achieve compliance, including engineering plans and studies used to determine methods selected for controlling exposure to lead;

(C) A report of the technology considered in meeting the permissible exposure limit;

(D) Air monitoring data which documents the source of lead emissions;

(E) A detailed schedule for implementation of the program, including documentation such as copies of purchase orders for equipment, construction contracts, etc.;

(F) A work practice program which includes items required under paragraphs (g), (h) and (i) of this regulation;

(G) An administrative control schedule required by paragraph (e)(6), if applicable;

(H) Other relevant information.

On June 18, 1982, pursuant to industry petitions, OSHA proposed to stay the requirements of (e)(3)(ii) (B) and (E) for employers in the primary and secondary smelting and battery industries (47 FR 26960). Simultaneous with that proposal,

OSHA issued an interim stay deferring the effective date of the requirements of paragraphs (e)(3)(ii) (B) and (E) for these industries. The interim stay subsequently was renewed to allow completion of the rulemaking on the stay (47 FR 26557, June 18, 1982; 47 FR 40410, September 14, 1982). On December 3, 1982, OSHA issued a final stay suspending the obligations of employers in the lead smelting and battery industries to comply with the requirements of paragraphs (e)(3)(ii) (B) and (E), pending completion of the reconsideration of the lead standard which was then underway (47 FR 54433). However, no stay was issued with respect to the obligation to prepare compliance plans containing elements (e)(3)(ii) (A), (C), (D), (F), (G) and (H) because it was felt that these elements would not involve excessive, unnecessary expenditures and would assist both OSHA and employers in realistically assessing methods for eventual compliance with the standard.

After proposing to stay the compliance plan provisions, the Agency was sued by the United Steelworkers of America (USWA), which challenged on procedural and substantive grounds the authority of the Assistant Secretary to issue the interim and final stays. That suit, filed in the U.S. Court of Appeals for the District of Columbia Circuit (Nos. 83-1022 and 83-1126) resulted in a court order dated April 17, 1984, vacating the Agency's stay of the requirements of paragraphs (e)(3)(ii) (B) and (E) as of June 1, 1984.

OSHA believed that it was necessary to allow the employers a period of time after that date to come into full compliance with these requirements. On April 24, 1984 (49 FR 17545), OSHA therefore proposed that by July 1, 1984, employers in the primary and secondary smelting and battery manufacturing industries complete compliance plans under § 1910.1025(e)(3)(ii) (B) and (E) that include all information in the possession of the employer as of July 1, 1984. Under paragraph (e)(3)(iii), these compliance plans would have to be available to OSHA and affected employees and their representatives. By August 1, 1984, these compliance plans would have to be updated to include all the information required by paragraphs (e)(3)(ii) (B) and (E).

OSHA invited comment and supporting information concerning the amount of time required for full compliance, including a discussion of the status of the development of employers' compliance plans, and the impact of such related matters as participation in the cooperative

assessment program and other proceedings.

The Court's order of April 17, 1984, did not preclude continuation of this rulemaking, but required that OSHA complete rulemaking proceedings by May 31, 1984. Interested parties were given until May 21, 1984 to submit data, views and arguments regarding the proposal.

In response to the April 24, 1984 proposed rule, OSHA received eight comments. Regarding the effective dates for compliance plans, commenters raised two important points. First, some affected groups indicated that logistical problems would be encountered in attempting to comply with the August 1, 1984 deadline. For example, the Secondary Lead Smelters Association (SLSA) stated that:

Since most secondary lead smelters do not retain engineers in-house, they will have to hire consultants to assist in the preparation of the compliance plans. The preparation of these plans will thus be very time-consuming as employers will have to: (1) Hire consultants; (2) have the consultants conduct extensive monitoring and design and possibly implement pilot installations; (3) draft a plan; and (4) prepare a detailed schedule for implementation of the plan. Clearly, the undertaking of such a complex task cannot be completed within two months (i.e. by August 1) as suggested in the proposed rule. (Ex. 544-4, p. 2)

In addition, the Lead Industries Association (LIA) and the RSR Corporation, a secondary lead smelter which incorporated LIA's comments by reference, stated that even those companies that could afford to retain engineering consultants to perform evaluations would be unable to complete the process by August 1. Furthermore, they cited other logistical problems such as obtaining competitive bids for engineering controls, getting production and delivery estimates, placing orders, and preparing implementation schedules which would go beyond an August 1 deadline (Ex. 544-6, 7). Consequently, several respondents including Amax Lead (Ex. 544-3), SLSA (Ex. 544-4), LIA (Ex. 544-6), and RSR Corp. (Ex. 544-7) were in favor of a December 1, 1984 deadline.

On the other hand, the United Auto Workers International Union (UAW), whose comments were restricted to the battery manufacturing industry, believed that the proposed deadlines for preparation of compliance plans were generous (Ex. 544-5). They requested that OSHA require all documents related to engineering controls which have been completed already be made available immediately to workers, their designated representatives and OSHA.

The UAW argued that battery manufacturers' representatives were aware as of November 1983 that the Agency had made a firm decision not to reopen the issue of feasibility of the PEL and that battery manufacturers have had time since then to have prepared the plans. They further contended that manufacturers who intended to comply with the 100 $\mu\text{g}/\text{m}^3$ interim control level would have had to begin to create the same types of documents required under the stayed compliance provisions. In addition, the UAW felt that since most battery plant workers were employed by large producers or large capacity plants, companies had the technical resources to produce compliance plans promptly.

While the USWA did not object to the proposed dates, they concurred with the UAW that the proposed effective dates of July 1, 1984 for information in the employer's possession, and August 1, 1984 for all other information meeting the compliance plan requirements were "exceedingly generous to the affected industries" (Ex. 544-8). They stated that:

The June 18, 1982 initial stay was issued only 11 days before the original deadline for written compliance plans. In contrast, OSHA intends to give employers 61 days from the date the stay is vacated (June 1), or 98 days from the date of the *Federal Register* notice informing employers that the stay would be vacated (April 24). (Ibid, pp. 1-2)

They added:

In fact, the affected industries should have known even earlier that the stay would eventually be lifted. The June 18, 1982 *Federal Register* notice clearly states that OSHA's original decision to issue a stay was premised on the Agency's then-pending reconsideration of the standard: "In view of OSHA's reconsideration of the lead standard, which may affect the provisions of the standard with respect to the use of engineering controls, the agency agrees that to require the commitment of substantial resources to establish a comprehensive compliance program under the existing standard would not be appropriate and should be deferred pending the outcome of the reconsideration." (47 *FR* 26561) But in June, 1983, the Deputy Assistant Secretary of Labor for Occupational Safety and Health announced that OSHA had decided not to revise the standard with respect to the PEL or the means of compliance (*BNA OSH&H Reporter*, Vol. 13, p. 91, June 23, 1983, attached). Thus any justification for failure to complete a compliance plan was removed almost a year ago.

In short, OSHA's proposed effective dates of July 1 and August 1, 1984, give affected employers more than ample time to complete the work which should have been completed in the 11 days between the first stay and the original effective date. (Id., p. 2)

In reviewing the affected industries' comments, OSHA found no new evidence as to why the proposed

deadlines cannot be met. Following judicial review, the engineering control requirements of the lead standard became effective on June 29, 1981. Primary and secondary smelters and battery manufacturers were required to have produced written compliance plans by June 29, 1982, one year after the standard became effective. The administrative stay issued on June 19, 1982, eleven days before the plans were due, further postponed their production for an additional two years.

In addition, OSHA believes that to comply with the other provisions of the standard, particularly the unstayed portions of the compliance plan provisions, affected industries should already have prepared fairly detailed written compliance plans. For example, under paragraph (e)(3)(ii)(A), employers are required to include in their plans a description of each operation in which lead is emitted, such as the machinery used, the material processed, the controls in place, the crew size and the maintenance procedures. Under paragraph (e)(3)(ii)(C), employers are required to include in their plans a report of the technology considered in meeting the PEL. Under paragraph (e)(3)(ii)(D), employers are required to include in their plans air monitoring data which document sources of lead emissions. Under paragraph (e)(3)(ii)(F), employers are required to include in their plans a work practice program which contains items required under the protective work clothing and equipment provisions, the housekeeping provisions and the hygiene facilities provisions of the lead standard. Next, paragraph (e)(3)(ii)(G) requires written documentation of an administrative control schedule if administrative controls are used as a means of reducing employees' time-weighted average exposure to lead. Finally, paragraph (e)(3)(ii)(H) requires employers to include any other relevant information in their written compliance plans. These requirements were not stayed and presumably have been complied with.

In view of the existence of this framework, development of a compliance plan which fully complies with paragraphs (B) and (E), as interpreted by the field directive that will be issued, should be feasible for affected employers by August 1, 1984. OSHA believes that further extensions of the deadlines for production of written compliance plans would be contrary to the spirit of the Court of Appeals' order. Therefore, OSHA believes that primary and secondary smelters and battery manufacturers have had sufficient time to have

prepared at least the framework for written compliance plans and that the deadlines for preparation of complete plans are adequate.

In addition to logistical problems in attempting to meet the proposed effective dates, several commenters felt that the implementation of the compliance plan requirements should be integrated with the cooperative assessment programs (CAPs) already in progress. For instance, the Battery Council International (BCI) stated that the August 1 deadline for full compliance with paragraphs (e)(3)(ii) (B) and (E) was unreasonable and infeasible and they urged that full compliance with subparagraphs (B) and (E) not be required until after completion of the CAP. BCI believed that OSHA intended the CAP to reach its conclusion prior to employers being obligated to complete compliance plans pursuant to subparagraphs (B) and (E). They further stated that:

*** the first stage of the program—the preparation of a manual of recommended control strategies on which a firm may subsequently draw in preparing plant-by-plant compliance plans—will not be completed until after August 1, 1984. Certainly, until the cooperative assessment program has reached some conclusions, employers cannot be expected to have identified feasible control techniques, much less be in a position to prepare a detailed schedule for implementation of those techniques, including having ordered equipment, undertaken construction and the like. Moreover, as OSHA has argued to the Court of Appeals, the purpose of the cooperative assessment program is to provide employers with the information necessary to comply with subparagraphs (B) and (E) to "help assure employers that the detailed compliance plans they are required to develop will be congruent with prevailing notions of feasibility." (Ex. 554-2, pp. 6-7)

BCI concluded its comments regarding integration of the compliance dates with the CAP by adding:

OSHA should confirm that employers which have expressed an intention to participate in the cooperative assessment program, or are members of BCI which is participating, are not required to include all of the information called for by paragraphs (B) and (E) until after Phase II of the cooperative assessment program has been completed. Thereafter, firms participating in Phase I of the cooperative assessment project should have six months to complete compliance plans. Where the employer participating in Phase II has within that time not been able to complete a tripartite or other variance application through no fault of his own, OSHA, the employers and employee representatives, where appropriate, should reach agreement, as part of Phase II of the cooperative assessment program, with regard to the date by which compliance plans must be completed. (Id., pp. 8-9).

Other commenters concurred with the BCI. For example the SLSA pointed out that:

*** the proposed rule appears to undermine the CAP since the program was created by OSHA to determine what controls are feasible and thus should be contained in the written compliance plans. If the proposed rule is promulgated without modification, it may serve as a disincentive to companies participating in the CAP since the employers would be required to immediately prepare compliance plans irrespective of the fact that the information necessary for the plans will not be available for several months. (Ex. 544-4, p. 3)

Consequently, the SLSA requested that OSHA modify the proposal to extend the deadline for written compliance plans in secondary smelters to December 1, 1984 for two reasons. First, the delayed implementation date would provide affected employers with sufficient time to develop the plans. Second, the delayed implementation date would permit employers participating in the CAP to utilize the manual to develop their written compliance plans.

In addition, both the LIA and the RSR Corp. requested that OSHA modify the proposal to integrate implementation of the compliance plan requirement with ongoing CAPs and variance proceedings. They pointed out that "OSHA's proposal to implement the engineering compliance plans requirement by August 1 makes no provisions for accommodating these processors and hence would have the very disruptive effect that the [A]gency has said should be avoided." (Ex. 544-6, pp. 12-13). They further recommended that the Agency not issue citations for failure to meet the effective date against employers who have initiated a study of long-term engineering control options or who have filed a variance application seeking resolution of feasibility issues and designed to lead to the issuance of an order equivalent to the production of a compliance plan.

On the other hand, both the UAW and the USWA argued that CAPs not be used as a basis for further delay in the effective dates of the compliance plan provisions of the standard. For example, the UAW argued that:

The CAP in battery making has not yet addressed the relationship of the compliance manual to the development of individual plant compliance plans. There is no completion date projected for the manual. Therefore, it is difficult to see how this program could be reasonably relied on by any employer as an essential component of the development of control measures in a particular plant or operation. (Ex. 544-5, p. 11)

In addition, the USWA, which has been involved in several cooperative assessments related to lead, urged that these efforts not be used to further delay the compliance plan provisions of the standard. They stated that:

The tripartite agreements between the USWA, ASARCO, and OSHA specify that those agreements are the compliance plans for the respective plant. The USWA is currently working with AMAX and OSHA to craft a similar plan for that company's lead smelter, although the final agreement will probably take the form of a temporary variance. In any event, we expect to have the agreement in place well before the August 1 deadline. The USWA is also involved directly in the cooperative assessment program for secondary smelting, and indirectly in a similar program for battery manufacture. These programs were never intended to replace or delay the compliance plan provisions of the standard. Indeed, it will be necessary for employers to prepare their own compliance plans in advance, in order to make effective use of the manuals being prepared by the cooperative assessment groups. The USWA agreed to participate in the cooperative assessment programs because we believed they would benefit our members working in the lead industries. We would be forced to reconsider our participation if OSHA were to use the programs as an excuse to delay further the compliance plan provisions of the standard. (Ex. 554-8, pp. 2-3)

They added:

At the same time, we recognize that effective compliance plans must be updated from time to time as new control techniques become available. Therefore, proper enforcement of the compliance plan provisions should provide sufficient flexibility to accommodate engineering studies which are in progress and moving forward as quickly as possible, of control options which the employer agrees to implement if they are found to be feasible and effective. This can best be done through the publication of an appropriate field directive before the August 1 deadline. The USWA plans to submit its suggestions for such a directive in the near future. (Id., p. 3).

The cooperative assessment program was designed to control worker exposure to lead. These agreements reflect lengthy discussions between OSHA, industry, and employees (through their representatives, if any) to accommodate feasibility limitations in creating a system of technical controls and work practices that will demonstrate to both OSHA and employees that an affected industry is complying with the lead standard. Such agreements are not meant to replace the 50 ug/m³ PEL which was promulgated in 1978 and has been upheld in numerous court challenges. OSHA recognizes, however, that some plants will have difficulty in achieving the PEL with

engineering controls and has taken action to alleviate these problems. Further, OSHA has recognized feasibility limitations by granting temporary variances, as in the case of MRP provisions.

OSHA believes that the compliance plan deadlines provided herein will neither undermine nor interfere with the ongoing CAPs. However, OSHA feels that the parties, including the USWA, have raised the necessity for sufficient flexibility to accommodate engineering studies currently in progress. To the extent that the August 1, 1984 effective date may not be sufficiently flexible in this regard, OSHA believes that the best way to accommodate employers currently involved in engineering studies is to issue a field directive in order to provide guidance regarding the Agency's policy for enforcing paragraph (e)(3) as of August 1, 1984.

While OSHA recognizes that some engineering studies of longer-range control options may not be completed by August 1, some of this work may have been completed when the compliance plan stay took effect in 1982. Therefore, in the event that an employer has by August 1, 1984, initiated a study of long-term engineering control options, either on its own or through active participation in a cooperative assessment with OSHA and employee representatives (where applicable), a citation for failure to meet the August 1 date will not be issued with respect to that control option, provided that the employer's compliance plan meets the guidelines described in the field directive. A draft of the field directive has been reviewed by interested parties. Their comments have been considered in developing in the final directive, which will be issued in the very near future.

Regulatory Impact and Regulatory Flexibility Assessments

OSHA hereby finds that this proposal is not "major" within the meaning of E.O. 12291 and that it does not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Authority and Signature

This document was prepared under the direction of Patrick R. Tyson, Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, D.C. 20210. It is issued pursuant to sections 6(b) and 8(g) of the Occupational Safety and Health Act (84 Stat. 1593, 1599; 29 U.S.C. 655, 657), 5

U.S.C. 553, Secretary's Order No. 9-83 (48 FR 35736), and 29 CFR Part 1911.

List of Subjects in 29 CFR Part 1910

Occupational safety and health, Lead.

Signed at Washington, D.C. this 31st day of May, 1984.

Patrick R. Tyson,

Deputy Assistant Secretary of Labor.

[FR Doc. 84-14975 Filed 5-31-84; 2:16 pm]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

Approval of Permanent Program Amendment From the State of Ohio Under the Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: OSM is announcing the approval of a program amendment submitted by Ohio as an amendment to the State's permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment consists of changes to the Ohio regulations concerning inspection frequency for inactive operations and compliance reviews.

The Ohio Division of Reclamation (the Division) submitted the proposed program amendment on December 28, 1983. OSM published a notice in the *Federal Register* on January 26, 1984, announcing receipt of the amendment and inviting public comment on the adequacy of the proposed amendment (49 FR 3709). The public comment period ended on February 27, 1984. A review of Ohio's proposed amendment by OSM identified a concern relating to the definition of an inactive operation. OSM notified the Division about its concern and on April 25, 1983, the Division responded by submitting modifications to its proposed amendment. OSM reopened the comment period from May 4 to May 21, 1984, in order to provide the public an opportunity to reconsider the adequacy of the proposed amendment.

After providing opportunity for public comment and conducting a thorough review of the program amendment, the Director has determined that the amendment, as modified on April 25, 1984, meets the requirements of SMCRA

and the Federal regulations, and is approving it. The Federal rules codifying decisions concerning the Ohio program are being amended to implement this action.

EFFECTIVE DATE: June 5, 1984.

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatfield, Director, Columbus Field Office, Office of Surface Mining, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43227; Telephone: (614) 866-0578.

SUPPLEMENTARY INFORMATION:

I. Background

The Ohio program was approved effective August 15, 1982, by notice published in the August 10, 1982 *Federal Register* (47 FR 34688). The approval was conditioned on the correction of 28 minor deficiencies contained in 11 conditions. Information pertinent to the general background, revisions, modifications, and amendments to the Ohio program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program can be found in the August 10, 1982 *Federal Register*.

II. Submission of Revisions

By letter dated December 28, 1983, Ohio submitted revisions to Ohio rule 1501:13-14-01 *Inspections*. Specifically, the amendment included the following revisions to rule 1501:13-14-01:

(1) Paragraph (A) is revised to include definitions for "inactive coal mining and reclamation operation," "active coal mining and reclamation operation," and "compliance review technician;"

(2) Paragraph (C) is revised to require such partial inspections of inactive sites as are necessary to ensure effective enforcement;

(3) Paragraph (D) is revised to require an average of at least one complete inspection per calendar quarter of each active and inactive operation;

(4) Paragraph (J) which provided that the operator may accompany the chief during any inspection is proposed to be deleted; and

(5) Paragraph (K) concerning compliance reviews would be designated as paragraph (J) and revised to conform to the Federal rule at 30 CFR 840.16.

In addition, Ohio made several non-substantive editorial changes to rule 1501:13-14-01.

On January 28, 1984, OSM published a notice in the *Federal Register* announcing receipt of the amendment and inviting public comment on whether the proposed amendment was no less