



VOSH PROGRAM DIRECTIVE: 02-406

ISSUED: September 15, 1993

**SUBJECT: Air Contaminants Standard, 1910.1000 - Inspection Procedures and Enforcement Guidance resulting from Court decision vacating 1989 PELs**

**A. Purpose.**

This Directive provides specific guidance on enforcing the Air Contaminants standard following the Circuit Court decision vacating the 1989 permissible exposure limits (PELs).

This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH Personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

**B. Scope.**

This Directive applies to all VOSH personnel and specifically to Occupational Health Enforcement and Consultation Services personnel.

**C. References.**

OSHA Memorandum (August 5, 1993) from Roger A. Clark, Director, Directorate of Compliance Programs

VOSH Program Directive 12-419D (August 1, 1993)

**D. Cancellation.**

Not Applicable.

**E. Action.**

The Assistant Commissioner for Enforcement, Directors and Supervisors shall assure that procedures established in this directive are adhered to in conducting inspections.

**F. Effective Date.**

September 1, 1993 for citations issued based on inspections after this date.

**G. Expiration Date.**

Not Applicable.

**H. Background.**

Federal OSHA has issued specific guidance to its field offices on enforcing the Air Contaminants standard as a result of the Eleventh Circuit Court of Appeals decision vacating permissible exposure limits (PELs) set in 1989.

In July 1992, the Eleventh Circuit Court of Appeals vacated protective PELs set by federal OSHA in 1989 for 212 air contaminants, moving them back to PELs established in 1971. The appeals court also vacated new PELs for 164 substances that were not previously regulated. A stay had allowed federal OSHA to enforce the 1989 PELs until March 22, 1993, when the stay expired.

On March 23, 1993, federal OSHA ceased enforcement of the 1989 PELs and began enforcing the previous PELs, which were listed in the "Transitional Limits" columns of Table Z-1-A and in Tables Z-2 and Z-3 of 29 CFR 1910.1000, the Air Contaminants standard.

On June 30, 1993, federal OSHA published in the Federal Register (58 Fed. Reg. 35338) an amended Air Contaminants standard to reflect the court's decision. The amended 29 CFR 1910.1000 includes a new Table Z-1 that includes the exposure limits that had been contained in the "Transitional Limits" columns of Table Z-1-A and a new grain dust limit and reprints the existing Tables Z-2 and Z-3 with minor corrections.

On June 21, 1993, the Safety and Health Codes Board revoked the 1989 Revised PELs and readopted the pre-1989 PELs.

**I. Summary.**

This directive provides specific guidance concerning compliance and enforcement of the Permissible Exposure Limits (PEL) listed in Table Z-1 of the amended 1910.1000, [58 Fed. Reg. 35338 (June 30, 1993)],

formally listed in the Transitional Limits columns of Tables Z-1-A, and in Table Z-2 and Z-3 of 29 CFR 1910.1000.

Guidance on the specific compliance and enforcement issues affected by the decision is as follows:

1. **Citations**

Beginning September 1, 1993, all citations issued must require compliance with the PELs listed in the Transitional Limits columns of Table Z-1-A, and in Table Z-2 and Table Z-3 of 1910.1000. Also, on that date, all citations issued must require compliance with the PELs listed in Tables Z-1, Z-2, and Z-3 of 1910.1000. Citations for violations of the 1989 PELs that were issued through September 1, are valid if the contest period has elapsed and the citation has been issued as a final order. However, when follow-up inspections are conducted, Failure to Abate citations can only be issued to enforce compliance to the Transitional Limits or the "Table Z-1" limits depending on whether these citations were issued before or from September 1.

a. **Unregulated substances:** When employee exposures exceed the 1989 PELs for the 164 substances that were not previously regulated or for any other unregulated substance, violations of the General Duty Clause, §40.1-51.1(a) of the Code of Virginia may be considered. The criteria for issuing a General Duty Clause citation must be demonstrated without reliance on the 1989 PELs (see specific guidance below), and be in accordance with the requirements of the Field Operations Manual (FOM), Chapter IX, A.2. Citations shall be issued only after consultation with the Enforcement Division Director who shall consult with the Program Evaluation and Technical Support (PETS) Director. The following information may be useful in meeting the criteria:

(1) **Recognized hazard:** The compliance officer must establish that a recognized hazard from occupational exposure to an unregulated substance exists. The employer's knowledge of a recognized hazard can be demonstrated by documenting industry recognition or employer recognition of the hazard. Sources that could be used for demonstrating hazard recognition are studies used in the preamble of the 1989 Air Contaminants Standard, documentation of National Institute of Occupational Safety and Health (NIOSH) Recommended Exposure Levels (REL), documentation of American Conference of Government Industrial Hygienist (ACGIH) Threshold Limit Values (TLV), and industry studies and publications.

(2) **Seriousness:** The compliance officer must look at the documentation of the ACGIH TLVs, NIOSH RELs and other sources of information which document serious health effects at specific exposure levels. CSHOs must also determine if there is significant documentation of

serious health effects at the sampled exposure level. Minor irritation, for example, or reversible effects without serious health consequences would not meet this criterion.

- b. **Regulated substances:** When employee exposures are between the 1989 PELs and the transitional limits (the "Table Z-1" limits), the issuance of general duty citations may also be considered. The issuance of general duty citations must be in accordance with the requirements specified in section 1.a.1 and 1.a.2 above, where it can be established that there are serious human health effects documented at exposure levels approximating the sampled exposure which is the basis for the hazard. Citations shall be issued only after consultation with the Enforcement Division Director who shall consult with the Program Evaluation and Technical Support (PETS) Director. In addition, the CSHO must demonstrate specific employer knowledge of a hazard at the documented exposure level. See VOSH FOM, Chapter IX, A.2.b.(2)(b). Factors that could show employer knowledge include:
  - 1) A prior notification letter to the employer explaining that employee exposure to toxic substances at levels recognized as hazardous by such experts as NIOSH and the ACGIH is lower than that set by VOSH's standard.
  - 2) A physician's request for removal of an employee from activities involving exposure to hazardous substances at the documented exposure level where a serious human health effect was diagnosed.

## 2. **General Duty Letter and Other Letters of Notification**

- a. **General Duty Letter:** Where the compliance officer determines that a serious hazard exists but the criteria for a general duty citation cannot be met, a general duty letter describing the hazard and suggesting corrective action may be issued in accordance with the VOSH FOM, Chapter IX, A.2.
- b. **Other letters of notification:** When an inspection documents employee exposures above the 1989 PELs but below the transitional limits ("Table Z-1" limits), the regional supervisor should notify the employer and encourage reduction of employee exposures to more protective levels. A sample notification is attached. (The notification need not be sent to the employer if the exposure is the basis for a general duty citation or a general duty letter.)

## 3. **Contested Cases and Settlements**

The PEL-related provisions of contested cases should be amended by the Commonwealth's Attorneys Office in consultation with the

PETS office to the transitional limits (the "Table Z-1" limits) or to an alleged general duty violation as an alternative if warranted by the circumstance of overexposure. Settlement provisions such as specific engineering controls, respirator program elements, work practices, training, and notifications are enforceable only if they are not tied to the 1989 PELs.

4. **Skin Designation**

Paragraph (a)(4), "Skin Designation," of the 1989 Air Contaminants Final Rule was deleted from the regulation in the June 30, 1993 Federal Register notice. However, Table Z-1 includes a column entitled "Skin Designation." Those substances for which the skin designation is noted with an "X" in the Skin Designation column are chemicals which can be absorbed across the skin. Employee skin exposure to these substances shall be prevented or reduced through the use of engineering controls, work practices, or appropriate personal protective equipment, such as gloves or coveralls. Where personal protective equipment (PPE) is required to prevent or reduce skin exposure and the employer has not provided or required the use of such PPE, a citation for violation of 29 CFR 1910.132 shall be issued.

5. **Specific Substances**

Organic dust

The substances regulated as inert or nuisance dusts were changed to Particulates Not Otherwise Regulated (PNOR) in the 1989 rulemaking to reflect federal OSHA's intention to cover all particulates, including organic dusts. Tables Z-1, Z-1-A and Z-3 give adequate notice of that clarification and indicate that organic particulates are covered. VOSH will continue to regulate organic particulates under the PEL for PNOR which references Table Z-3 under inert or nuisance dust.

The PNOR entry of Table Z-1 and the "Inert or Nuisance Dust" entry of Table Z-3 (58 Fed. Reg. 353338-40, June 30, 1993) are the same and both indicate that organic and inorganic particulates are covered. PNOR citations should refer to the "Inert or Nuisance Dust" entry and with the identical limits also being cited.

"Save" example: Employees were exposed to Particulates Not Otherwise Regulated listed in Table Z-1 which is also referenced in Table Z-3 under "Inert or Nuisance Dust" in excess of 5 mg/m<sup>3</sup> (respirable) and/or 15 mg/m<sup>3</sup> (total) as an 8-hour Time Weighted Average concentration.

Wood dust

Wood dust will now be regulated as a PNOR because the wood dust PEL has been vacated.

## Carbon dioxide

Carbon dioxide returns to the Table Z-1 limit of 5,000 parts per million (ppm). Neither the 1989 PEL of 10,000 ppm nor the Short-Term Exposure Limit (STEL) of 30,000 ppm can now be enforced.

In workplaces where the employer has instituted a monitoring and compliance program to ensure employee exposures do not exceed a 30,000 ppm (STEL) then a de minimus notice may be issued when the 8-hour TWA is between 5,000 and 10,000 ppm. However, when the employer has instituted such a compliance and monitoring program for a 30,000 ppm (STEL) and the 8-hour TWA exceeds 10,000 ppm, a "serious" citation shall be issued.

### 6. Petition for Modification of Abatement (PMA)

PMA's that are in effect and were issued prior to September 1, 1993, must be amended to Table Z-1.

### 7. Debt Collection

Penalties for citations of violations of the 1989 PELs, issued prior to September 1 that have become final orders of the Commissioner, were based on a valid standard. The citations are valid and the penalties collected are nonrefundable. Penalties not yet collected should be handled in the same way as any other uncollected debt. (See VOSH FOM, Chapter XI).

Carol Amato  
Commissioner

Attachments: OSHA Memorandum (August 5, 1993) from Roger A. Clark,  
Director, Directorate of Compliance Programs

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_tabl e=INTERPRETATIONS&p\\_id=21220&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_tabl e=INTERPRETATIONS&p_id=21220&p_text_version=FALSE)

58 Fed. Reg. 35338 (June 30, 1993)

[http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_tabl e=FEDERAL\\_REGISTER&p\\_id=13308&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_tabl e=FEDERAL_REGISTER&p_id=13308&p_text_version=FALSE)

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APPENDIX

SAMPLE NOTIFICATION LETTER FOR SUBSTANCES REGULATED  
UNDER THE TABLE Z-1 LIMITS

Company Name  
Street Address  
City, State Zip Code

Dear Company Owner:

During a recent Virginia Occupational Safety and Health Administration (VOSH) compliance inspection on **[date]**, VOSH documented employee exposures to **[substance]** that were between **[amount]** and **[amount]**. The exposures were documented from sampling, interviews and observation of your employees that performed **[task]**. Exposure to **[substance]** at these levels is associated with the following health effects:

**[list health effects]**

VOSH also noted the insufficient/improper use of the **[control methodology]** while the employees performed the above task.

The U.S. Court of Appeals, Eleventh Circuit, vacated the 1989 Permissible Exposure Limits (PEL) listed in the "Final Rules" columns of Table Z-1-A of VOSH's Air Contaminants Standard, 1910.1000, and the Safety and Health Codes Board revoked the Revised PELs and readopted the pre-1989 PELs. Accordingly, the PEL for **[substance]** has reverted to the level listed under Table Z-1, and in Table Z-2 and Table Z-3 of the amended 1910.1000 (58 FR 35338-351, June 30, 1993). VOSH continues to believe that controlling employee exposure to this limit is insufficiently protective. VOSH therefore recommends that employees' exposures be limited to the more protective level of either the National Institute of Occupational Safety and Health (NIOSH) Recommended Exposure Levels (REL) of **[level]** or the American Conference of Government Industrial Hygienist (ACGIH) Threshold Limit Values (TLV) of **[level]**.

SAMPLE NOTIFICATION LETTER FOR SUBSTANCES NO LONGER REGULATED

Company Name  
Street Address  
City, State Zip Code

Dear Company Owner:

During a recent Virginia Occupational Safety and Health Administration (VOSH) compliance inspection on **[date]**, VOSH documented employee exposures to **[substance]** that were between **[amount]** and **[amount]**. The exposures were documented from sampling, interviews and observation of your employees that performed **[task]**. Exposure to **[substance]** at these levels is associated with the following health effects:

**[list health effects]**

VOSH also noted the insufficient/improper use of the **[control methodology]** while the employees performed the above task.

The U.S. Court of Appeals, Eleventh Circuit, vacated the 1989 Permissible Exposure Limits (PEL) listed in the "Final Rules" columns of Table Z-1-A of VOSH's Air Contaminants Standard, 1910.1000, and the Safety and Health Codes Board revoked the Revised PELs and readopted the pre-1989 PELs. Accordingly, no VOSH PEL exists for **[substance]**. However, in VOSH's opinion a potentially serious health hazard exists if employee exposures are not adequately controlled. VOSH therefore recommends that employees' exposures should be controlled to the more protective level of either the National Institute of Occupational Safety and Health (NIOSH) Recommended Exposure Levels (REL) of **[level]** or the American Conference of Government Industrial Hygienist (ACGIH) Threshold Limit Values (TLV) of **[level]**.