

Surface Finishing Letter to OSHA

Mr. John L. Henshaw, Assistant Secretary
Occupational Safety and Health Administration
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Request for Extension of Comment Period for Proposed Rule on Occupational Exposure to Hexavalent Chromium, 69 Fed. Reg. 59305 (October 4, 2004) – OSHA Docket No. H054A

Dear Mr. Henshaw:

On behalf of Surface Finishing Industry Council, we hereby request a 30-day extension to the comment deadline for the October 4, 2004 Occupational Safety and Health Administration ("OSHA") Proposed Rule on Occupational Exposure to Hexavalent Chromium, 69 Fed. Reg. 59305 – OSHA Docket No. H054A. Comments on the proposed rule are currently due January 3, 2005.

The Surface Finishing Industry Council represents the interests of the leading management, scientific and technical, and supplier communities serving the surface coatings industry. This industry comprises several thousand U.S. small companies and thousands of "captive" operations nested in larger manufacturing facilities. The finishing industry – along with the major manufacturing supply chains it serves, including automotive, industrial equipment, appliances and hardware, aerospace and defense, medical instrumentation, electronics and others – will be dramatically affected by the proposed rulemaking.

OSHA has already recognized that many industry sectors will be impacted significantly by the final promulgation of this standard by convening a SBREFA panel. These industry sectors must be provided sufficient opportunity to review the proposed rule, including the voluminous background materials and to respond specifically to OSHA's request for comment on the 65 issues set out in the preamble. An extension of the comment period for this rule is warranted for numerous reasons that are discussed below.

More Industry Sectors Than Anticipated Are Impacted by Proposed PEL

Many industry observers were surprised by the low PEL in the proposed standard, particularly based on comments of the SBREFA panel. With the low proposed PEL, many additional industry sectors that did not anticipate impacts will be substantially affected by proposed PEL. Since October 4th, many industry sectors have been evaluating potential impacts to determine if comments are needed for their industries, and if so, what information is needed to submit those comments. Many of these industry sectors are small businesses and did not have an opportunity to participate in the SBREFA panel process. The broadened impact of the proposed standard on an ever-expanding group of industry sectors dictates that additional time is needed for all interested stakeholders to submit information on technical feasibility, compliance costs and economic impact for their industry sector, which even OSHA did not consider.

Extensive Administrative Record Must Be Reviewed and Analyzed

Filing comments on the proposed rule will require commenters to review and analyze not only the lengthy 168-page preamble and proposed rule, but literally thousands of pages of docket materials, including epidemiological and animal studies, exposure and risk assessments, toxicological profiles, test methods and communications between OSHA and other agencies and with members of the public. The sheer volume of the docket necessitates an extension of time to allow sufficient time for all interested stakeholders to review and evaluate these critical documents.

There are currently 626 supporting documents for the proposed rule. Many of these supporting documents are lengthy, some even exceeding 600 pages. For example, OSHA's "Preliminary Economic and Initial Regulatory Flexibility Analysis for OSHA's Proposed Standard for Occupational Exposure to Hexavalent Chromium" has 645 pages. This does not even include the additional references that OSHA cites within this document -- 31 of which are available through OSHA's online docketing system.

Additional time is necessary to review and analyze the data produced from the 38 site visits that OSHA conducted as part of a broader study of occupational hexavalent chromium exposures and exposure-control technologies. This information must be reviewed, analyzed, and shared with industry experts in order to draft substantive and useful comments on a rule of this magnitude.

OSHA also has specifically asked for responses to 65 questions, many of which result from the critical SBREFA Panel Report issued April 2004. OSHA has requested responses that are supported by evidence and reason, the collection of which entails substantial time and effort.

Critical Background Documents Have Been Difficult to Access in the Docket

Early in the comment period, several key background documents and references were not available in the docket, thereby delaying critical review of the background information for the proposed rule. The inability of commenters to access quickly and easily essential background materials in OSHA's docket has significantly impeded their progress. This fact, together with the limited time available to review documents and provide meaningful comments, further warrants a 30-day extension of the comment period.

Major Revisions To OSHA's Economic Impact Analysis Are Needed

Based on preliminary analysis, OSHA's estimates of the costs needed to comply with the proposed standard are significantly underestimated by as much as two orders of magnitude. This factor alone will require a revised estimate of economic impact such as facility closures and job losses on the impacted industry sectors. Accordingly, additional time

is needed for meaningful comments and input from impacted industries to insure that OSHA's decisions are made based on the best available evidence.

Estimated Benefits of Rule Are Significantly Overestimated

Although OSHA has concluded that the benefits of the proposed rule exceed the costs, it has relied extensively on inappropriate methodologies and inaccurate data to make substantially inflated benefit estimates for the proposed rule. In a departure from the expected incremental nature of net benefits for rules, OSHA's analysis shows that the net benefits peak at the proposed level of 1 ug/m³. This result alone suggests that further analysis of OSHA's benefit estimates are warranted.

Based on a preliminary review of OSHA's methodology and analysis, OSHA calculated benefits using old exposure patterns and outdated cancer case estimates. Furthermore, OSHA has discounted costs that occur in the future, but has not similarly discounted future benefits. These and other methodological flaws suggest that OSHA has significantly overestimated the expected benefits of the proposed rule. Additional time is needed to review this issue thoroughly so that meaningful comments on an appropriate benefits analysis can be provided to OSHA.

Decisions Must Be Made Based on Best Available Evidence

OSHA has a statutory mandate to make decisions based on best available evidence, and additional time is needed to provide this evidence to OSHA in the comments. More time is needed for data collection and analysis to supplement OSHA's record, particularly with respect to compliance costs and economic impact. Companies must conduct work place exposure monitoring to determine the level of impact, evaluate cost and feasibility of various engineering controls, determine likely impacts on customers and markets, and then provide this data and analysis to OSHA within the comment period. Because supply chain disruptions and impacts are likely outcomes of the proposed PEL, additional time is needed to make an appropriate assessment of these issues that are critically important not only to small business, but also the nation's economy.

SBREFA Panel Recommendations Must Be Fully Considered

The SBREFA panel issued a report on the potential impacts of a revised hexavalent chromium workplace exposure standard on small business. The SBREFA panel report's recommendations to minimize impacts of the rule on small business were essentially ignored and were not incorporated into the proposed rule. Commenters will need additional time to provide comments on these issues. For example, the report noted the potential technical and economic feasibility problems for small businesses to meet the lower PELs under consideration such as 1 ug/m³. While OSHA claimed that the SBREFA panel's recommendations were addressed in the proposed rule, OSHA opaquely cited references to analysis in background documents as evidence to this claim. Additional time is needed to locate, review and assess these materials to determine how OSHA has attempted to minimize the impact of this proposed standard on small business.

Furthermore, the peer-reviewed risk assessment undertaken by OSHA for this new standard was not available to the SBREFA panel. Additional time is also needed to evaluate and consider the potential significance of the risk assessment and its particular relevance and impact on small business.

Comment Period Is Effectively Shortened by Holiday Seasons

The comment period does not provide sufficient time to develop and draft meaningful comments analyzing this proposed standard and the voluminous background materials, especially because the comment period includes several major holidays, including: Thanksgiving, Christmas and the New Year. Scheduling and holding essential working meetings and/or discussions with industry experts and affected companies during the holidays are very difficult. An extension of the comment period is appropriate because the holidays effectively shorten the critical time needed to conduct the necessary analysis and prepare meaningful and responsive comments.

Extension Will Not Unduly Burden OSHA Or Delay The Rulemaking Schedule

While we recognize that OSHA must finalize this new workplace exposure standard by the court-ordered deadline of January 18, 2006, an extension of 30 days will not unduly burden OSHA or delay the issuance of the final rule pursuant to the court order. Keep in mind that the court deadline does not excuse OSHA from its obligation to conduct a fair notice and comment process. An additional 30 days would greatly assist OSHA in formulating an accurate and comprehensive rule, as well as allow industry stakeholders additional time to prepare comments and collect relevant data. In light of the importance of this matter to OSHA and all interested stakeholders, we urge OSHA to grant this modest extension of the comment period.

The proposed new workplace exposure standard for hexavalent is a significant rule that will impact a substantial number of industry sectors. The cumulative effect of the factors discussed above dictates the need for at least a 30-day extension of the comment period. Given the relative importance of the standard and the critical need for meaningful comments, a 30-day extension of the comment period is appropriate.

Thank you for your assistance. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,
Jeffery S. Hannapel, Esq.
cc: OSHA Docket Office