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Environmental Health Department

October 23, 1980

TO: Official Members - LIA
LIA Environmental Health Committee

FROM: Jerome F. Cole

SUBJECT: Clarification or Stay of the OSHA Lead Standard

Enclosed is a copy of a Motion for Clarifcation of the Court's Order of August 15, 1980 Or to Stay the New Lead Standard submitted by LIA's legal counsel on October 16, 1980.

The purpose of this motion is to request the Court to extend the partial stay which was issued on March 1, 1979, until such time the Court rules on LIA's motion for reconsideration.

Sincerely,

Jerome F. Cole
Director, Environmental Health

Enclosure

LIA03274

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,	:	
Petitioner,	:	
-against-	:	Docket No. 79-1048
RAY MARSHALL, Secretary of Labor, et al.,	:	
Respondents,	:	
and all consolidated cases.	:	

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MOTION FOR CLARIFICATION OF THE
COURT'S ORDER OF AUGUST 15, 1980
OR TO STAY THE NEW LEAD STANDARD

The undersigned petitioners, by their attorneys, respectfully move this Court to clarify its Opinion and Order, dated August 15, 1980 (the "Decision"), or to stay the final standard for occupational exposure to lead, 29 C.F.R. § 1910.1025 (the "Standard"), except as to the permissible air-lead limit, pending resolution of the rehearing petitions. Specifically, petitioners request that the Court issue the following order or orders:

(a) an order, pursuant to Rule 6 of the Court's General Rules, clarifying the Decision to indicate whether the vacatur of the partial stay of March 1, 1979 (the "Partial Stay") was effective on August 15, 1980, when the Decision was issued, or whether the Partial Stay is to become effective only upon the issuance of the Court's mandate implementing the Decision; and,

(b) if the Partial Stay was vacated by the Decision on August 15, 1980, an order, pursuant to Rules 18 and 41(b) of the Federal Rules of Appellate Procedure, staying all of the Standard, except the permissible exposure limit of 50 ug/m^3 (the "PEL"), until a date 30 days after the final determination by the Court of the Joint Petition For Rehearing And Suggestion For Rehearing En Banc, dated September 25, 1980 (the "Rehearing Petition"). As to the PEL, 29 C.F.R. § 1910.1025(c)(1), petitioners further move this Court to allow employers covered by the Standard, during the pendency of the stay requested herein, to meet the PEL by any combination of engineering, work practice and respirator controls.

In support of this motion, petitioners state as follows:

1. This action involves petitions for review of the Standard. On March 1, 1979, this Court issued the Partial Stay of the Standard pending judicial review, pointing out that "the objective of the stay is to defer the require-

ments that employers undertake the expense of engineering controls, revision of work practices, and construction of facilities pending determination of their challenge to the standard." Partial Stay at 1. The Partial Stay (a copy of which is attached hereto as Rider A) was granted after the industry petitioners had submitted extensive evidence showing that implementation of the requirement for engineering controls would cause irreparable damage and that worker health would not be jeopardized by granting the stay.

2. On August 15, 1980, this Court (Judge MacKinnon dissenting) issued the Decision, affirming most of the Standard and remanding to the Occupational Safety and Health Administration ("OSHA") for further consideration the question whether the Standard is feasible for certain industries (the "remand industries"). The Court specified that for the remand industries the stay of Section 1910.1025(e)(1) of the Standard was to remain in effect, thereby permitting the remand industries to meet the PEL of 50 ug/m^3 by any combination of engineering, work practice and respirator controls.

3. In the concluding "Summary" of the Decision, the Court set forth the "disposition" of the action, enumerating its conclusions and rulings, and stating among other things that the Partial Stay was lifted in its entirety as to ten specific industries.

4. Because the vacatur of the Partial Stay was set forth as a part of the disposition Summary of the entire case, and was not separately dealt with in the Decision, the lead industries assumed that the vacating of the Partial Stay, together with the rest of the "disposition" Summary in the Decision, would not become effective until the issuance of the mandate following the determination of the Rehearing Petition.[1] OSHA, however, has recently taken the position that the Partial Stay was vacated on August 15, 1980, when the Decision was filed. Petitioners respectfully request that the Court clarify its Decision to indicate whether (a) the Partial Stay was vacated on August 15, 1980, as OSHA claims, or (b) the vacatur of the Partial Stay becomes effective only upon the issuance of the Court's mandate, as the lead industries suggest. If the Court concludes that the Partial Stay was vacated on August 15, petitioners request, for the reasons stated below, that all of the Standard except the PEL be stayed until 30 days after the final determination of the Rehearing Petition. Such relief is particularly appropriate in view of the Supreme Court's

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1. The timely filing of the Rehearing Petition (as permitted by the Court's order, dated Spetember 9, 1980), as well as the filing of the petition for rehearing and reconsideration on August 29, 1980 by the National Association of Recycling Industries, Inc., stays the mandate until disposition of those petitions. See Rule 41(a) of the Federal Rules of Appellate Procedure.

granting of a writ of certiorari last week in the OSHA cotton dust case, American Textile Manufacturers Institute, Inc. v. Marshall, Docket Nos. 79-1429, -1583 (Oct. 6, 1980), an action involving similar (but far less extreme) issues as this case. See note 2 infra.

5. It is well settled that a stay of an administrative order is appropriate when, as here, petitioners will suffer irreparable injury and have meritorious claims, and the requested stay will not substantially harm other parties. See, e.g., Virginia Petroleum Jobbers Ass'n v. F.P.C., 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (1958). Moreover, inasmuch as the industry petitioners in this action intend to seek review by the Supreme Court in the event that their Rehearing Petition is denied, a stay should issue because petitioners are able to show "good cause". See Rule 41(b) of the Federal Rules of Appellate Procedure; Rules 6(f)(2) and 14(b) of the Court's General Rules; In re FTC Line of Business Report Litigation, Civ. No. 77-1728, Slip Op. at 11, 15 (D.C. Cir. Sept. 28, 1978). Good cause exists here, and justifies a stay, because (as explained in paragraph 6 below) "substantial" issues have been raised in the Rehearing Petition and, if necessary, will be raised in an application for a writ of certiorari. In re FTC Line of Business Report Litigation, supra, Slip Op. at 11.

6. Whatever the disposition of petitioner's claims in this action, the majority and the dissenting opinions leave no doubt that the issues in controversy are substantial. The substantiality of petitioners' arguments is confirmed by the unusual length of the opinions, the pronounced disagreement within the panel on key points, and the acknowledgment by the majority that "a number of important questions on appeal are very close." Decision at 6 n.7. Indeed, three of the issues raised by this action--the meaning of economic "feasibility", the need for cost-benefit analyses, and OSHA's authority to require medical removal protection--will very shortly be reviewed by the Supreme Court in the cotton dust case, American Textile Manufacturers Institute, Inc. v. Marshall, supra. Reversal by the Supreme Court on any one of these three points would also require reversal of the majority's Decision in the case at bar.[2]

2. The three issues presented by the cotton dust case are far less extreme than the parallel issues raised in this action: (1) in the cotton dust case, where OSHA had estimated the cost of compliance, the Court of Appeals held that economic feasibility meant economic survival; here, the same test was applied but OSHA was not even required to do a formal cost analysis of the PEL or to estimate the costs; (2) in the cotton dust case, OSHA did no cost-benefit analysis; here, the agency not only did not do any such analysis, but it also admitted it was unable to estimate meaningfully the health benefits (if any) which were expected from the new Standard; (3) in the cotton dust case, the MRP provision was limited to workers who could not wear respirators and for whom an alternate position was available; [footnote cont'd]

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7. Pending disposition of their Rehearing Petition and, if necessary, action by the Supreme Court, petitioners should be relieved of the enormous expenses which will be required under the Standard but which will be unnecessary if petitioners' claims are upheld. When moving for the Partial Stay, petitioners showed that the lead industries would have to spend more than half a billion dollars in the first 12 months after implementation of the Standard merely to attempt to comply with the provisions requiring new engineering controls and work practices. See Memorandum, dated January 25, 1979, of the Lead Industries Association, Inc., at pages 12-19.[3] The extreme costliness of the Standard and potential irreparable injury that justified the Partial Stay of March 1, 1979, justifies the stay requested now.

8. Granting the new stay will not jeopardize

[footnote cont'd] here, a worker removed from exposure is entitled to full job security regardless of the availability of other positions and regardless of whether he is sick or disabled. This Court's decision in the cotton dust case is reported at 617 F.2d 636.

3. If the Decision vacated the Partial Stay as of August 15, 1980, the "implementation schedule" for the engineering control requirements under Section (e)(1) and Table I of the Standard would begin to run on that date. See Partial Stay ¶ 3, at 2 (staying installation of new engineering controls and the preparation of written compliance programs). If the Partial Stay remains in effect, or the stay alternatively requested in this motion is granted, the implementation schedule would continue to be tolled.

workers' health if, as suggested by petitioners, the PEL remains in effect. By issuing the Partial Stay last year and granting a stay of Section (e)(1) for the remand industries only two months ago in its August 15 Decision, the Court implicitly recognized that the health of workers in the lead industries would not be endangered if compliance with the PEL of 50 ug/m^3 were permitted by a combination of engineering, work practice and respirator controls.

WHEREFORE, for the reasons stated above, petitioners respectfully request this Court to clarify its Decision or to stay the Standard, except as to the PEL, until 30 days after the final determination of the Rehearing Petitioner. As to the PEL, petitioners further request that employers covered by the Standard be allowed, during the pendency of the Court's stay, to meet the PEL by any combination of engineering, work practice and respirator controls.

Dated: October 16, 1980

Respectfully submitted,

ORIGINAL SIGNED BY
STANDISH F. MEDINA JR.

Standish Forde Medina, Jr.
Debevoise, Plimpton, Lyons & Gates
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petitioners and intervenors

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