



January 4, 2017

*Submitted by Email and Through the
Federal eRulemaking Portal*

Mr. Blake Skogland
OSHA Directorate of Construction Standards and Guidance
OSHA Docket Office
Technical Data Center, Room N-3653
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Standards Improvement Project- Phase IV (SIP-IV), Proposed Changes to
Lockout/Tagout Regulations, Docket No. OSHA-2012-0007

Dear Mr. Skogland:

The Corporate Environmental Enforcement Council, Inc. (“CEEC”) appreciates this opportunity to comment on the Occupational Safety and Health Administration’s proposed revisions to its regulations through the Standards Improvement Project (“SIP”) in response to Executive Order 13563, “Improving Regulations and Regulatory Review.” CEEC is particularly interested in the proposed revision removing “unexpected” from the lockout/tagout (“LOTO”) standard found at 29 C.F.R. § 1910.147 governing servicing and maintenance operations of machines and equipment. CEEC believes that this revision falls outside the scope of the SIP and should be pursued, if at all, through the formal rulemaking process.

Founded in 1995, CEEC is the only cross-industry business coalition that brings together the diverse perspectives of legal, technical and governmental affairs professionals on environmental health and safety issues in the context of enforcement policy and practice. For many years, CEEC and its 28 member companies have closely followed OSHA developments and from time to time have weighed in on important proposed changes to regulatory requirements in order to provide OSHA with a view of practical, on-the-ground implications of its policy decisions. It is with this intent that CEEC writes to raise practical, economic, and legal concerns with the significant proposed revision to OSHA’s LOTO standard.

1. Purpose of Standards Improvement Project

The SIP started in March 1995 when the Presidential Memorandum “Regulatory Reinvention Initiative” was published, compelling Departments and Agencies to reevaluate regulations in order to streamline government regulation and reduce red tape. In response to this Memorandum, OSHA began a series of rulemakings designed to revise or remove standards that were confusing, outdated, duplicative, or inconsistent with other standards. OSHA published a final rule known as “Standards Improvement Project, Phase I” (“SIP-I”), after initiating its first round of standard revisions/removals in 1998. Two additional rounds of rulemaking resulted in final SIP rules in 2005 (“SIP-II”) and 2011 (“SIP-III”). OSHA decided to initiate the SIP-IV rulemaking in response to the 2011 Executive Order (“EO”) 13563, “Improving Regulations and Regulatory Review,” 76 Fed. Reg. 38,210 (Jan. 21, 2011), which calls for regulations that are “accessible, consistent, written in plain language, and easy to understand.”

OSHA claims that the SIP-IV rulemaking is a way “to improve and streamline OSHA standards by removing or revising requirements that are confusing or outdated, or duplicative.” 81 Fed. Reg. 68,504. However, the substantive changes proposed by OSHA go far beyond the intended purpose of the SIP, which is meant to “remove or revise outdated, duplicative, unnecessary, and inconsistent requirements in OSHA’s safety and health standards,” not to implement new regulatory interpretations with significant impacts to the regulated community. *Id.* The proposed substantive revision to the LOTO standard goes beyond revisions proposed in previous SIPs and should be addressed through the formal rulemaking process.

2. Need for Formal Rulemaking

OSHA issued a Request for Information (“RFI”) relating to SIP-IV in 2012, asking the public to identify standards that are in need of revision or removal to reduce the regulatory burden while maintaining or increasing the protection afforded to employees. In that RFI, OSHA specifically stated that “[w]hile commenters may recommend extensive revisions to, or major reorganizations of, OSHA standards, recommendations that require large-scale revisions to standards are not appropriate for this rulemaking. The Agency will determine whether such large-scale revisions are appropriate for a separate, future rulemaking.” 77 Fed. Reg. 72,782 (December 6, 2012). This is exactly the course OSHA must take with regard to the proposed revision to the LOTO standard. Moreover, OSHA indicated that SIP-IV RFI was primarily focused on Construction standards (as opposed to a focus on the General Industry standards in 29 C.F.R. § 1910). By contrast, the recently proposed SIP-IV strays from the RFI and goes well beyond Construction standards.

The OSH Act includes a rulemaking process for OSHA to modify its safety standards. The Act requires that the rulemaking process be followed to adopt substantive changes to the standards. 29 U.S.C. § 655. The required procedure is purposeful given the implications that substantive changes in regulations have on employees and employers, and includes the convening of an advisory committee and a meaningful public participation process. *Id.* The practical ramifications of the proposed revision to the LOTO standard certainly warrant the full-blown administrative process required by the OSH Act.

3. LOTO Servicing and Maintenance Revision Unwarranted

The original LOTO standard was published in 1989 and included the term “unexpected” in 29 C.F.R. § 1910.147(a)(1)(i). OSHA has historically interpreted the standard to be limited solely to the unexpected hazard of the release of hazardous energy, which interpretation is consistent with the plain language of the regulation. OSHA is now taking the position that the term “unexpected” in 29 C.F.R. § 1910.147(a)(1)(i) has been misinterpreted all along to exclude some operations where employees are subject to injury from startup or the release of stored energy. 81 Fed. Reg. 68,506. By taking this position, OSHA is attempting to expand the realm of hazards covered by removing the modifier “unexpected” and in its place implying that “any” energy-related hazard that could result in harm to employees is subject to the standard. The removal of “unexpected” from § 1910.147(a)(1)(i), as well as the proposed removal of the word in §§ 1910.147(a)(2)(iii)(A), (a)(3)(i), (b), (c)(1), (c)(4)(i), (f)(4) and Appendix A, is a significant change that will impact operations nationwide and will require substantial changes to existing LOTO programs.

a. Practical Effects

The implications of the proposed removal of “unexpected” from the LOTO standard are sweeping and will make widely used alternative safety methods such as warning systems and other technologies that currently enable safe and quick access for repairs or maintenance obsolete. Under the proposed revision, employers will not be able to adequately demonstrate that there is no exposure to potential unexpected energization unless lockout/tagout is used. Many alternative measures that provide effective protection from hazardous energy are currently being used.

For instance, engineered systems and safeguards are an effective alternative to LOTO, and, where appropriate, technical or automated systems may provide increased reliability and reduce the potential for human error. Many companies use control circuits, guard systems, or institutional controls such as enclosing, isolating or redirecting the hazardous energy as accepted alternative measures. An example of an engineered system that would not comply with the proposed LOTO standard revision is the use of a robot teach pendant to set up a robot. Under the current standard, an operator can enter the robot cell with the teach pendant and is able to energize the robot using the enabling switch on the teach pendant and move the robot at slow speed to teach it new path points. The teach pendant is an engineered safeguard that is being used to protect the operator from the unexpected energization and movement of the robot as the robot cannot be energized without the operator using the enabling switch. Removing the word “unexpected” from the LOTO standard would exclude this type of task as the operator is still exposed to the energization of the robot since he is within the work space of the robot, despite the fact that it is being controlled by the operator. The proposed revision to the LOTO standard would effectively prohibit other similar hold-to-run control operations for equipment that requires setup or thread-up.

The proposed revision also fails to consider group maintenance activities and potential impacts on affected, but not authorized, employees in the vicinity of maintenance operations. Where more than one individual is servicing or performing maintenance on a machine, LOTO requires authorized employees to apply a LOTO device. However, this requirement fails to consider the safeguards that visual and audible warnings can provide to other affected, but not authorized, employees who may also face the risk of unexpected energization but are not applying a LOTO device. These affected employees are protected via a properly designed warning system despite not being a part of the LOTO. Likewise, the removal of “unexpected” from the LOTO standard fails to account for necessary machine testing after maintenance to ensure maintenance was effective. Often after maintenance is conducted, employees must test machines to ensure proper function as a result of such maintenance. By its very nature, this testing must be conducted using energization and can be conducted safely using guards and warning systems. Additionally, warning and alerting techniques and other administrative controls such as written procedures and work practices, limited time exposure to hazards, and employee health and safety rules and training are also accepted and widely used alternative measures.

Furthermore, the proposed revision to the LOTO standard will make the standard inconsistent with other industry standards covering the same issue, including the industry consensus standard upon which the original LOTO standard was based. The *American national standard for personnel protection – Lockout/tagout of energy sources – Minimum safety requirements* standard, ANSI Z244.1 published in 1982 required LOTO to apply solely to the unexpected hazard of the release of hazardous energy.

b. Economic Impacts

Beyond the practical impacts to facility operations, employers will also face potentially significant economic impacts from the proposed revisions, contrary to the purpose of the SIP to “reduce costs and paperwork where possible, without reducing employee protections.” 81 Fed. Reg. 68,504. Employers will face costs associated with maintenance time delays that likely exceed the \$27,899 cited in the Preliminary Economic Analysis and Regulatory Flexibility Act certification. 81 Fed. Reg. 68,528. Further, the \$3.2 million per year in cost savings to regulated entities is simply inaccurate. *Id.* OSHA states that the removal of “unexpected” from the LOTO standard “would not represent any revision in OSHA policy, but instead [will] clarify the Agency’s original meaning of the term ‘energization’ in the standard, [and for this reason] OSHA concludes that this action would not result in any costs, compliance burdens, or additional employer responsibility other than what the Final Economic Analysis for original § 1910.147 (OSHA, 1989).” 81 Fed. Reg. 68,529.

This conclusion is misguided. OSHA admits that its compliance officers are currently applying a set of factors to determine whether the LOTO standard applies, including whether sufficient warning systems make LOTO unnecessary because startup would not be unexpected. The proposed revision will require that the LOTO standard be applied to a much broader range of maintenance and servicing operations and will have significant economic impacts on the regulated community. The proposed revision to the LOTO standard will result in major time

delays for servicing. Requiring LOTO for routine maintenance where automated warning systems are in place to protect employees will lead to inefficient repairs with no added safety benefit. Additionally, sunk costs associated with existing warning systems that will become obsolete under the proposed revisions have not been considered. Widely available safety information shows that automated warning systems (rather than lockout/tagout, which relies on personnel and is thereby subject to human error) are reliable and effective at alerting employees to potential electric hazards.

OSHA also recognizes that the proposed revision “may change the frequency or number of violations cited and the amount of fines assessed due to improved employer understanding of the revised language . . .” *Id.* However, OSHA does not find these increased costs to be material. CEEC respectfully submits that any potential increase in enforcement, or the severity of enforcement, represents a material cost that must be fully vetted as part of the formal rulemaking process.

Further, many companies with global operations, including many CEEC members, will be subject to inconsistent regulatory requirements across the globe as a result of the proposed removal of “unexpected” from 29 C.F.R § 1910.147(a)(1)(i). OSHA’s proposed revision will place U.S. operations at odds with regulatory approaches used in many other occupational safety programs worldwide. For example, the international machinery standard addressing lockout/tagout also applies only to “unexpected” hazards. *See ISO 14118 Safety of machinery – Prevention of unexpected start-up.* Many companies implement unified platforms using the latest in safety technology for machine safety across all of their operations. The proposed revision will seriously compromise their ability to implement such unified platforms and will put OSHA’s standards at odds with other standards worldwide, which will impact U.S. facilities’ ability to compete in a global marketplace.

c. Legal Considerations

The proposed rulemaking notes the Sixth Circuit’s decision in *Reich v. General Motors Corp., Delco Chassis Div.*, 89 F.3d 313 (6th Cir. 1996) (“General Motors Delco”). In that case, OSHA alleged that employees were exposed to the unexpected energization or start-up of equipment, or the release of stored energy while performing maintenance activities. General Motors contested the citations arguing that its employees were not exposed to the “unexpected” energization as stated in the regulations because the equipment in question included an 8- to 12-step startup procedure, including time delays and audible or visual warnings. The court held that because these features would warn the servicing employees that the machines were about to start, the startup would not be “unexpected.” *General Motors Delco*, 89 F.3d at 316. The Sixth Circuit rejected OSHA’s interpretation and upheld the plain language of the standard. OSHA is now attempting to use this SIP to circumvent the holding of a federal appellate court through the narrow SIP process, which was never intended to be a vehicle to amend substantive OSHA regulations.

According to OSHA, the *General Motors Delco* decision fundamentally misconstrues the “unexpected” language of the LOTO standard by allowing employers to use warning and delay

systems as alternatives to following the requirements of the standard. OSHA believes that warning devices are not as protective as a LOTO program, and that the standard should not allow them to be used as an alternative to a LOTO program. OSHA further argues that “the exclusive use of warning devices subverts the intent of the standard by removing control over the hazardous energy from individual authorized employees and instead placing the burden on those exposed employees to become cognizant of and to recognize the warnings, so that they can attempt to escape danger zones before they are injured.” 81 Fed. Reg. at 68,506.

The LOTO standard is intended to protect employees from all forms of hazardous energy by isolating machines from their energy sources during servicing and/or maintenance, and providing the workers who are servicing them with control over the energy isolation devices. However, OSHA focuses its analysis of the *General Motors Delco* decision on the final warning step of an 8-to-12-step process, while ignoring the preceding 7 to 11 steps that actually constitute the alternative method of controlling hazardous energy. If considered collectively, these 8-to-12 step restraining systems arguably are equally or more reliable than the procedure for lockout, which is subject to an employee’s own actions rather than an automatic process. For instance, OSHA cites to the Occupational Safety and Health Review Commission’s decision in *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2139 & n.4 (No. 04-0475, 2007) to support its argument that an employee simply knowing that a machine is operating was insufficient to avoid an OSHA citation because the hazard was not unexpected. This decision completely ignored the preceding steps of the restraining system, which included audible or visual signals or the presence of company workers in the immediate area and would have alerted servicing employees that the machines were about to start up. Limiting an evaluation of an alternative restraining system to only the warning component of the system unfairly discounts the safeguards in place with these systems.

As OSHA points out in the preamble, OSHA compliance officers are currently using a set of 11 factors to evaluate the adequacy and reliability of warning devices. *Id.* at 68,529. After twenty years of applying these factors in the wake of the *General Motors Delco* decision, the uncertainty alleged by OSHA for the regulated community has surely been minimized. OSHA believes that removing “unexpected” from the LOTO standard will revert the standard to “its original understanding of the standard.” *Id.* at 68,507. However, as OSHA is aware, “unexpected” has appeared in the standard since it was originally published in 1989, leading one to believe that the intended original interpretation was consistent with the plain language of the standard, as the *General Motors Delco* court held. If OSHA wishes to reinterpret longstanding interpretations supported by the plain language of the standard, it should make such a substantive change through a formal rulemaking and not by alleging that its application for over twenty years has been in error. Fundamental fairness demands nothing less.

Further, the SIP rulemaking process, which is limited to removing or revising requirements that are confusing or outdated, or duplicative, is not the proper vehicle for overturning a federal appellate court’s twenty-year-old decision. OSHA states in the preamble that the impetus for this proposed revision is the *General Motors Delco* decision, which should not be considered confusing or outdated.

Any revision to the 29 C.F.R. § 1910 standard is only proper via a formal rulemaking process.

4. Conclusion

OSHA's attempt to make a substantive revision to the LOTO standard through the SIP process is inconsistent with the intended purpose of a SIP, which is limited to removing confusing, outdated, duplicative, or inconsistent regulations. If OSHA intends to revise 29 C.F.R. § 1910.147(a)(1)(i) as proposed, it should do so using OSHA's formal administrative rulemaking process, including an advisory committee of OSHA experts, research regarding the alleged hazard, consideration of the technological feasibility and economic impacts of the proposed revision, and an opportunity for the public to weigh in with comments based on a complete administrative record. 29 U.S.C. § 655. CEEC respectfully submits that OSHA's proposed revision is inconsistent with the plain language of the standard and existing interpretations, other LOTO standards, and federal case law, and is not warranted given existing safeguards such as automated warning systems.

CEEC appreciates the opportunity to comment on the proposed revisions in OSHA's SIP-IV. However, given the significance of the proposed revision to 29 C.F.R. § 1910.147(a)(1)(i), CEEC urges OSHA to pull it from SIP-IV and address it, if at all, through a formal rulemaking process instead.

Please contact me if OSHA needs additional input from CEEC members on the impact of the proposed revision, or to seek CEEC member participation in an advisory committee to evaluate the proposed revision in greater detail.

Sincerely,

A handwritten signature in black ink that reads "John Flatley". The signature is written in a cursive, slightly slanted style.

John Flatley
Executive Director