



State of Michigan
John Engler, Governor

Department of Consumer & Industry Services
Kathleen M. Wilbur, Director

Bureau of Safety and Regulation
State Secondary Complex
7150 Harris Drive
P.O. Box 30643
Lansing, Michigan 48909-8143

August 1, 1997

Mr. David John Masud
Masud, Gilbert and Patterson, P.C.
4449 Fashion Square Boulevard
Saginaw, Michigan 48603-1242

Dear Mr. Masud:

Pursuant to your request, enclosed is a Declaratory Ruling regarding the Permit Required Confined Space (PRCS) Standard and Michigan Occupational Safety and Health (MIOSHA) welding rules, Occupational Health (OH) Rules 3303(2), 3240 and the General Industry Safety Standard (GISS) Rule 1213.

We regret for any inconsistent interpretation Michigan Sugar has previously received from our staff and for the delay in our response. The Declaratory Ruling should help clarify the issues you raised. We have not received a reply from federal OSHA regarding our request that they provide a response to the issues you have raised, since, as you know, under MIOSHA's provisions we have adopted the federal standard.

If you have any questions on this ruling, please contact our office.

Sincerely,

A handwritten signature in cursive script that reads "Douglas R. Earle".

Douglas R. Earle
Director

Enclosure

STATE OF MICHIGAN
DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES
BUREAU OF SAFETY AND REGULATION

In the Matter of:

Michigan Sugar Company
a domestic corporation.

DECLARATORY RULING

Pursuant to the Administrative Procedures Act ("APA"), 1969 PA 306, as amended, MCL 24.101 et seq; MSA 3.560(101) et seq, Michigan Sugar Company, a domestic corporation, has filed an application, requesting a declaratory ruling on the following five enumerated statements which pertain to confined space regulations:

1. Can a confined space in which welding and cutting is performed be declassified if the space meets the definition of a Part 90 "permit required confined space" and the requirements Part 90, Rule 9002(c)(5) can be met?

2. Can a confined space in which welding and cutting is performed be declassified if the space meets the definition of a Part 90 "permit space", and the requirements of Part 90, Rule 9002(c)(7) can be met?

3. If, after the elimination of all hazards in a Section (c)(7) declassified space, the operations being performed within or about that space have not changed in any manner, must the space be reevaluated for hazards, and if so, how frequently?

4. If, after initial air sampling, the operations being performed within a Section (c)(5) declassified space have not changed in any manner, at what frequency must air sampling be conducted?

5. If, after the elimination of all hazards in a Section (c)(7) declassified space, the operations being performed within that space have not changed in any manner, must air sampling be conducted, and if so, how frequently?

ALLEGED FACTS

Michigan Sugar alleges that it is engaged in the business of processing beet sugar at four plant locations in Michigan and that it maintains detailed policies to ensure compliance with confined space regulations for all of its plants. Michigan Sugar further alleges that the need for its employees to enter a confined space often arises when repair or maintenance work on machinery and equipment is needed and that Part 90 of the General Industry Safety Standards, promulgated pursuant to the provisions of the Michigan Occupational Safety and Health Act (MIOSHA), conflicts with confined space compliance requirements in the welding and cutting regulations of Parts 12, 32, and 33. Finally, Michigan Sugar alleges that the Department of Consumer and Industry Services, Bureau of Safety and Regulation has failed to identify a consistent interpretation and enforcement mechanism for all confined space regulations, resulting in different interpretations of the regulations by different inspectors and conflicting guidance on confined space compliance, culminating in the receipt by Michigan Sugar of MIOSHA citations for conditions previously deemed compliant by different MIOSHA inspectors.

RESPONSE TO THE QUESTIONS

The Michigan Occupational Health and Safety Act, 1974 PA 154, as amended, MCL 408.1001 *et seq*; MSA 15.50 *et seq*, (MIOSHA) is enforced through the provisions of the Act as well as health and safety standards. Those standards are promulgated by standards promulgation commissions, specifically, the General Industry Safety Standards Commission, the Construction Safety Standards Commission, and the Occupational Health Standards Commission. In addition, certain federal Occupational Safety and Health standards, adopted or promulgated by the United States Department of Labor and codified in the Code of Federal Regulations have been adopted by and incorporated into MIOSHA by reference pursuant to the provisions of the APA.

Standards are sometimes referred to as "general" and "specific." "General" standards or rules are broadly worded regulations covering many employers in various industries. "Specific" standards or rules are detailed regulations applicable to a smaller number of employers, usually covering a particular industry, process, or task. When two or more standards apply to a particular work condition, the provisions of a "specific" standard takes precedence over the provisions of a "general" standard.

General Industry Safety Standards ("GISS") Part 90, Confined Space Entry, is a "general" standard which sets forth requirements for the practices and procedures to protect employees from the hazards associated with entry into permit required confined spaces. The provisions of Part 90 are generally applicable to all employers¹ unless they conflict with specific requirements for confined space entry in other standards. When a particular process or task, such as welding, is performed within a confined space, the standards specific to that task apply.

¹Agriculture, construction and shipyard employment are specifically exempted from the requirements of Part 90.

Due to the size and sophistication of operations at Michigan Sugar, dozens of MIOSHA standards may be applicable at any location on any day. Employees may make entries into confined spaces which are governed by the requirements of Part 90, Confined Spaces. When they make such entries to perform welding tasks, they must also comply with the regulations governing those specific tasks in confined spaces. With that background in mind, the questions will be answered in the order posed. The answers are based upon the assumption that the questions relate to "reclassification" of confined spaces as provided in Part 90.

Question 1: Can a confined space in which welding and cutting is performed be declassified if the space meets the definition of a Part 90 "permit required confined space", and the requirements of Part 90, rule 9002(c)(5) can be met?

Answer: Yes, as long as all hazards are considered. Pursuant to the provisions of Part 90, Confined Space Entry, all employers are required to evaluate the workplace to determine if any spaces are permit-required confined spaces.² A permit space may be reclassified as a "(c)(5)" space if the only hazard posed by the space is an actual or potentially hazardous atmosphere, and continuous forced air ventilation alone is sufficient to maintain the space safe for entry.³ When the final Confined Space rule was published in the Federal Register, the following notation was set forth regarding the requirements for assessing the (c)(5) status of a confined space: "Additionally, the work to be performed within the space must not introduce any hazards - work with hazardous quantities of flammable or toxic substances and hot work are not permitted".⁴ This statement is consistent with the recognition of the specific hazards associated with welding operations.

Welding and cutting operations performed in confined spaces can introduce additional hazards within the space. Those hazards are addressed by the specific regulations found in GISS, Part 12, Welding and Cutting (Rule 1213); Occupational Health Rule 3303(2), Specific Operations and Special Industries - Welding in Confined Spaces; and Occupational Health Rule 3240(5), Welding, Cutting and Brazing. For example, GISS Rule 1213 includes protections for the hazards associated with pressurized gas cylinders and electrical hazards which can, with rapid onset, endanger occupants in confined spaces. Occupational Health Rules 3240(5) and 3303(2) provide protections for the atmospheric hazards associated with welding operations in confined spaces.

Question 2: Can a confined space in which welding and cutting is performed be declassified if the space meets the definition of a Part 90 "permit space" and the requirements of Part 90, rule 9002(c)(7) can be met?

²29 CFR 1910.146(c)(1), as incorporated in 1993 MAC R 408.9002

³29 CFR 1910.146(c)(5)(1), as incorporated in R 408.9002

⁴Fed. Reg., Vol. 58, No. 9, p.4488, Summary and Explanation

Answer: A (c)(7) space, by definition, contains no actual or potential atmospheric hazards, and all other hazards within the space have been eliminated at the time of evaluation and classification.⁵ If there are non-atmospheric hazards within the space (e.g. engulfment, electromechanical) which have been eliminated, the space could be reclassified as a (c)(7) space. If welding and cutting is done within this space, the employer must comply with the provisions of the specific welding and cutting rules. The employer would then have a certification of the reclassification to "(c)(7)" status and documented compliance with the welding rules, which includes ventilation and testing.

Question 3: If, after the elimination of all hazards in a section (c)(7) declassified space have not changed in any manner, must the space be reevaluated, and if so, how frequently?

Answer: After a space has been certified as a (c)(7) space, the certification is valid for as long as the conditions within the space remain the same. The space must be evaluated upon each entry to assure the conditions of the (c)(7) certification are met. If conditions have changed, additional testing may be indicated. If the space is part of a process which is put back into production after entry, and is subsequently shut down again for entry, the space must be recertified under the (c)(7) process including air monitoring.

The importance of training and empowering employees and first line supervisors regarding the written certification and information on "prohibited conditions" must be highlighted. A prohibited condition is any change in a permit space that is not allowed by the permit during the period when entry is authorized. This would include unforeseen events as well as purposeful actions such as an employee taking a pail of solvent into the space. Such a condition would result in evacuation and reevaluation of the space. We find similar language in the certification processes involving (c)(5) and (c)(7) spaces. Rules (c)(5)(I)(A) and (G) and (c)(7)(iv) require evacuation and reevaluation upon discovery of conditions not covered by the certification. If an employer certifies a space as a (c)(7) space and some time later employees detect a condition that was not a part of the original certification, such as a strange odor emanating from the space or the space was certified in a dry condition and now has three inches of water covering the bottom, a reevaluation would be required.

Question 4: If, after initial air sampling, the operations being performed within a section (c)(5) declassified space have not changed in any manner, at what frequency must air sampling be conducted?

Answer: Part 90 provides that the atmosphere in a (c)(5) space be "periodically tested as necessary to ensure that the continuous forced air ventilation is preventing the accumulation of a hazardous atmosphere".⁶ The standard does not prescribe set time periods; however, since the goal is the preservation of acceptable entry conditions, the atmosphere should be tested as often as necessary to ensure that this goal is being met. The intensity of the hazard and the control the employer has over the exposure must be considered in determining frequency of air monitoring. Where the employer knows through experience the degree of hazard involved, has removed as much of the hazardous material as is feasible and is preventing further accumulation of the material, monitoring is performed less often. Requirements appropriate in a relatively benign space, would be preentry monitoring and

⁵29 CFR 1910.146(c)(7), as incorporated in R408.9002

⁶29 CFR 1910.146(c)(5)(ii)(F), as incorporated in R408.9002

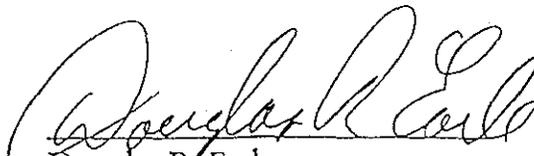
additional monitoring upon returning to the space when it has been left unattended. Where the degree of hazard is unknown, where there are significant amounts of the material in the space and the employer cannot ensure more material will not enter the space, continuous monitoring may be required. Conditions requiring continuous monitoring are more than likely to move the space out of (c)(5) status and into a full permit entry.

Representative monitoring for welding fumes would be deemed acceptable if conditions remain the same for the duration of the task. Representative monitoring for a task at one plant may not be representative of employee exposures at another plant. One must consider variations in the work spaces and individual employee work practices. In rule 3240 (5)(l)(j)(ii) and (k) the rule states that air monitoring must be done "under the most adverse conditions" and be within acceptable limits.

The second purpose of 3303 (2) and 3240 (5) recognizes the potential for acute illness and even death from a sudden lack of respirable air during the welding work. This is once again a performance approach where Michigan Sugar should indicate a policy and procedure which could be reviewed and verified with employees, supervisors and employee health records. If monitoring were to show consistently acceptable air quality, or when engineering controls cannot produce acceptable air quality but employees are protected through appropriate respiratory protection, compliance would be indicated.

Question 5: If, after the elimination of all hazards in a section (c)(7) declassified space, the operations being performed within the space have not changed in any manner, must air sampling be conducted, and if so, how frequently?

Answer: Since a (c)(7) space is one which has been certified as containing no actual or potential hazardous atmosphere and all other hazards have been eliminated, then the air monitoring initially conducted to classify the space as (c)(7) should suffice. If the space contained hazardous materials which could create a hazardous atmosphere, or if the space had significant amounts of biodegradation or oxidization within, it would, not qualify for (c)(7) status. If an actual or potentially hazardous atmosphere exists, the space might, at best, qualify as (c)(5) space, with air monitoring conducted with each entry.


Douglas R. Earle
Director

Date: 7/31/97