

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**SUMMARY
PUBLIC MEETING/ PUBLIC HEARING/ BUSINESS MEETING
September 20, 2012
Sacramento, California**

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman John MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:03 a.m., September 20, 2012, in the Auditorium of the State Resources Building, Sacramento, California.

ATTENDANCE

Board Members Present

John MacLeod
Hank McDermott
Bill Jackson
Laura Stock
David Harrison
Dave Thomas
Barbara Smisko

Board Members Absent

Board Staff

Marley Hart, Executive Officer
Mike Manieri,
Principal Safety Engineer
David Beales, Legal Counsel
David Kernazitskas,
Associate Safety Engineer
Sarah Money, Executive Assistant

Division of Occupational Safety and Health

Deborah Gold, Deputy Chief of Health

Others present

Timothy J. Maples, NOV Wilson
George Harmer, General Production
Services
Darin Jeffries, General Production
Services
Elizabeth Treanor, PRR
Russ McCrary, Ironworkers
Marti Fisher, CalChamber
Mark Stone, EPIC Insurance Brokers

Andrew Hamilton, Center for Public Internet
Law, University of San Diego School
Of Law

David Shiraishi, DOL-OSHA
Kevin Thompson, Cal-OSHA Reporter
Bob Hornauer, NCCCO
Steve Johnson, Assoc. Roofing Contractors of
the BAC
Dan Leacox, Greenberg Traurig

Dorinda Folse, USDOL OSHA
Patrick Bell, DIR/DOSH
Jim Zaben, Kings Oil Tools
Greg McClelland, Western Steel
Council
Jay Weir, AT&T
Amalia Neidhart, DOSH

Robert Hassebrock, Weatherford
Doug Van Allen, Baker Hughes
James Thomas, Nabors Well
Russ Haddadin, AMOT
David Crow, Weatherford
Carol Frehm, H.J. McDermott, Inc.

B. OPENING COMMENTS

Mr. MacLeod indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Patrick Bell, Principal Safety Engineer for the Division of Occupational Safety and Health (DOSH), commented on the Diesel Engine Runaway Protection proposal scheduled to be considered for adoption during the Business Meeting. He stated that the DOSH cannot support this proposal. The proposal cuts the distance for required safeguards on diesel engines in half (to 50 feet), which makes it ineffective in providing workplace safety from fires and explosions. He also stated that DOSH's Research and Standards Unit is currently doing a comprehensive rewrite of Subchapter 14 that will address the safety of diesel engines and other sources of ignition in petroleum drilling and well servicing operations.

Mr. McDermott asked Mr. Bell how the requirement of 50 feet compares to what is in Title 8 right now. Mr. Bell stated that right now, the DOSH only enforces the requirement regarding providing air intake shutoff devices and that they have to do that through a special order or an order to take special action, which is more difficult in terms of the way that it addresses the issue.

Mr. MacLeod asked Mr. Bell if he feels that the proposal is better than what we currently have. Mr. Bell feels that it is not better than what we currently have because DOSH currently has tools to enforce the requirement for providing air intake shutoff devices, and he feels that this proposal would undermine the Division's ability to enforce and require air intake shutoff devices on diesel engines used in well drilling and servicing operations. Mr. MacLeod asked Mr. Bell if he feels that adoption of the proposal would decrease worker safety. Mr. Bell said he believes that it will, because it will allow diesel engines to be operated within 50 feet of the well bore without requiring an air intake shutoff device. Mr. MacLeod asked Mr. Bell what the current distance requirement is in the standard. Mr. Bell stated that there is no distance requirement in the standard or in the RP 54.

Mr. Harrison asked if there have been any accidents in California due to runaway engines. Mr. Bell stated that there have been three accidents in the last 10 years. Mr. Jackson asked Mr. Bell how many special orders or orders prohibiting use has DOSH issued for this type of exposure in the last two years. Mr. Bell stated that they have not issued any in the last two years.

Deborah Gold, Deputy Chief of Health – DOSH, commented on DOSH's request for re-hearing on the Guardsmark variance. Ms. Gold stated that under the Bagley Keene Act, the Division has the right to address the Board on issues that it feels the Board needs to know about. Mr. MacLeod asked Mr. Beales if the Board could hear public comment on a variance. Mr. Beales stated that Ms. Gold was correct regarding her reference to the Bagley Keene Act and recommended that the Board hear Ms. Gold in this instance.

Ms. Gold stated that the root of the reasoning in the Guardsmark decision is the Board's acceptance of Guardsmark's policy that allows a 5-minute delay in permitting an employee to begin to access a restroom. A 5-minute delay is not equivalent to the requirement in the standard. Ms. Gold believes that the Board should review this 5-minute rule and that if the Board believes that an exception to the standard in situations like Guardsmark's is necessary, then the correct course for the Board to take is to propose an exception to the standard, let it be heard and commented on by all parties, and then adopt it into the regulation. After that has happened, it can be used to measure equivalent safety.

Ms. Gold further stated that it is difficult for the employer to prove, and for DOSH to assess, that the condition noted in the variance regarding a maximum 5-minute wait time has been met. She said that DOSH is not sure how to enforce this part of the regulation since there is no provision in the standard stating how to measure compliance with that requirement. She stated that DOSH can enforce the standard as it currently exists, and the employer can demonstrate compliance with the standard.

Russ Haddadin, AMOT employee representing Jogen Bhalla, provided and read a written statement to the Board regarding the Diesel Engine Runaway proposal, recommending that the Board not adopt the proposal. Please see the copy of the written statement for more information.

Mr. Harrison stated that a lot of time has been invested in working on this proposal, and that if the Board did not adopt the proposal today, Mr. Bhalla's original petition (Petition 516, which initiated the proposal) would expire. Mr. Harrison asked Mr. Haddadin if he was okay with that. Mr. Haddadin stated that he was not, and that he feels that there should be methods to properly address safety issues such as this where they are not held to arbitrary timelines. He also stated that if the Board asks them to re-file the petition to properly address this issue, they will do it.

Mr. MacLeod asked Mr. Haddadin if he feels that the proposal is better than what we have now. Mr. Haddadin said no.

Doug Van Allen, HSE Specialist with Baker Hughes, commented on the Diesel Engine Runaway proposal. Mr. Van Allen believes that the best way to help the industry is to offer gas monitoring at the well head where the gas is going to come out of the ground. If there is monitoring there, they will be able to shut down the engine before something happens. He also stated that revising the standard to require an automatic air intake shutoff device on all diesel engines does not address trucks coming onto the well site from out of state, and that they have no control over whether or not trucks from out of state have the required air intake shutoff

device since none of the other states require them to have the device.

Ms. Gold addressed the Board again to answer the question of how adopting the revised Diesel Engine Runaway standard will and will not improve safety. She addressed comment #3 on page 15 of the Final Statement of Reasons and pointed out that in the Board staff's response to that comment, they mention a number of regulations that may currently apply to equipment in this situation. She also stated that when this is adopted, it will be considered to be the more vertical standard, which will make it more difficult for DOSH to apply the other regulations to diesel engines outside of the 50-foot distance and compromise DOSH's ability to issue special orders. Ms. Gold also feels that this standard makes the 50-foot distance the zone of danger by definition, which is not always true. She stated that there are several other factors to consider when defining an appropriate zone of danger, such as the plume and the nature of the release. Ms. Gold feels that the revised standard is worse than nothing.

Jim Zaben, Environmental Supervisor for Kings Oil Tools, commented on the Diesel Engine Runaway proposal. He stated that there are some wells that are within a few feet of each other, so they do not have the luxury of 100 feet of distance from the well bore. He feels that adding a safety device or engineering control, such as an automatic shutoff device, as a safety measure will create additional problems.

George Harmer, Safety Director for General Production Services, commented on the Diesel Engine Runaway proposal. He feels that the proposal is more closely in line with the industry standards and what they are already doing than the standard as it is currently written. He stated that there are things that they cannot control or change, such as whether a vehicle has an automatic shutoff device on it or not, so they work with things that they can control and change. They do not allow anyone to enter the work site without notifying them of the safety hazards that exist and do not allow vehicles to run unattended at the site. He feels that the proposal is better than what we currently have.

Robert Hasebrock, QHSSE Manager, Pacific Area, Weatherford, commented on the Diesel Engine Runaway proposal. He feels that it well written and aligned with the consensus standards that the industry put together. He stated that it is difficult to expand to distances beyond 50 feet in some cases and that it could lead to abandonment of wells that they cannot control a 100-foot zone around, which could result in a loss of revenue and jobs.

James Thomas, Regulatory Affairs Manager, Nabors Well Services, commented on the Diesel Engine Runaway proposal and commended Hans Boersma for his work on the proposal. He was pleased that Mr. Boersma took the time to evaluate each of the comments, suggestions, and recommendations provided by the stakeholders when writing this proposal. He feels that the reasonable alternatives for controlling runaway engines that Mr. Boersma provided, especially regarding continuous air monitoring, was the most important part. He disagrees with the statement that this proposal will not improve employee safety because he feels continuous air monitoring will maximize the protection of the employee working at the well bore by giving the employee early notice about the situation, giving them time to take actions to correct it. He also supports testing the automatic shutoff device using the manufacturer's

recommendations. He believes that this proposal is a huge savings and is huge for the safety of employees.

Mr. Harrison asked Mr. Thomas if he can control who goes on and off the site. Mr. Thomas said yes and described his company's procedure. Mr. Harrison also asked him if the radius ever changes. James said that they do change the radius if necessary to provide safety. Mr. Harrison asked him what the largest safety zone is that he has ever had. Mr. Thomas said that the largest was 75 feet.

Tim Maples, NOV Wilson, commented on the Diesel Engine Runaway proposal. He said that they have technology that is hydraulically driven to help stop the rigs and that they are similar to the braking systems in a car. As to stopping at the weight column or tubing string with a caliper brake, he explained that a caliper brake functions like the braking system in a car because it stops the weight from free falling and hitting someone on the floor. As to the blowout preventers, he explained that when you identify a problem and take the necessary actions to shut the well bore in, the shutdown process is also hydraulically driven because there is an external source that has a triplex pump that controls it and makes the rams close onto the well pipe. If you kill that source, then you have to mechanically send the hand over to engage it with nitrogen bottles that close into the well bore, which is another safety hazard.

C. ADJOURNMENT

Mr. MacLeod adjourned the public meeting at 11:07 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Mr. MacLeod called the Public Hearing of the Board to order at 11:08 a.m., September 20, 2012, in the Auditorium of the State Resources Building, Sacramento, California.

Mr. MacLeod opened the Public Hearing and introduced the item noticed for public hearing.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4
Article 15, Sections 1610.3 and 1616.3
GENERAL INDUSTRY SAFETY ORDERS
Division 1, Chapter 4, Subchapter 7
Article 91, Section 4885 and Article 98
New Section 4993.1 and Sections 4999 and 5001
Work Area Control (Crane Swing Radius Hazards)

Mr. Manieri summarized the history and purpose of the proposal and indicated that the proposal is ready for the Board's consideration and the public's comment.

There were no public or Board comments on this proposal.

B. ADJOURNMENT

Mr. MacLeod adjourned the Public Hearing at 11:13 a.m.

III. BUSINESS MEETING

Mr. MacLeod called the Business Meeting of the Board to order at 11:14 a.m., September 20, 2012, in the Auditorium of the State Resources Building, Sacramento, California.

A. PROPOSED SAFETY ORDERS FOR ADOPTION

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4
Article 10, Section 1593
GENERAL INDUSTRY SAFETY ORDERS
Division 1, Chapter 4, Subchapter 7
Article 25, Section 3650
Use of Forklift Trucks and Excavators for Hoisting Loads
(Heard at the July 19, 2012, Public Hearing)

Mr. Manieri summarized the history and purpose of the proposal and indicated that the proposal is now ready for the Board's adoption.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. Thomas that the Board adopt the proposal.

A roll call was taken, and all members present voted "aye." The motion passed.

2. TITLE 8: **LOGGING AND SAWMILL SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 13
Article 11, Section 6325
Fueling of Helicopters Used in Logging Operations
(Heard at the August 16, 2012, Public Hearing)

Mr. Manieri summarized the history and purpose of the proposal and indicated that the proposal is now ready for the Board's adoption.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. Thomas that the Board adopt the proposal.

A roll call was taken, and all members present voted “aye.” The motion passed.

3. TITLE 8: **PETROLEUM SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 14
Article 2, Section 6505
Article 35, New Section 6625.1
Article 46, Section 6651
Diesel Engine Runaway Protection
(Heard at the November 17, 2011, Public Hearing)

Mr. Manieri summarized the history and purpose of the proposal and indicated that the proposal is now ready for the Board’s adoption.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. McDermott that the Board adopt the proposal.

Mr. Harrison stated that he has been involved in the advisory committee process for this proposal since the beginning, and in that time, there has been no consensus on this item, and no one has supported it. As demonstrated by those who spoke at today’s meeting, there is still no consensus on this matter. He also stated that he reviewed the API and RP 54, and in those documents, there are several references to a 100-foot distance, but no references to a 50-foot distance. He said that because of this, he cannot support this proposal.

Ms. Stock also expressed concern regarding this proposal. She said that she is concerned about the distance of 50 feet versus 100 feet. She read the supplement to API, which referenced the 100-foot distance many times, especially with spark arrestors, and she believes that the concern revolves around preventing ignition sources within 100 feet. She also said that being as safe as possible, as well as doing safety right the first time, makes sense, and she is concerned about this proposal becoming a precedence for future standards if it is adopted.

Ms. Smisko stated that due to the lack of consensus, as well as the fact that employers are currently using the best practices in the industry to prevent accidents and the Division’s concerns about precedence and enforcement in regards to this matter, she feels that the Board may be rushing to make a decision. She feels that by doing this, it may prevent another process from happening that might involve more people and allow a consensus to be reached on this matter.

Mr. Jackson encouraged the Board to not let the goal of perfect get in the way of much better. He feels that this proposal is an improvement over what we currently have today, which is nothing. He encouraged the Board to adopt the proposal and stated that if further improvement is needed after that, the Board can direct the staff from there to amend it.

Mr. McDermott concurred with Mr. Jackson’s statement, further adding that the folks who do not participate in proceedings like this are probably the ones who do not do what is currently

required. He believes that rejecting this proposal will allow them to continue to not do what is required.

Ms. Stock asked about the minimum amount of time that a revised version of this proposal could be brought to the Board should the Board vote it down today. Ms. Hart responded by stating that if it is indeed voted down today, it dies today and Title 8 will not change, and if the Board wants to have the staff work on it again in 2013, then the Board could direct the staff to put it on the 2013 work plan. Ms. Hart said that it is difficult to state a specific timeline as to when a revised version of the proposal could be brought to the Board due to the fact that an advisory committee would need to be convened to get new information. She explained that the timeline also depends on the issuance of federal final rules and other factors. She stated that if a revised version could even be brought back to the Board, it would probably not happen in the next six months.

Mr. Manieri also responded to Ms. Stock's question by stating that the API does not require the use of automatic shutoff devices at 100 feet and that the accident record in California does not support a 100-foot rule in terms of what has happened. He stated that there is nothing that predicates a distance greater than 50 feet and that the petitioner was asked to produce data at the advisory committee meeting on this item proving that there is a 100-foot mandate for automatic shutoff devices, but the petitioner could not produce that data.

Mr. Beales stated that Mr. Boersma worked very hard on this proposal, and there was a lot of discussion on the 50-foot radius. He stated that in reviewing the accidents that have occurred in California, Mr. Boersma found that they occurred within a 50-foot radius. That being the case, Mr. Beales feels that an opponent of the regulation could question whether there is a necessity for regulation beyond 50 feet, which might create a legal impediment going beyond 50 feet.

Ms. Hart invited Mr. Boersma to address the Board further on his findings. Mr. Boersma stated that the California and federal accident data both show that there is no need for a 100-foot safety zone and that the accidents occurred due to containment failure with an ignition source close to the well, within a 50-foot distance. He stated that they chose the 50-foot distance for several reasons, mainly because the industry felt that 100 feet is not practicable or reasonable due to work site conditions. He stated that the petitioner seemed to like the Canadian standards, so he researched the Canadian standards and discovered that each province had different mandates for safety zone distances, but he found that all of them were very effective. Mr. Boersma also stated that this proposal will require continuous air monitoring, as opposed to the periodic air monitoring that the standard requires now. The proposal also requires shut down to occur when the LEL levels are at 10%, as opposed to 20% which is what is required now. He feels that it is better to improve the standard than to throw it out and encouraged the Board to approve the proposal.

Mr. MacLeod asked Mr. Boersma if the current standard requires air monitoring at the bore head. Mr. Boersma stated that it only requires air monitoring upon arriving at the site, and then periodic monitoring after that. The proposal mandates continuous air monitoring.

Ms. Smisko asked about the length of time that it would take to either amend the standard or

bring a proposal with a revised distance listed if the Board adopted the proposal today. Ms. Hart responded by stating that the amendment process is the same as the rulemaking process. Mr. Boersma added that in reviewing the accident data, it was clear to him that those who had accidents and problems, both in California and nationally, were not following the standard that is already in place. He feels that this proposal will clarify what the requirements are.

Ms. Stock requested DOSH to speak again as to why this proposal would provide less safety. Ms. Gold responded by stating that the proposal sets up a 50-foot zone of danger, which does not exist, and that the Division does issue several special orders each year; they just have not issued any for well heads in the last few years. She stated that DOSH is also concerned about the industry thinking that anything outside of the 50-foot zone is okay. She also stated that the alternative of having the employee run to shut off their engine puts the employee in the zone of danger. She said that the API and other safety orders that the Board staff referenced do not have a required distance limit and that the API only requires a shutoff device at the well head and spark arrestors at 100 feet. Ms. Gold feels that accident levels should not be necessary to prove necessity for safety. She also feels that the Board can control how fast this item can be brought back by directing the staff to make it a priority.

Mr. McDermott asked Ms. Gold to explain how the 50-foot distance would impair the DOSH's ability to write special orders or cite people. Ms. Gold began by stating that the condition requiring issuance of a special order is when no other existing standards can address the safety hazard, and she feels that this proposal would make it more difficult for DOSH to overcome the 50-foot requirement when issuing special orders. She stated that the 50-foot limit established by the Board indicates that the hazard exists only within that 50-foot distance. This could create a lot of arguments and appeals for DOSH, and Ms. Gold feels that there are ways for the Board to address this so that the Division can issue special orders or take special action. She recommended that the Board add language to the proposal stating the circumstances in which the Division can take special action or issue special orders in regards to the provisions listed in the proposal.

Mr. McDermott also asked Ms. Gold if issuing a special order in this case would only apply to drilling and production, and not any other industry. Ms. Gold replied that an order to take special action would be specifically for the operations covered by this proposal, and that the ability to write special orders would still be there for anything that is not covered by this proposal. She stated that anything not covered by the proposal would not be affected.

Mr. MacLeod went back to Ms. Stock's question of how the Division believes that this proposal constitutes a reduction in safety. Ms. Gold thinks that the distance of 50 feet stated in this proposal will be applied to other standards that have no distance requirement or have overlapping distance requirements. She stated that without this proposal, DOSH would be able to undertake enforcement at the API distance of 100 feet or wherever DOSH believes that the hazard exists. With this proposal, Ms. Gold feels that the Board is stating that the hazard only exists within 50 feet and will therefore establish the same belief in the employer's mind instead of allowing them to make their own determination.

Mr. McDermott asked Ms. Gold if any of these alternative ideas and points were raised during

the advisory committee process in time for language to be added to this proposal to address special orders. Ms. Gold stated that she did not participate in the advisory committee. Mr. Bell stated that he participated in the advisory committee, but to his recollection, they did not raise the issue in that fashion. However, they have raised the point that they could deal with it by way of a special order or special action.

Ms. Smisko asked Ms. Gold about a comment that she made earlier regarding the fact that this proposal encourages employees to go into the zone of danger to take action and asked where that was stated in the proposal. Ms. Gold referenced two sections of the proposal where it states that the diesel engine experiencing runaway shall be shut down and stated that there is nothing in the proposal saying how the engine will be shut down, and if it is not shut down by a device, employees will probably have to do it, causing them to have to go into the zone of danger to do so. She stated that if the engine is in danger of exploding, they want the employees to run away from it, not toward it.

Ms. Stock asked if the Board is allowed to make a motion to add the Division's suggested new language to the proposal without having to go to advisory committee. Mr. Beales and Ms. Hart stated that there is a one-year deadline from the date that a rulemaking is noticed during which the proposal must be adopted. Ms. Hart further informed Ms. Stock that the one-year deadline on this rulemaking is September 30, and Mr. Beales stated that if the Board mandates a change in the wording at today's meeting, then that change in the wording would require a 15-day notice, which would carry the rulemaking past the one-year deadline. At that point, a new rulemaking that is newly noticed with a new one-year deadline would have to commence, and everything would have to be started from scratch. Mr. Beales further explained that if the Board did adopt the proposal today, it could direct the staff to fine tune it in a subsequent rulemaking, which would take as long or short of a time as starting from scratch with a new one-year period would take.

Mr. Beales also stated that the argument regarding the Division's issuance of special orders is a legal red herring. He stated that if this proposal is adopted and a 50-foot safety zone is established, based on the way that DOSH has issued special orders, he does not see any logical reason why the Division could not issue special orders regarding hazards at any distance beyond 50 feet. It is the same logic that DOSH would apply to a danger in the absence of any standard. If they perceive a danger that is not covered by a specific standard, such as a danger beyond the 50-foot distance listed in the proposal, they should be able to issue a special order to address that danger.

Ms. Hart wanted to get back to Ms. Stock's question as to when this item can be re-noticed. She stated that this is the first time that she has heard anything from DOSH regarding special orders and that DOSH did not comment on the revised language that was sent out as the 15-day notice, so she was not aware that DOSH had any problems with the revised language. She stated that if this item is re-noticed with the language being proposed today plus the new language for special orders, it would start a new one-year period, go through public hearing again, and may still result in more 15-day notices because public hearings can bring up new issues.

Mr. Harrison pointed out that he was part of the advisory committees on this issue and wanted the Board to keep in mind that there were two other issues on which no consensus was reached. The two items were regarding accelerated concentrations of flammable atmosphere and the rate of their concentration in comparison to human error.

Ms. Smisko commented that according to what was heard today, whether the Board denies the proposal and it has to be started again from scratch or the Board adopts the proposal and then makes some changes, the timelines for both are the same. She also stated that if the proposal is adopted and then changes are made as directed by the Board, then in the interim, we will have an additional level of safety in that we will have automatic monitoring.

Mr. MacLeod commented that he agrees with Mr. Jackson because he does not believe the proposal is less safe than what we already have. He also agrees with Mr. McDermott that the folks who have not been participating in this process are probably not following the current standard. He believes that the proposal will give the Division enforcement capabilities and that 50 feet is better than what we have now. He also believes that if the Board does not adopt the proposal today with the continuous air monitoring provision, we will be missing that critical safety component.

Mr. Thomas stated that he does not feel comfortable voting on this proposal because there is a lot of dissent on the issue. However, he does agree that continuous air monitoring is better than what we have now. He stated that the Board will need to address the other items that Mr. Harrison brought up.

A roll call was taken. Mr. Harrison, Ms. Stock, and Mr. Thomas voted “no”, and all other members present voted “aye.” The motion passed.

At 12:21 p.m., Mr. MacLeod called for a break. The meeting was called back to order at 12:35 p.m.

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Mr. Beales asked the Board to adopt the proposed decisions in all of the matters listed on the consent calendar, all of which grant variances.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. Harrison to adopt the consent calendar as modified.

A roll call was taken, and all members present voted “aye.” The motion passed.

2. Petition for Re-Hearing regarding OSHSB File No. 11-V-148 (Guardsmark, LLC)

Mr. Beales stated that parties in legal hearings, such as DOSH, that do not like the decision are not entitled to endless hearings until they get the decision that they want. He told the Board that there are three legal grounds stated in the Standards Board's regulations for granting a petition for re-hearing (Title 8, Section 427 (a)) and that as a matter of law, DOSH has not met those grounds in this matter. Based on this, he feels that as a matter of law, the petition for re-hearing should be denied and that DOSH should apply for either a revocation of the variance or modification of the variance, which Labor Code Section 143 allows them to do. He also stated that the 5-minute wait time issue was not litigated before the hearing panel at the time of the variance hearing. If DOSH feels that the 5-minute wait time is not acceptable, it should apply to revoke the variance. If DOSH feels that a requirement should be added to log the wait time, it should apply for a modification of the variance. Mr. Beales feels that neither issue is a basis for a re-hearing. He stated that a re-hearing would mean starting over again from scratch and would leave other parties disadvantaged in ways that the law does not contemplate. He feels that Guardsmark received the variance that it was entitled to based on the record that was presented during the hearing, and that variance was unanimously approved by the Board. He encouraged the Board to adopt the proposed decision to deny the petition.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. McDermott to adopt the proposed decision (the proposed decision was to deny DOSH's re-hearing petition).

Mr. Harrison asked Mr. Beales if any labor representatives were present at the hearing. Mr. Beales stated that there were no labor representatives present. Mr. Harrison then asked Mr. Beales if there were any labor representatives present on behalf of the Board. Mr. Beales stated that Mr. MacLeod and Mr. Jackson were present. Mr. Harrison stated that installing a portable toilet near the guard shack seems to be a simple fix to this situation and asked why that had not been done. Mr. Beales stated that it is not a simple fix due to the fact that it is unclear where the portable toilet can practicably be installed near the guard shack and whether or not the toilet would be flushable, which it would need to be in order to comply with the regulation. Mr. Harrison stated that whether there is a re-hearing or some other process in regards to this matter, he would like for a labor representative to be involved as this issue moves forward. Mr. Beales responded by stating that there is a procedure to have a labor representative present as this item moves forward if that is the Board's desire.

Ms. Stock stated she feels that the variance does not provide equivalent safety and wanted to know how we move forward from here. She also asked to hear from Ms. Gold why she believes that a re-hearing is necessary.

Mr. Beales asked if he could address Ms. Stock's question before Ms. Gold did. He stated that the regulations say that a petition for re-hearing may be filed by any party within a certain period of time "upon the following grounds, and no other": the Standards Board acted without, or in excess of, its power, the decision was not supported by substantial evidence, or the decision was contrary to the law. He believes that none of those basic facts exist in this case. In his opinion, the proposed re-hearing petition decision as it exists responds to those arguments

and states the reasons why there is no legal basis for a petition for re-hearing. He believes that it is legally required that the Board deny the petition.

Ms. Gold stated that DOSH disagrees with Mr. Beales in that they do believe that the Board's decision was granted contrary to the law. She also stated that a re-hearing does not mean that a full re-hearing of the matter will be necessary. She cited section 427.3 from Title 8, California Code of Regulations, which states that if a re-hearing is granted, it can be a limited re-hearing or a review of the record. The type of re-hearing is at the Board's discretion. She stated that DOSH disagrees with the Board's findings listed in item number 2 under "Findings of Fact" in the Proposed Variance Decision for this case, because they does not feel that the procedure that the gatehouse guard must go through to access a restroom complies with the first sentence in 3364 (b) that states that restrooms shall be available to employees at all times. She stated that DOSH also disputes that the 5-minute wait time rule that the Board established in this case provides equivalent safety to what is stated in 3364(b), stating that the 5-minute rule does not even exist in the standard.

Mr. McDermott asked Ms. Gold how this relates to the course of options that Mr. Beales laid out. Ms. Gold said that in regards to revocation, the burden at the original variance hearing is on the applicant to prove equivalent safety to the standard listed in 3364(b). She feels that the applicant did not prove equivalent safety to the provision in 3364(b) regarding restrooms being available to the employees at all times and that the Board evaluated equivalent safety based on a 5-minute standard that does not exist. She also feels that the procedure that the gatehouse employee has to go through to access a restroom does not equate to restrooms being available to the employees at all times. She believes that a re-hearing is the best course of action in this case because the Board granted the variance based on a standard that does not exist.

Mr. Beales told the Board that 3364 does not state that a restroom has to be immediately available at all times; it states that restrooms are to be accessible to employees at all times. He also stated that "accessible" is a very vague term and is not made clear in the standard. The Appeals Board's Decision After Reconsideration does not address this matter; it addresses the 200-foot rule. Mr. Beales also stated that DOSH did not argue about the 5-minute maximum wait time condition at the variance hearing; they only argued about the 200-foot rule. He said that the 5-minute wait time issue was raised at the variance hearing and that no dispute was raised at that time. It was agreed that the 5-minute wait time would occur regardless of whether or not a portable toilet is installed and regardless of where the toilet is located in relation to the guard shack, because someone would still need to travel to the guard shack to relieve the person there. He also stated that DOSH did not dispute this at the variance hearing.

Mr. McDermott commented that DOSH has recourse in filing to revoke the variance. He also stated that the employer already has the decision, so the Board would not be shortcutting the process by voting to do a re-hearing.

Mr. Harrison asked how long it takes to file for a revocation of a variance. Mr. Beales stated that it is done in the same way as a variance application and that the only thing governing how long it will take is the 60-day period that DOSH takes to do an evaluation. Mr. Harrison asked Ms. Gold if she concurred with that. Ms. Gold stated that it would probably take six months.

Mr. Jackson stated that he was present at the variance hearing and that the hearing panel believed that the applicant showed equivalency to the standard at that time. He also reminded the Board that they all voted unanimously to grant the variance based on the panel's recommendation. He believes the Board should make their decision based on the record that already exists and not allow the Division, the applicant, or even the Board staff to change the path based on information that is not part of the record.

Ms. Stock stated that to make the best decision for protecting workers in this case, she feels that it would be better to have a re-hearing to look at the issues again and allow the representation that Mr. Harrison noted was missing during the first hearing. She feels that the benefits of having a re-hearing outweigh the downsides.

Mr. MacLeod asked Mr. Beales if DOSH can base their petition for re-hearing on the fact that they believe the decision was made contrary to law because they feel that the requirements in the variance do not meet the standard of equivalence. Mr. Beales said that DOSH can argue that there is not equivalent safety, but they would be bound by the record of the hearing. Mr. MacLeod asked if the burden of proof at a re-hearing would be on the applicant. Mr. Beales said yes. Mr. MacLeod wondered why the burden of proof would be on the applicant during a re-hearing rather than on DOSH since DOSH is the one that is dissatisfied. Mr. Beales stated that the Evidence Code has provisions dealing with burden of proof, which are cited in the proposed re-hearing petition decision.

Mr. Harrison asked if Ms. Gold had any further comments on this issue. Ms. Gold stated that the Board made their initial ruling in error, and she believes that the only way to correct that error is to have a re-hearing. She also stated that the Board staff and DOSH staff recommended to the Board in the beginning that the Board not grant the variance because it was not equivalent safety. She said that the Division did not stipulate that the 5-minute rule in the variance was acceptable. She feels that a re-hearing will allow everyone to go back and start over again from scratch.

Mr. Beales responded by saying that during the variance hearing, he mentioned the 5-minute wait time and asked if that time would be necessary regardless of how far away the restroom is located from the guard shack. He stated that no party disagreed with that point and that the Division did not speak of any problems regarding the wait time at that time, so therefore, the wait time was not an issue.

Ms. Stock stated that if there was not equivalent safety and the Board made an error in its decision, then she feels a re-hearing would be the appropriate way to address this situation. She asked for Mr. Thomas to comment. Mr. Thomas stated that if the Board made a decision that the Division didn't like or agree with, the Division has the right to appeal it through the appeals process, and he feels that is the correct way to handle this situation. In response to this, Ms. Gold stated that a re-hearing is an appeal. Both Mr. Beales and Mr. Thomas replied that an appeal is not a re-hearing, and Mr. Beales added that one of three specific grounds, which the Division has not met, must be met to permit a re-hearing.

A roll call was taken. Mr. Harrison and Ms. Stock voted “no”, and all other members present voted “aye.” The motion passed.

C. OTHER

1. Legislative Update

Mr. Beales stated that all of the bills listed in the Board packets passed the Senate. Of those bills, the Governor only signed Senate Bill 1099 which sets specific dates throughout the year that regulations are to take effect.

2. Executive Officer’s Report

Ms. Hart reminded everyone to send in their information if they want to remain on the public mailing list.

She also spoke about an article in the Cal/OSHA Reporter regarding the Federal OSHA Annual Monitoring Evaluation Report and stated that there had been some concern about it. Ms. Hart stated that this report was for the federal fiscal year that was from October 1, 2010 to September 30, 2011 and that in March, after the advisory committee meeting, Federal OSHA was informed that the Board would not be moving forward with the payment for required personal protective equipment rule and was sent the advisory committee meeting minutes. She stated that there has not been any feedback from Federal OSHA since then, so recently, the staff sent federal OSHA another letter stating the PPE findings again and asking that the matter be concluded.

Ms. Hart also stated that the Board and staff have been asked to reduce travel expenditures this fiscal year to a level even lower than last year, which will result in many of the Board meetings taking place in Sacramento, with a few Southern California meetings (most of them will be same-day trips). She also said that on August 30, 2012, the staff bid farewell to Fu Yiu (Yo-Yo) who has been a Student Assistant on the Board staff for 6 years. Due to the recent hiring restrictions imposed by the Governor, the staff is unable to fill her position, but her duties have been redistributed to other administrative staff.

3. Future Agenda Items

Mr. McDermott stated that he would like to address a problem with the advisory committee process. He wants to address how to handle situations where someone has a product to sell and files a petition with the Board in an attempt to advertise or sell that product. He feels that the current process to handle those types of cases is very time-consuming, and he would like to figure out how to handle that better.

Mr. Harrison stated that he would like for the Board staff to address some of the issues brought up during today’s meeting regarding automatic shutoff devices for diesel engines and bring recommendations to the Board on those issues. He was mainly concerned with the issues regarding a 50-foot distance versus a 100-foot distance, continuous air monitoring, and human

reaction time versus human error. Ms. Hart asked him what he meant by recommendations. Mr. McDermott suggested that the Board staff put together a pro and con statement for each of the issues, listing facts for and against each one. Ms. Stock also wanted to know what the API said regarding this issue. Ms. Hart stated that she has a letter from the API that she will bring to them and that the staff will put together a side-by-side pro/con document regarding each of the issues that Mr. Harrison asked about in time for the November Board Meeting.

Ms. Smisko also asked for an update on Safe Patient Handling from DOSH and wanted to find out when it will come back to the Board. Ms. Gold stated that DOSH plans to send out a revised draft of the proposal to the advisory committee members next week for review, will give them a month to respond, and will have an additional advisory committee if necessary. In the meantime, DOSH is working on the Initial Statement of Reasons. DOSH plans to bring a proposal to the Board before the end of this year and will keep Ms. Hart advised of any changes that arise along the way.

Ms. Hart told the Board the Board staff can put an update from DOSH on all agendas in the future. Several Board Members indicated that would be a good idea. Ms. Gold stated that it would also be helpful to DOSH if the Board and staff let them know ahead of time what items they would like an update on.

D. ADJOURNMENT

Mr. MacLeod adjourned the Business Meeting at 1:47 p.m.