

Memorandum

To : ALL STANDARDS BOARD MEMBERS

Date: October 7, 2011

From : **Occupational Safety and Health Standards Board**
Conrad Tolson, Senior Engineer - Standards

Subject : **General Conditions in Shipyard Employment, Federal Final Rule (Horcher)**

At the September 15, 2011, Public Hearing, the Occupational Safety and Standards Board considered revisions to California Code of Regulations, Title 8, Subchapter 18, Ship Building, Ship Repairing and Ship Breaking Safety Orders, Articles 1, 3, 4, 6, and 8. The rulemaking proposal also included an incidental revision to Subchapter 7, General Industry Safety Orders, Article 109, Section 5194.1. These standards are substantially the same as the Federal Final Rule promulgated on May 2, 2011, by the U.S. Department of Labor, Occupational Safety and Health Administration (Federal OSHA), revising its standards on General Working Conditions in Shipyard Employment found primarily in federal 29 CFR Part 1915. The federal revisions update existing requirements to reflect advances in industry practices and technology, consolidate some general safety and health requirements into a single subpart, and provide protection from hazards not addressed by existing standards, including the control of hazardous energy.

Labor Code Section 142.3(a)(3) exempts the Board from providing a comment period when adopting a standard substantially the same as a federal standard. However, as indicated in the Notice and Informative Digest, the Board still provided a comment period for the purpose of identifying only issues related to the following two areas: 1) identify any issues unique to California related to this proposal which should be addressed in this rulemaking and/or a subsequent rulemaking and, 2) solicit comments on the proposed effective date.

There are no modifications to the information contained in the Staff Development Memorandum except for the following substantive modifications that are the result of public comments and/or Board staff evaluation.

Section 8356, Control of Hazardous Energy (Lockout/Tags-Plus).

This section, as originally proposed, with the exception of subsection (o), "Information and Training," would have become effective the same time as other parts of the shipyard rulemaking. A commenter noted that the shipbuilding industry trade association, the Shipbuilders' Council of America (SCA), is in negotiations with Federal OSHA regarding the Subpart F rulemaking process and that Federal OSHA has issued a memorandum to Regional Administrators to delay citations under section 1915.89 (Lockout/Tags-Plus). The SCA has also petitioned the U.S. 4th Circuit Court of Appeals, for review of the federal rulemaking process. Although Federal OSHA has not issued direction to state-plan states regarding these matters, the Board notes that the

original Federal Final Rule contained a 3-month phase-in for section 1915.89. Accordingly, the Board proposes to incorporate the federal 3-month phase-in into the state standard, thus effective dates of Section 8356, subsections (c) and (o) have been amended accordingly and new subsection (a)(5) has been added.

The purpose and necessity for these modifications is to provide the same time allowance as offered by Federal OSHA for implementation of lockout/tags-plus provisions.

SUMMARY AND RESPONSE TO ORAL AND WRITTEN COMMENTS:

I. Written Comments

Van A. Howell, CSP, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, Oakland Area Office, by letter received August 23, 2011.

Comment:

The proposal to adopt the Federal Final Rule for General Working Conditions in Shipyard Employment, published in the May 2, 2011 Federal Register, under the state's Horcher process, except for editorial and format differences and where existing state standards provide a higher level of protection, is commensurate with federal standards.

Response:

The Board thanks Mr. Howell for his comment and participation in the rulemaking process.

Robert C. Massey, Manager, Safety and Industrial Hygiene, General Dynamics NASSCO, by email received September 9, 2011.

Mr. Massey stated that NASSCO is one of the six largest shipyards in the country, and by far the largest member of the shipbuilding industry in California. His company is generally supportive of the rulemaking proposal; however they have two issues of concern with the federal rule which also apply to California's proposal:

Comment No. 1:

Lighting: the Applicant is concerned that the adoption of the specific lighting tables in CFR 1915.82 into Title 8, Section 8391.3, could be interpreted to mean a specific foot candle threshold is required regardless of the work activity in the area, and that there is a potential for a wide interpretation of the standard, possibly to include every square foot of the shipyard. The commenter provided a copy of a memorandum to OSHA Regional Administrators from Deputy Assistant Secretary Richard Fairfax establishing a temporary citation policy for certain provisions (including lighting) of the Federal Final Rule for Shipyard Employment. The memorandum delayed citations of 29 CFR 1915.82, Lighting, from August 2, 2011, through October 31, 2011.

Response:

The state counterpart for 29 CFR 1915.82 is Section 8391.3. Although Federal OSHA's citation policy applies to 1915.82, and delays citations on that section through October 31, 2011, Federal

OSHA has not contacted nor authorized California to delay enforcement of this section. It is likely however that, due to built-in review times in California's Administrative Procedures Act, Section 8391.3 won't become effective until after that date. The Board therefore won't be able to offer any other relief beyond the anticipated administrative review process.

Comment No. 2:

The Lockout/Tags-Plus provisions of 29 CFR 1915.89 (state counterpart Section 8356) present challenges to the shipbuilding industry in the areas of coordination and interface with the U.S. Navy. The new rules emphasize a highly centralized process through a Lockout/Tags-Plus Coordinator. Because of the large number of system tag outs and technical expertise required to safely isolate systems, the shipbuilding industry has favored a more decentralized model. Under the new rules, the Navy exercises the coordinator function on commissioned vessels, but they are exempt from the Tags-Plus provisions, meaning that although the Navy functions as the coordinator, the ship builder still remains responsible for individual accountability requirements of group tag outs, although they do not control the system tag out. The SCA is working with Federal OSHA to clarify these matters. Noting that the state has six months to adopt federal promulgations, the commenter requested the Board to delay the effective date for lockout/tags-plus to May 31, 2012, to allow the interchange between the industry and Federal OSHA time to play-out.

Response:

The Federal Register¹ established an effective date for the Federal Final Rule of August 1, 2011, except for the provisions of 1915.89 which were to become effective October 31, 2011, under the original rule. The Board has received no other direction from Federal OSHA and is obligated to adopt federal standards within 6 months of the federal promulgation. However, in consideration that the federal standard included a 3-month phase-in for section 1915.89, the Board will modify their proposal to include a similar 3-month phase-in for state counterpart Section 8356.

The Board thanks Mr. Massey and NASSCO for their interest and participation in the rulemaking process.

II. Oral Comments

Oral comments received at the September 15, 2011, Public Hearing in Sacramento, California.

Robert C. Massey, Manager, Safety and Industrial Hygiene, General Dynamics NASSCO.

Comment:

Mr. Massey reiterated the comments made in the NASSCO letter received by email on September 9, 2011.

Response:

See response under "Written Comments" above.

¹ Federal Register, Vol. 76, No. 84, May 2, 2011, page 24576.

The Board thanks Mr. Massey for appearing at the Public Hearing and for his participation in the rulemaking process.

DETERMINATION OF MANDATE

These standards do not impose a mandate on local agencies or school districts as indicated in the Staff Development Memorandum.