

Memorandum

To : ALL STANDARDS BOARD MEMBERS

Date : November 2, 2015

From : **Occupational Safety and Health Standards Board**
Michael Nelmda, Senior Engineer, Board Staff

Subject : *Confined Spaces in Construction (Horcher)*

At the October 15, 2015 Public Hearing, the Occupational Safety and Standards Board considered revisions to California Code of Regulations, Title 8, Construction Safety Orders, New Article 37, New Sections 1950 through 1962, Confined Spaces in Construction. These standards are substantially the same as federal standards.

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 (Informative Digest), the Board still provided a comment period for the purpose of identifying only issues related to the following three areas: 1) any clear and compelling reasons for California to deviate from the federal standards; 2) any issues unique to California related to this proposal which should be addressed in this rulemaking and/or subsequent rulemaking; and, 3) solicit comments on the proposed effective date.

As a result of public comments, there were no changes made to the original proposal.

SUMMARY OF WRITTEN AND ORAL COMMENTS

I. Oral Comments:

There were no oral comments at the October 15, 2015 Public Hearing in Sacramento, California.

II. Written Comments:

Michael Donlon, PE, CSP, Chief Safety Officer of Department of Water Resources, Safety System, by electronic mail submission on August 31, 2015.

Comment: Mr. Donlon requested that the proposal should include the removal of Section 5156(b)(2)[A], the requirement for construction operations to comply with Section 5158, Other Confined Space Operations. Mr. Donlon explained that Section 1502 is clear that the Construction Safety Orders takes precedence over the General Industry Safety Orders for construction activities so Section 5156(b)(2)[A] should be removed. He contends that failure to do so will cause confusion to the regulated public as to which regulation they must comply with for construction operations.

Response: Under the proposed standard, Section 1950(c) states:

(c) Where this standard applies and there is a provision that addresses a confined space hazard in another applicable Title 8 standard, the employer shall comply with both that requirement and the applicable provisions of this standard.

While the provisions within Section 5158 and proposed Article 37 both address confined spaces in construction, a review of the provisions within both Article 37 and Section 5158 did not result any direct conflicts. The Board recognizes, however, the implementation of both the proposed Article 37 and Section 5158 may present a concern to employers. This concern may be relieved through additional rulemaking.

The Board thanks Mr. Donlon for his comments and participation in the Board's rulemaking process.

Robert Mahan, CHST, Safety Specialist for Pacific Gas and Electric, by electronic mail submission on September 11, 2015.

Comment: Mr. Mahan is requesting clarification on the application of Section 5158, Other Confined Spaces, with the incoming implementation of Confined Spaces in Construction. Mr. Mahan identified subsections within Section 5156(b)(2) which states:

(2) The confined space definition along with other definitions and requirements of section 5158, Other Confined Space Operations shall apply to:

(A) Construction operations regulated by section 1502;

...

(F) Natural gas utility operation within distribution and transmission facility vaults defined in Title 49 Code of Federal Regulations Parts 191, 192 and 193; or

(G) Electric utility operations within underground vaults. See section 2700 for a definition of vault.

Mr. Mahan quoted a partial list of operations within of the provision of Section 1502(a):

construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts

Mr. Mahan questioned whether utility companies performing the operations listed above, would "still be allowed to perform work in accordance with Section 5158 other confined spaces"—rather than Article 37.

Response: The application of Section 1502 must be read in its entirety to determine under what circumstances and locations the Construction Safety Orders apply. Work performed by utilities is governed under both the proposed Article 37 and Section 5158 when the activities performed by the utilities constitute employment in connection with "*construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its part*" or "*all excavations not covered by other safety orders for a specific industry or*

operation.” Additionally, utility companies performing work “*at construction projects*” must comply with Section 5158 and the proposed Article 37 as well.

In addition, please see the response to Mr. Donlon’s comments.

The Board thanks Mr. Mahan for his comments and participation in the Board’s rulemaking process.

Paul Burnett, Safety Program Administrator, Environmental Health and Safety Unit, Santa Clara Valley Water District, by electronic mail submission on September 29, 2015.

Comment: Mr. Burnett proposed to delete “in that order” from Section 1952(e)(2)(C) and to remove the order from which tests are conducted with direct reading instruments from Section 1953(a)(5)(C).

Mr. Burnett questioned whether it is necessary, with the advent of multi-gas meters, which display gas detection concentrations simultaneously, that the order in which measurements are taken need to be preserved. Mr. Burnett doubts that single gas testers remain on the market. Mr. Burnett believes the requirement to be outmoded, comparing the requirement to test gases in the order prescribed by the proposed standard to “notifying Cal/OSHA of an injury by telegraph.”

Response: Single-gas testers are still sold and there are instances where multiple toxic gases are to be evaluated. The order of testing is important to employees in instances where more than one direct reading instrument is used to test for multiple airborne toxins.

To provide context to Mr. Burnett’s position, the OSHA Technical Manual states:

Order of testing: Confined spaces, such as sewers and well pits, commonly contain a hazardous atmosphere which may be oxygen deficient and contain a flammable or toxic gas. Many flammable gas sensors are oxygen dependent and will not provide reliable readings in an oxygen deficient atmosphere. Therefore, oxygen content must always be determined before taking combustible gas readings. Flammable gases and vapors are tested second because the risk of fire or explosion is typically more life threatening than exposure to toxic air contaminants. Monitoring for toxicity is usually conducted last. This monitoring process is greatly simplified by using a multi-gas monitor containing sensors for oxygen, LEL, and the relevant toxic gases.

The Board thanks Mr. Burnett for his comments and participation in the Board’s rulemaking process.

Fabian Rousset, Safety Specialist, Verengo Solar, by electronic mail submission on October 2, 2015.

Comment: Mr. Rousset requested that the Confined Spaces final code specify that residential attics could be preemptively presumed as confined spaces, and not as permit confined spaces.

Mr. Rousset believes applying the costly procedures on a residential home that are applied to oil storage tank, sewer line, or other permit confined space would be inappropriate.

Moreover, Mr. Rousset believes that the costs of the atmospheric sensors, an attendant, local municipal costs on local emergency response (fire department) would be excessive for the purposes of performing residential electrical attic run or inspection.

Response: California language is verbatim from the Federal OSHA Regulation:

29 CFR 1926.1203(a):

*Before it begins work at a worksite, each employer must ensure that a **competent person identifies all confined spaces** in which one or more of the employees it directs may work, **and identifies each space that is a permit space**, through consideration and evaluation of the elements of that space, including testing as necessary. [Emphasis added]*

The employer's competent person is responsible for the identification of locations that are confined spaces. The competent person must then determine which identified confined spaces must be classified as permit spaces based on the nature of the hazards present.

The duty to classify a confined space as a permit space is that of the employer's competent person. However, it is improper to assume that an identified "confined space" is absent of a hazardous atmosphere without the required proper evaluation and "testing as necessary."

If a confined space is not deemed a permit space, the requirements of an attendant and emergency response are not required unless the condition within the space changes, resulting in permit space conditions. The entry into the space and the accompanying hazards must be addressed through permit confined space requirements.

The Board thanks Mr. Rousset for his comments and participation in the Board's rulemaking process.

Jay Weir, CSP, OHST, ARM, Senior Manager – EHS Corporate Compliance, AT&T Corporate Compliance, by electronic mail submission on October 14, 2015 with attached letter dated October 15, 2015.

Comment 1: Mr. Weir requested that the proposed rule specifically clarify that telecommunication manholes do not fall within the newly proposed Article 37 of the Cal/OSHA Construction Standards, unless hazards would not be adequately addressed by controls set forth in Title 8, Subchapter 21, and more specifically, Section 8616, which continues to serve as the applicable vertical standard within the telecommunications industry.

Mr. Weir outlined the requirements within Section 8616 and broadly the Telecommunication Standards provisions for safety. Mr. Weir opined that operations within manholes in the telecommunication industry do not constitute a high hazard exposure, if the proper procedures are followed. Mr. Weir based his opinion on an analysis of manhole related injuries within the telecommunication industry. His position is that excluding telecommunications manholes where hazards are adequately addressed by controls set forth in Title 8, Section 8616 will not divert the intent of the new rule's applicability to the construction industry, while clarifying the employer's obligations and eliminating confusing requirements for similar operations conducted in telecommunication manholes.

Therefore, Mr. Weir contends that the proposed Confined Spaces in Construction Rule should be modified to make it clear that the proposed Article 37 does not apply to the telecommunication industry, which is already governed by the vertical standard.

Response 1: The Telecommunication Safety Orders apply to manholes and unvented vaults where they are existing. Section 8600(b) of the Telecommunication Safety Orders:

*(b) Operations or conditions not **specifically** covered by this Article are subject to all the applicable orders contained in the other Safety Orders, including but not limited to the following: General Industry, **Construction** and Electrical Safety Orders. [Emphasis added]*

The Board notes the applicability of Section 8616 for telecommunication work within existing manholes and unvented vaults.

From Section 8616:

*The provisions of this section apply to the guarding of manholes and street openings, and to the ventilation and testing for gas in manholes and unvented vaults, **where telecommunications field work is performed on or with underground lines.** [Emphasis added]*

While manholes and unvented vaults are undergoing construction activity or no work is performed on or with underground lines—the Construction Safety Orders apply “at construction projects”.

Federal OSHA did not move to exclude telecommunication manholes from the Federal Confined Space in Construction. In fact, as Mr. Weir had highlighted, “communication” manholes were specifically referenced as an example of “locations where confined spaces may occur”.

The Board also recognizes the 1993 Federal Final Rule for the Confined Spaces in General Industry Safety Orders, which did reflect Federal OSHA's position as it relates to communication work in manholes and underground vaults in general industry:

Under current OSHA practice, as outlined in §1910.5(c), confined spaces that are presently regulated in other sections of Part 1910 will continue to be regulated

under those sections, to the extent that permit spaces are already regulated under those sections. For example, telecommunication work in manholes and underground vaults is normally covered under §1910.286(o). Such work will continue to be covered under the telecommunication standard, and the provisions of §1910.146 would not apply as long as the provisions of §1910.268(o) protect against the hazards within the manhole. Confined Spaces that are not covered by any other OSHA rule will fall under §1910.146. [Emphasis added.]

An additional note was also contained within the 1993 Federal Final Rule:

Taking the telecommunications example further, the Agency can envision manholes that may be more appropriately covered by §1910.146. Although it is rare, manholes can become overwhelmingly contaminated with toxins or other hazardous chemicals (Washington Tr. 159, 165). If the work could not be made safe before entry, as required by §1910.268(o)(2)(i)(B), entry would have to be performed under the provisions of §1910.146. [Emphasis added.]

This explanation is notably absent in the Federal Final Rule for the Confined Space in Construction. Instead, Federal OSHA promulgated the following:

1926.1201(c)

*Where this standard applies and there is a provision that addresses a confined space hazard in another applicable OSHA standard, the employer must comply with **both** that requirement and the applicable provisions of this standard. [Emphasis added]*

Moreover, the communication aspects of proposed Article 37 are not addressed within the provisions of Section 8616 and are addressed in a limited extent in Section 5158. At construction projects, communication between all affected contractors present, the controlling contractor, host employer, and owners is critical to ensure hazardous operations do not endanger trades within the confined space and vice versa.

Comment 2: Mr. Weir raised that a petition is before the U.S. Court of Appeals for the Fifth Circuit that clarifies the points he raised and requested that the Board defers to the outcome and interpretation of that litigation.

Response 2: To the best of the Board staff's knowledge, the subject Federal Rule remains in effect and subject to enforcement notwithstanding possible litigation which may or may not effect that status at a future time.

The Board thanks Mr. Weir for his comments and participation in the Board's rulemaking process.

Kevin Brinkman, PE, National Elevator Industry, Inc. (NEII) Code and Safety Director, NEII, by letter dated October 15, 2015.

Comment: Mr. Brinkman raised concerns that Federal OSHA's Confined Spaces in Construction standard is in the initial stages of implementation and questions related to the application of the rule on construction sites and the interaction among controlling contractors, host employers and other contractors on multi-employer worksites have yet to be resolved.

Mr. Brinkman also raised what he characterizes as confusing and misleading information regarding the designation of confined spaces and permit required confined spaces. He specifically cited two publications by OSHA, which he used to demonstrate the perceived inconsistency.

The first, is an OSHA FactSheet – Confined Spaces in Construction: Pits though Mr. Brinkman does not indicate the portion of the publication he believes conflicts and it is not clear to Board staff to which he may be referring.

Second, is from the Federal Final Rule [Federal Register Volume 80, Number 85 (Monday, May 4, 2015)] Page 25374-25375:

It is important to note that only the presence of a hazard inside a confined space will trigger the majority of procedures required by this final rule. One commenter asserted that limited egress is a continual hazard to every employee in a confined space, regardless of whether any other hazards exist (ID-060, p. 3). Therefore, the commenter argued that the permit requirements of this final rule, including the requirement to have a rescue service available, should apply to all confined spaces, even those spaces in which another hazard does not exist. This approach would apparently treat all confined spaces as permit spaces, which would be a radical departure from OSHA's longstanding treatment of confined spaces in the general industry.

OSHA does not agree that such a departure, or the additional costs that employers would incur because of such departure, are warranted in the absence of employee exposure to some hazard inside the confined space. Limited egress in a confined space is a safety concern only when an employee cannot readily exit a confined space to avoid being exposed to a hazard within the space. Limited egress, by itself, is unlikely to injure or kill an employee. If limited egress is the only safety concern, then OSHA concludes that it is not reasonable to require employers to comply with the provisions of this final rule that pertain to permit spaces. In such a circumstance, employers already must follow existing construction standards that apply to work in an enclosed space (for example, Sec. 1926.353--Ventilation and protection in welding, cutting, and heating at, and Sec. 1926.55--Gases, vapors, fumes, dusts, and mists).

Mr. Brinkman urged the Board to “proceed with caution” or even delay the adoption of the federal requirements while the “implementation challenges” are addressed, presumably at the federal level. Mr. Brinkman requested an opportunity to meet with appropriate personnel within the Division to discuss any potential deviations from the federal standard. Mr. Brinkman

requested a discussion related to the automatic classification of elevator pits as either permit spaces or confined spaces.

Response: Mr. Brinkman’s concerns are noted. The Board finds no inconsistency in the publication presented and the passage of the Federal Final Rule Mr. Brinkman references. With respect to the treatment of all confined spaces as permit spaces, there is no basis within the proposed rule, or the Federal equivalent from which the California rule is based, that demands that all spaces are to be deemed “permit spaces”. As addressed in response to Mr. Rousset’s comments, that it is the duty of the employer’s competent person to identify confined spaces then the identify the subset of confined spaces that are permit spaces through a proper evaluation and “testing as necessary.”

In his comments, Mr. Brinkman commented “stakeholders are still grappling with questions related to the application of the rule on construction sites and interaction among controlling contractors, host employers, and other contractors on multi-employer worksites.” Proposed Article 37 specifically assigns responsibilities to each entity. It is unclear to which interactions Mr. Brinkman is referring based on the comment.

Mr. Brinkman also requested discussions with Cal/OSHA personnel regarding any potential deviations from the automatic classification of elevator pits as permit space. The Board encourages Mr. Brinkman to participate in any future rulemaking regarding this topic.

The Board thanks Mr. Brinkman for his comments and participation in the Board’s rulemaking process.

**David Y. Shiraishi, MPH, Area Director, Region IX, U.S. Department of Labor,
Occupational Safety and Health Administration, by letter dated October 22, 2015.**

Comment: Mr. Shiraishi commented that the proposed regulations are commensurate with the federal standards.

Response: The Board thanks Mr. Shiraishi for his comments and participation in the Board’s rulemaking process.

DETERMINATION OF MANDATE

These regulations do not impose a mandate on local agencies or school districts.