

Memorandum

To : ALL STANDARDS BOARD MEMBERS

Date: February 7, 2020

From : **Occupational Safety and Health Standards Board**
Michael Manieri, Principal Safety Engineer, OSHSB

Subject : **Cranes and Derricks in Construction: Operator Qualification [HORCHER]**

At the June 20, 2019 Public Hearing, the Occupational Safety and Standards Board considered revisions to California Code of Regulations, Title 8, Construction Safety Orders (CSO), Sections 1618.1 and 1618.4, Cranes and Derricks in Construction: Operator Qualification [HORCHER]. These standards are substantially the same as federal standards.

Labor Code subsection 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 and/or Board staff evaluation, the following changes have been made to the original proposal.

Subsection 1618.1(d)(1)(A):

This subsection, as originally noticed [and copied from 1618.1(b)(2) as presently published], stated: “If no accredited testing agency offers certification examinations for a particular type of equipment, an operator will be deemed *qualified to operate* that equipment...”

As a result of a comment received, and comparison with federal text, the subject verbiage is further proposed to be replaced with the corresponding federal language: “deemed *to have complied with the certification requirements of this section for* that equipment...” [Emphasis added to highlight the modification]

The rationale for this change to the previously proposed verbiage is that it more clearly precludes an operator from being considered qualified to safely operate equipment without also being trained and evaluated by the operator’s employer. This change will retain or enhance safety and will also conform state verbiage to federal verbiage.

Subsection 1618.1(d)(2):

This subsection, as originally noticed, stated that for a certification to satisfy the requirements of Option 1, the crane operator testing organization providing the certification had to be an “accredited certifying entity”, and it then went on to list specific criteria for being accredited, including ISO/IEC 17024:2003(E).

As a result of a comment received from the National Commission for the Certification of Crane Operators (NCCCO), and comparison with federal text, this verbiage is further proposed to be changed to the federal text “the certification shall be accredited by an *approved* nationally recognized accrediting agency based on that agency’s determination that industry-recognized criteria for written testing materials, practical examinations, test administration, grading, facilities/equipment, and personnel have been met.” The term “approved” has been added to federal verbiage to assure that the state will retain oversight in determining acceptable criteria. [Emphasis added to highlight the modification]

The commenter noted that reference to the International Organization for Standardization (ISO), International Electrotechnical Commission (IEC) 17024 standard was unnecessary because American National Standards Institute (ANSI) accreditation is in and of itself a pathway to compliance with the ISO standards. Moreover, the edition of the ISO/IEC standard referenced is obsolete and the standard is updated on a regular basis. Harmonizing state criteria with federal criteria for accreditation will improve the portability of operator certification documentation, and by adding “approved”, the state will retain oversight of the process.

Subsection 1618.1(g)(3):

This subsection, as originally noticed, required that the written certification examination be “developed, validated, and administered in accordance with the Standards for Educational and Psychological Testing (Copyright 1999) published jointly by the Joint Committee of the American Educational Research Association, the American Psychological Association, and the National Council in Measurement in Education.”

As a result of a comment received from NCCCO, the subsection is proposed to be revised to read: “... developed, validated, and administered in accordance with generally accepted industry best practices.”

The commenter asserted that it is nearly impossible for any test developer to meet all the standards listed; however, the test developer strives to meet or utilizes this Standard as guidance. Furthermore, as previously noted, editions change, and the current edition of the referenced standard is 2014, not 1999.

This proposed modification will retain the substance of the state standard and delete the reference to an obsolete standard less readily available to the regulated public.

Subsection 1618.1(g)(3)(A)7:

This subsection, as originally noticed, required the written exam to test knowledge and skills identified as necessary for safe crane operations including knowledge of “this Article” (CSO Article 15).

A comment received from NCCCO noted that National certification exams cannot take into account state-specific requirements. The Board accepted this comment and therefore proposes to replace “this Article” with a reference to 29 CFR 1926, Subpart CC. This modification is effectively verbatim the federal standard, and 29 CFR 1926, Subpart CC is the standard upon which CSO Article 15 is based.

SUMMARY OF WRITTEN AND ORAL COMMENTS

I. Written Comments

Ms. Amber Rose, CIH, Area Director – Oakland Area Office, Occupational Safety and Health Administration, Region IX, by letter dated May 28, 2019.

Comment:

Ms. Rose stated that OSHA completed review of the proposed safety and health standard; Title 8, Construction Safety Orders, Sections 1618.1 and 1618.4, Cranes and Derricks in Construction: Operator Qualification (Horcher), and the proposed standards appear to be commensurate with the federal standard.

Response:

The Board thanks OSHA Region IX for their comments and participation in the rulemaking process.

Mr. Bradley Closson, President, CRAFT Forensic Services, by email dated June 9, 2019.

Comment No. 1:

Subsection 1618.1(f)(1)(A) requires the employer to ensure through an evaluation that each operator is qualified by a demonstration of the skills, knowledge, and ability to safely operate the size and configuration of equipment he/she will be operating;"

The commenter stated that current operator certification entities (NCCCO, NCCER, etc.) do not test on the various computer-based operator aids (e.g. Load-moment indicators and limiters, rated capacity indicators, etc.) that are proprietary, uniquely designed and installed in each crane model by its manufacturer.

He then asked about what process or program the Division will accept for verifying that the operator has the "knowledge" and "skill" to safely operate cranes in various configurations using proprietary computer-based systems. He stated additional guidance is needed as to what specific training or demonstration will be needed to satisfy this requirement.

Response:

Subsection 1618.1(d)(1)(A) requires certification by crane type, and uses the phrase "qualified to operate a particular type of equipment..." These qualifiers should provide the mechanism to ensure that operators are qualified for the type of equipment they will be operating. However, if further clarification or assistance is required, the commenter may wish to direct this question to the Division's Crane Unit.

Comment No. 2:

Some currently used certification programs do not require the accomplishment of any "machine set-up" in their certification programs and thus the commenter opines they do not to satisfy subsection 1618.1(d)(1) [*Ed. Note: this comment also includes subsection 1618.1(f)(1)*]. The commenter wanted to know what programs the Division accepts as meeting this requirement.

Response:

Board staff contacted the commenter for more information, and he clarified that machine set-up includes both the set-up of the crane on-site and also computer set-up. As an accident investigator, he said he had seen numerous cases where certified operators don't know how to use computers and controls in the cranes they are operating, and he is of the opinion that this is an important subject that needs to be addressed in the certification or evaluation process. The Board will be unable to respond to these concerns as additional training or evaluation that might be required to respond to the commenter's concerns are outside the scope of the Horcher rulemaking.

Comment No. 3:

Subsection 1618.1(f)(2): There is a provision that for operators employed prior to the effective date of this standard, the employer may rely on its previous assessments of the operator in lieu of conducting a new evaluation of operator's existing knowledge and skills.

The commenter stated that additional guidance is needed to define what documentation, other information or process will be required to allow an employer to "rely on its previous assessments."

Response:

The language closely conforms to the language of the corresponding federal provisions, 29 CFR 1926.1427(f)(2). Also, subsection 1618.1(f)(5) prescribes documentation for operator assessments going forward, which can serve as guidance for "previous assessments."

The Board thanks Mr. Closson for his comments and participation in the rulemaking process.

Mr. Graham Brent, Chief Executive Officer, National Commission for the Certification of Crane Operators (NCCCO), by letter dated June 19, 2019.

Comment No. 1:

Proposed subsection 1618.1(a) states, in part, that "The employer shall ensure that each operator is trained, certified/licensed, and evaluated in accordance with this section..." The commenter requests that the verbiage be modified to read: "The employer shall ensure that each operator is *qualified by virtue of being* trained, certified/licensed, and evaluated in accordance with this section..." [Emphasis added to highlight the modification]

The rationale for their request is that the ultimate goal of training, certification and evaluation is to ensure that a crane operator is qualified. Since the Standard makes numerous references throughout to "qualified," they are of the opinion that it is important to define this term at the outset.

Response:

This request would require a substantive change outside the scope of the Horcher process [Labor Code, subsection 142.3(a)(3)], and thus cannot be implemented in this rulemaking.

Comment No. 2:

The commenter notes that proposed subsection 1618.1(b)(4)(A)3 requires trainers to have the knowledge, training, and experience necessary to direct an operator-in-training on the equipment in use and that they possess a valid certificate of competency for the type of crane operated by the trainee.

He added that NCCCO strongly supports the requirement that trainers should be certified. However, they also recommend the insertion of additional verbiage after this sentence, to read: “If no accredited testing agency offers a certificate of competency for a particular type of crane operated by the trainee, the trainer must possess a valid certificate of competency for the type of crane that is most similar to the crane operated by the trainee.” The commenter’s rationale is that this modification would improve the quality of training and also increase safety during training in the event the operator-in-training engages in an unsafe act and the trainer must intervene.

Response:

This request would require a substantive change beyond the scope of the Horcher process and thus cannot be implemented in this rulemaking. For the record the comment inadvertently left out (A) in reference to subsection 1618.1(b)(4)(A)3. Paragraph (A) connects the comment to authorized trainers.

Comment No. 3:

Proposed subsection 1618.1(d)(1)(A) states, in part, that an operator will be “*deemed qualified*” to operate a particular piece of equipment if the operator is certified under this subsection... and that “If no accredited testing agency offers certification examinations for a particular type of equipment, an operator will be *deemed qualified* to operate that equipment if the operator has been certified for the type that is most similar to that equipment and for which a certification examination is available.” [Emphasis added to highlight the modification]

The commenter requests replacing the phrase “deemed qualified” with “deemed to have met the certification requirements of this paragraph” in both instances where it is used. The rationale is that the proposed verbiage as written might lead to the misconception that an operator could be considered qualified to safely operate equipment without also being trained and evaluated by the operator’s employer. A similar rationale was used by Federal OSHA when that Agency adopted language similar to the foregoing recommendation in the final rule.

Response:

The Board notes that subsection 1618.1(d)(1)(A) was previously subsection 1618.1(b)(2)(A) and that it was imperfectly melded with federal verbiage as part of the Horcher modifications. The Board is persuaded by this comment and proposes to modify subsection 1618.1(d)(1)(A) to be taken verbatim from the federal verbiage as was requested by the commenter.

Comment No. 4:

Proposed subsection 1618.1(d)(1)(A) sets forth requirements for operators to be certified for “that type, or type and capacity of equipment or for higher-capacity equipment of that type.”

NCCCO recommends the deletion of the phrase “or type and capacity” from this verbiage so that it will only read: “that type of equipment.” Their rationale is that removing the reference to “type and capacity” brings this provision in line with other references in this standard.

Response:

The Board is unable to make the requested modification within the limitations of the Horcher process which require state verbiage to be “substantially the same” as federal, and in this case the federal verbiage uses the phrase “type and capacity.”

Comment No. 5:

Proposed subsection 1618.1(d)(2) states, in part, that “ANSI accreditation shall be in accordance with the requirements of the ANSI, International Organization for Standardization (ISO), International Electrotechnical Commission (IEC) 17024:2003(E), Conformity Assessment-General Requirements for Bodies Operating Certification of Persons, which is hereby incorporated by reference.”

NCCCO requests deletion of this sentence in its entirety. Their rationale is that reference to ISO 17024 is unnecessary, because ANSI accreditation is in and of itself a pathway to compliance with the ISO standard. Moreover, the edition of the standard referenced has been superseded, and is subject to being superseded in the future by new editions as the standard is updated on a regular basis.

Response:

The proposed verbiage was moved forward from previous subsection 1618.1(b)(3) to new subsection 1618.1(d)(2). The Board had originally proposed to retain existing state reference standards for accredited certifying entities; however, the Board is persuaded by the commenter’s rationale, to adopt the federal verbiage for this subsection and to delete obsolete state references dating back to a 2003 rulemaking for Section 5006.1. However, a state specific reference is further proposed to require that the nationally recognized accrediting agency be state approved in order to retain existing state oversight for approval of accrediting agencies.

Comment No. 6:

Proposed paragraph 1618.1(d)(3) states that “Crane operators shall re-certify every five (5) years.” The commenter recommends amending the language to read: “Crane operators shall re-certify at least every five (5) years.” Their rationale is that since the recertification process may take several months and certification bodies allow for that in the “window” they provide to certificants to recertify (NCCCO offers a 12- month window, for example), the proposed language would be more accurate in reflecting actual practice.

Response:

The federal counterpart for subsection 1618.1(d)(3) is 29 CFR 1926.1427(d)(1)(iv). 29 CFR 1926.1427(d)(4) is related in that it prescribes that certification is valid for 5 years. However, the federal verbiage does not contain the requested “at least” verbiage. Thus, the commenter’s request to add “at least” is outside the scope of this Horcher adoption, and the Board declines to incorporate this comment.

Comment No. 7:

Proposed paragraph 1618.1(d)(3) states, in part, that, “Operators with at least one-thousand (1,000) hours of documented experience operating the specific type of crane for which re-certification is sought as covered by this section during the immediately preceding certification period and who meet the physical examination, substance abuse, and examination requirements set forth in subsections (g)(1)-(g)(3) of this section shall not be required to take the “hands-on” examination specified in subsection (g)(4) of this section to re-certify.”

The commenter recommends deleting this sentence in its entirety. Their rationale is that while a recertification requirement is clearly essential for the integrity of the certification process, it should be left up to the certification organizations themselves to determine the appropriate pathways for that recertification to be accomplished. There is no consensus among the accredited certification bodies as to how the practical exam component of the recertification exam should be formulated, and there is a risk of disenfranchising thousands of certified operators if this prescriptive requirement is adopted.

All accredited certification organizations must abide by the requirements of the entities that accredit them (ANSI or NCCA) as well as the standards to which they are held, which include requirements for recertification. Adherence to these standards is sufficient for maintaining the integrity of accredited certifications, while providing a degree of flexibility for the accredited certification bodies on how they develop and administer their programs.

Response:

The exception for operators with 1,000 hours of documented experience is in the current CSO subsection 1618.1(b)(4) and is also in General Industry Safety Orders (GISO) subsection 5006.1(d). Deletion of this section would upset consistency between CSO and GISO, and furthermore is outside the scope of the Horcher process, thus Board declines to accept this recommendation.

Comment No. 8:

Proposed paragraph 1618.1(g)(1) would require Accrediting Certifying Entities to issue certificates to operators who have passed a physical examination.

The commenter recommends that this requirement be deleted. Alternatively, this requirement should be moved to paragraph 1618.1(f) Evaluation. Their rationale is that physical qualifications may be different for (1) each crane type and (2) the job being undertaken. A national certification program cannot, and is not designed to, take into account the differing demands that a particular type of crane may place on a crane operator working in a particular setting, and is not able to predict the type of work and the surrounding circumstances that a crane may be engaged in. To be clear NCCCO is not suggesting that physical requirements are not important in helping to establish that crane operators are qualified; rather, that this responsibility is more properly and effectively borne by the employer who uniquely has the information needed to make the appropriate evaluation about the crane operator’s physical capability on any given piece of equipment on any given worksite.

Response:

The physical examination is currently a requirement for certification in CSO subsection 1618.1(b)(1)(A) and GISO subsection 5006.1(a)(1). Relocating the requirement for a physical exam to the new “Evaluation” section would be a substantive change outside the scope of the Horcher process, thus the Board declines to accept this recommendation for purposes of this rulemaking.

Comment No. 9:

Proposed paragraph 1618.1(g)(2) would require Accrediting Certifying Entities to issue certificates to operators who have passed a substance abuse test.

The commenter recommends that this requirement be deleted. Alternatively, this requirement should be moved to paragraph 1618.1(f) Evaluation. Their rationale is that there are no standardized substance abuse tests for the crane industry. Each job location and/or employer may have varying substance abuse test requirements. Further, substance abuse tests are not portable. They clarified that NCCCO is not suggesting that compliance with substance abuse requirements is not important in helping to establish that crane operators are qualified, rather that this responsibility is more properly and effectively borne by the employer who evaluates the crane operator working at a particular job site.

Response:

Substance abuse testing is currently a requirement for certification in CSO subsection 1618.1(b)(1)(B) and GISO subsection 5006.1(a)(2). Relocating the requirement for substance abuse testing to the new “Evaluation” section would be a substantive change outside the scope of the Horcher process, thus the Board declines to accept this recommendation for purposes of this rulemaking.

Comment No. 10:

Proposed paragraph 1618.1(g)(3) would require that the written exams taken by candidates be developed, validated, and administered in accordance with the Standards for Educational and Psychological Testing (Copyright 1999) published jointly by the Joint Committee of the American Educational Research Association, the American Psychological Association, and the National Council in Measurement in Education.

The commenter recommended that this requirement be restated as follows:

“... developed, validated, and administered in accordance with generally accepted industry best practices.”

The commenter takes issue with requiring the written exam to be developed, validated and administered in in accordance with the Standards for Educational and Psychological Testing (Copyright 1999) because it is nearly impossible for any test developer to meet all of the standards listed. They assert that the test developer strives to meet or utilizes the Standards as guidance. They also note that, as mentioned earlier, standards change, and that the current edition of the referenced standard is 2014, not 1999.

Response:

The Board accepts this comment to the extent that it proposes to delete the specific reference to the obsolete Standards for Educational and Psychological Testing (Copyright 1999), and to replace it with “generally accepted industry best practices” which will retain the substance of the state standard and delete the reference to an obsolete standard not readily available to the regulated public.

Comment No. 11:

Proposed paragraph 1618.1(g)(3)(A)(7) would require Accredited Certifying Entities to issue certificates only to those crane operators who, among other requirements, have passed a written examination that demonstrated (s)he has the information necessary for safe operation of the specific type of equipment (s)he will operate, including “This Article, including incorporated materials.”

The commenter recommends that this requirement be considered a part of the employer’s evaluation process and that it be moved to paragraph 1618.1 (f) “Evaluation”. Their rationale is that national certification exams cannot take into account state-specific requirements. With respect to any areas in which the proposed state standard deviates from the federal standard, on which all national crane operator certification programs are based, these areas are better addressed in practice by the employer as part of the evaluation process.

Response:

The Board is persuaded by this comment to the extent that the reference to “this Article” (CCR Title 8, Article 15), will be replaced with a reference to 29 CFR 1926, Subpart CC. This change will make state verbiage effectively verbatim to the federal standard.

The Board believes the concept expressed in subsection 1618.1(g)(3)(A)(7) pertains to the areas of skill and knowledge prospective crane operators are to possess to be deemed certified following the operator's evaluation as specified in subsection 1618.1(f). The proposed preceding subsection 1618.1 (f) is intended to clarify to the employer what the evaluation process consists of in terms the necessary knowledge and skillsets and specifically how the operator is to be evaluation is to be made. It is the Board's view that these are two entirely different requirements that should remain grouped as they are proposed consistent with the federal standard. Consequently no modification to the proposal will be made with regard to this specific comment.

Comment No. 12:

Subsection 1618.1(f) establishes minimum criteria for the person who performs the required evaluation of an operator-in-training. Under the proposed standard, the evaluation must be conducted by an individual who possesses the knowledge, training, and experience necessary for assessing an operator’s knowledge, skill, judgment, and ability.

The commenter recommended that evaluators be required to be certified operators, by requiring that the evaluator “possess a valid certificate of competency for the type of crane operated by the operator-in-training.” Alternatively, evaluators should be required at least to have passed the written part of a certification test and have familiarity with the equipment’s controls, consistent with the requirements for trainers set forth in existing paragraph (f)(3). Their rationale is that as

with the criteria for trainers, certification may not be an appropriate “sole” criterion or a sufficient indication of competence as an evaluator, but it should be regarded as an appropriately necessary condition of establishing such competence and ensuring a “baseline” of knowledge and skills.

Response:

The commenter’s recommendation for the evaluator to be a certified operator is outside the scope of this Horcher rulemaking. With respect to requiring the evaluator to have passed the written part of a certification test, Board believes this is already adequately covered by existing subsection 1618.1 (f)(3).

Comment No. 13:

Proposed subsection 1618.1(b)(4)(A)(3) sets forth requirements for persons who provide operators-in-training with sufficient training to ensure they operate equipment safely. Similarly, proposed subsection 1618.1(f)(3) sets forth requirements for persons who perform the required evaluations of operators-in-training. However, under this proposed Standard, evaluators are not precluded from also acting as trainers.

The commenter recommends that trainers should be precluded from acting as evaluators within the framework of the standard. Alternatively, trainers should be precluded from acting as evaluators with respect to any operator whom the evaluator has previously trained. Their rationale is that individuals responsible for training operators are less likely to be in a position to effectively evaluate operators for whom they provide training services. Furthermore, this separation of training and assessment functions is a requirement of both ANSI and NCCA accreditation and is a key provision of the ISO standard governing personnel credentialing. By separating the training and evaluation functions, the proposed Standard is more likely to result in outcomes that ensure the quality of evaluations and improve worksite safety.

Response:

The Board is persuaded by the commenter’s assertion that individuals responsible for training operators are less likely to be in a position to effectively evaluate operators for whom they provide training services, and the Division has prohibited this practice.

See response to written comment No. 5 above and modifications made to subsection 1618.1(d)(2) which require the crane operator testing organization providing the certification to be accredited by an approved, nationally recognized accrediting agency based on that agency’s determination that industry-recognized criteria for testing have been met. As the commenter has noted, separation of these functions is required by industry-recognized standards (e.g. ANSI, NCCA, ISO), thus Board is of the opinion that the commenter’s concerns have been satisfied by the modifications made in response to written comment No. 5.

Comment No. 14:

Proposed subsection 1618.1(f)(4) states that “the employer may allow the operator to operate other equipment that the employer can demonstrate does not require *substantially different* skills, knowledge, or judgment to operate.” [Emphasis added to highlight the modification]

NCCCCO opines that the language “substantially different” is ambiguous. On the one hand, the language may be read to signify that an employer who has completed an evaluation may, under certain conditions, allow an operator to operate other equipment without conducting an additional evaluation. On the other hand, the language could be read to mean that, under certain conditions, the employer may allow an operator to operate other equipment without an additional evaluation and without regard to any independent requirement of certification. In other words, the language could be read to mean that an employer’s determination that no “substantially different skills, knowledge, or judgment” are required to operate “other equipment” excuses both the need for any additional evaluation and the need for any particular certification. Thus, in addition to allowing the employer to determine whether an additional evaluation is necessary when operating “other equipment,” subsection (f)(4) could be construed to mean that an employer has authority to interpret the scope of a certification program or category or to simply ignore the scope of the certification.

NCCCCO requests that the Board clarify the proposed subsection (f)(4) to indicate that the employer is only determining whether additional evaluation is necessary for different equipment, and that the employer’s approval to operate “other equipment” may be given only if the operator is also certified or deemed to have complied with the certification requirements for type of the other equipment at issue.

Response:

The state verbiage is verbatim of federal 29 CFR 1926.1427(f)(5), and the suggested deviation from it are outside the scope of the Horcher rulemaking process. Thus, the Board declines to incorporate the requested modifications.

Comment No. 15:

Proposed Exception (2) states that “Operator qualification or certification under this section is not required for operation of articulating/knuckle-boom cranes having a boom length of less than 25 feet or a maximum rated load capacity of less than 15,000 pounds when used to deliver material to a construction site.”

NCCCCO recommends this sentence be deleted. Their rationale is that this does not constitute an “exception” to the Standard since the Standard is a construction standard. The activity referenced delivery to a construction site – falls under General Industry regulations and therefore is not relevant to this proposed state standard. Furthermore, retaining it risks confusing employers as to whether or not articulating knuckle-boom cranes having a boom length of less than 25 feet or a maximum rated load capacity of less than 15,000 pounds when engaged in any activity are required to be operated by a certified and qualified operator under the terms of this section.

Response:

This exception is existing verbiage in CSO Section 1618.1, Exception 2, which is not directly addressed by the federal final rule, and the original text was adopted to provide equivalency with 29 CFR 1926.1400(c)(17). Thus, the suggested deviation from this section would be outside the scope of this Horcher rulemaking.

The Board thanks Mr. Brent and NCCCO for their comments and participation in the rulemaking process.

II. Oral Comments.

Oral comments received at the June 20, 2019 Public Hearing in Pasadena, California.

Mr. Chris Badger, Safety Training Coordinator, City of Santa Rosa Water Department.

Comment No. 1:

There's a lot of confusion throughout municipal utilities regarding what is construction and what is maintenance. He noted that OSHA has issued a letter of interpretation to the effect that if you have a system of telephone poles with a hundred poles, and you replace one with an identical pole, that that is considered maintenance. However, he said, if you replace that pole with an upgraded pole, it would be considered to be construction. To him that doesn't make sense because you're replacing it with the same piece of equipment, and the same physical hazards are there. Yet the operator needs to be certified to do that work if it is construction, but not if it is maintenance. In fact, the new pole may be lighter and less hazardous to replace.

The commenter stated that the city of Santa Rosa maintains a potable water system, a sewer system and a water treatment plant. In his opinion, the City just maintains these systems; however, under the proposal, some of their work is considered construction and will require a certified operator. Thus, he emphasized the need for clarity in what is construction and what is maintenance.

Response:

The commenter has correctly noted that OSHA has a letter of interpretation regarding the subject of maintenance vs. construction. Although such clarifying does sometimes occur as part of the regulatory enforcement process, the subject federal terminology has remained in the form presently proposed for incorporation into the corresponding California regulation.

Comment No. 2:

The commenter also addressed the subject of service truck cranes. He stated that they are generally rated from 2,000 to 6,000 pounds, and they are used a lot in maintenance, but this rulemaking appears to include them in operator qualification requirements. He went on to state that, in the 37 years he has worked for the city, they have never had an injury accident with a service truck crane, and he opined that the crane standards are more appropriately aimed at large mobile cranes and that service trucks should be exempted from crane operator qualification and certification requirements.

Response:

Although the commenter did not reference a specific section for his concern, it does relate to the subject of Section 1618.1, Exception 3. Section 1618.1 Exception 3 is a legacy exception from Section 5006.1, which is included to maintain consistency with the GISO. Because of the scope of Article 15, the new requirements for operator certification and qualification will only apply to mechanic's truck crane operators if they are involved in construction activities and operating

cranes rated over 2,000 pounds. Also, it may bear noting that the scope of CSO Article 15 excludes mechanic's trucks with a hoisting device when used in activities related to equipment maintenance and repair. [CSO subsection 1610.1(c)(9), state counterpart to federal 29 CFR 1926.1400(c)(9)]

Comment No. 3:

The commenter also touched on the issue of drug testing and physicals. From his perspective, operators of mobile boom trucks are also commercial drivers and a commercial driver's license requires random drug testing and periodic physicals, and thus their license covers the requirement. However, there are smaller agencies/smaller towns that may not have employees who have commercial licenses, but they do operate service crane trucks. He opined that this proposal will require those smaller governmental entities to implement random drug testing and periodic physicals, and this will require negotiations with their union reps, as well as the issue of what the employee does outside work hours with legal recreational drugs such marijuana. He wonders how the employers will deal with drug use when the employee is not on duty.

Response:

As noted in the response to oral comment No. 2, these requirements only apply to operators engaged in construction activities using cranes and similar lifting devices with lifting capacity greater than 2,000 pounds. Furthermore, although the commenter did not identify the section of concern, to the extent it concerns proposed CSO subsection 1618.1(e)(2)(A) [currently CSO subsection 1618.1(c)(2)(A)], these are existing requirements, not part of this proposal, and thus are outside the scope of the Horcher rulemaking.

Comment No. 4:

The commenter had a question about whether municipalities, such as the City of Santa Rosa, qualify as non-military government entities [staff presumes this is referencing subsection 1618.1(a)(1) and (e)(2)]. If so, can they license their operators?

Response:

Yes, municipalities are non-military government entities, and under the provisions of subsection 1618.1(a)(1) and (e)(2), they may license their operators, subject to the limitations of subsection 1618.1(a)(1) and (e)(3); i.e., the licenses meet operator qualification requirements for operation of equipment only within the jurisdiction of the government entity (they are non-portable).

Comment No. 5:

The commenter would like to see a standard for service truck cranes modeled after GISO 3668, Powered Industrial Truck Operator Training, which specifies training topics, and in his opinion, would be more effective and easier for stakeholders to implement and use.

Response:

This request is outside the scope and limitations of the Horcher process, and therefore the present rulemaking proposal.

The Board thanks Mr. Badger and the City of Santa Rosa for their comments and participation in the rulemaking process.

Mr. Richard Thompson, CSP, National Commission for the Certification of Crane Operators (NCCCO), also referred to as (CCO), Manager, California Affairs.

Comment No. 1:

NCCCO supports proposed subsection 1618.1(a) with regard to certification and evaluation; however, they recommend that the sentence be modified to read, “The employer shall insure that each operator is qualified by virtue of being trained, certified/licensed, and evaluated in accordance with this section.”

Response:

This comment was also presented to the Board in written form by Mr. Graham Brent, CEO of NCCCO by letter dated June 19, 2019 (see NCCCO written comment No. 1). For reasons stated in response to that comment, their suggestion cannot be implemented as part of the Horcher rulemaking process.

The Board also notes Mr. Thompson’s support of the proposed language in subsection 1618.1(b)(4)(A)(3) that requires the trainer to possess the knowledge and skill-set to direct the operator in training on the equipment and has the correct training credential. Point of clarification, this specific proposed requirement is referred to by Mr. Thompson in his oral comments as subsection 1618.1(b)(4)(3), but in fact the correct cite for the passage in question is subsection 1618.1(b)(4)(A)(3) which refers to the operator's trainer's knowledge.

Comment No. 2:

NCCCO notes that proposed subsection 1618.1(d)(1)(A) includes requirements for operators to be certified for “...type, or type and capacity of equipment or for higher-capacity equipment of that type.”

NCCCO recommends the deletion of the phrase “or type and capacity” from this verbiage so that it will only read: “that type of equipment.” NCCCO notes that “type and capacity” can present a problem to some certifying entities that only certify by type alone. This modification would help clarify the requirement for them.

Response:

For reasons stated in response to NCCCO’s written comment No. 4, making this modification would be outside the scope of the present Horcher rulemaking proposal and process.

Comment No. 3:

Proposed subsection 1618.1(d)(3) states that “Crane operators shall re-certify every five years.” NCCCO recommends amending the language to read: “Crane operators shall re-certify at least every five years.” The commenter notes that the recertification process may take several months, and certification bodies allow for that with a “window” for recertification prior to the end of the 5-year certification cycle (NCCCO offers a 12-month window, for example). The proposed modification would more accurately reflect actual practice.

Response:

For reasons stated in response to NCCCO's written comment No. 6, this request cannot be accommodated because this request would require a substantive change outside the scope of the Horcher process [Labor Code, subsection 142.3(a)(3)], and thus cannot be implemented in this rulemaking.

Comment No. 4:

Proposed subsection 1618.1(d)(3) also provides that operators with at least 1,000 hours of documented experience shall not be required to take the hands-on examination specified in subsection (g)(4) to recertify. NCCCO recommends that that this provision be deleted in its entirety. They believe that should be left up to the certifying entities to determine appropriate pathways for recertification. They also believe that this creates a risk of disenfranchising thousands of certified operators if this prescriptive requirement is adopted.

Response:

For reasons stated in response to NCCCO's written comment No. 7, this request cannot be accommodated because this request would require a substantive change outside the scope of the Horcher process [Labor Code, subsection 142.3(a)(3)], and thus cannot be implemented in this rulemaking.

Comment No. 5:

Proposed paragraph 1618.1(g)(1) and (g)(2) would require accredited certifying entities to issue certificates to operators who have passed a physical examination and a substance abuse test. NCCCO recommends that this requirement be moved to 1618.1(f), which covers evaluation. There are no standardized physical examinations or drug tests for crane operators. NCCCO opines that this responsibility is more properly and effectively borne by the employer.

Response:

Relocating the requirement as requested would be a substantive change outside the scope of the Horcher rulemaking process (see also the Board's response to NCCCO written comment No. 8).

Comment No. 6:

NCCCO recommends deleting Exception 2 to Section 1618.1 which pertains to the operation of articulating boom cranes or knuckle boom cranes when used to deliver material to a construction site. The commenter commented that much like the digger derrick exception [Ed. Comment: this appears to be a reference to Exception No. 3] it's already in Section 5006.1 and putting what is basically a general industry provision into the construction industry standard, it will continue to create confusion as it has for years with the digger derrick exception. He stated that some people read only as far as the word "digger derrick," in the exception, and believe that that digger derrick operators are exempt from certification, and just about everything, although certifying entities know they aren't. This exception creates an additional layer of confusion that has been prevalent since 2005, when that exception was put in there.

Response:

Making changes to this exception would be outside the scope of the Horcher rulemaking for reasons explained in the Board's response to NCCCO written comment No. 15, and thus cannot be accommodated.

The Board thanks Mr. Thompson and NCCCO for their comments and participation in the rulemaking process.

Mr. Thomas Sicklesteel, CEO-Elect, National Commission for the Certification of Crane Operators (NCCCO).

Comment No. 1:

Mr. Sicklesteel opined that the California rule has gone a bit beyond federal OSHA, and he wanted to address some of the issues that this has created.

He first noted that, in the federal rulemaking, OSHA had changed the rules on operator qualification. They have moved from a concept where the operator is certified only to a qualification of certification plus evaluation by the employer. That is a significant modification. He opined that the reason OSHA did that was because there were so many configurations of cranes and so many different alternatives that there was no way to have a standardized national exam to handle all of them.

He posited that there are three different branches within the subject of operator qualification and that the California proposal may not properly account for those differences. Training is one branch, certification is another, and a third branch is employer evaluation, although he opined the third branch is not clearly distinguished in all cases. And so, there's a few situations, such as where the proposal states "The employer shall deem the employee qualified," the language is unclear.

NCCCO thinks it would be very helpful for the standard to start off by defining what "qualified" means. NCCCO believes the intent is that the employee is qualified by virtue of training, certification, and evaluation, and that this should be clarified right up at the front end of the standard [subsection 1618.1(a)].

Response:

The Board notes that the NCCCO had submitted written comments regarding the issue of modifying the proposal to include a clear definition for what is considered "qualified". This request cannot be accommodated because this request would require a substantive change outside the scope of the Horcher process [Labor Code, subsection 142.3(a)(3)], and thus cannot be implemented in this rulemaking. See also the Board's response to Mr. Graham Brent's (NCCCO) written comment No. 1 dated June 19, 2019.

Comment No. 2:

Subsection 1618.1(d)(1)(A) uses the term "deem qualified" but is unclear which branch of the tree (training, certification, evaluation) it refers to. The commenter opines that this refers to certification, so they recommend that the verbiage should actually read: "deemed to meet the

certification requirement” because simply being certified does not mean the operator meets all of the requirements and they think it is important to be specific.

Response:

This comment pertains to the same subject matter as their written comment No. 3. For reasons stated in the response to written comment No. 3, this comment was accepted and proposed subsection 1618.1(d)(1)(A) has been modified to be verbatim the federal verbiage.

Comment No. 3:

Subsection 1618.1(d)(2) prescribes accreditation requirements for a certifying agency, some of which are obsolete and are inconsistent with national practice. NCCCO recommends that it just require accreditation by NCCA or ANSI; those are the two main accrediting bodies. He stated that if the certifying agency meets those requirements, then it's an accredited agency.

Response:

This comment parallels NCCCO written comment No. 5, and the Board is persuaded by the commenter’s rationale and will incorporate federal verbiage as discussed in our response to the written comment.

Comment No. 4:

The commenter noted that subsection 1618.1(d)(3) provides a waiver of exams for recertification [Ed. Note: This appears to refer to the exception for operators with at least 1,000 hours of documented experience].

He stated that the waiver element has been, and continues to be, subject to change by ANSI as time goes on. Generally, ANSI has been tightening the waiver conditions. Thus, NCCCO doesn’t think specifying how to waiver out of a practical exam is a very good approach, especially when it may be in disagreement with ANSI. It could force accrediting agencies or certified agencies to choose between their accreditation and compliance with the state standard, and that wouldn't make sense. So NCCCO recommends striking that language. Alternatively, the verbiage could refer to industry best practices.

Response:

The comment parallels NCCCO written comment No. 7. This request cannot be accommodated because this request would require a substantive change outside the scope of the Horcher process [Labor Code, subsection 142.3(a)(3)], and thus cannot be implemented in this rulemaking.

Comment No. 5:

Referring to subsection 1618.1(g)(3), regarding the development of exams, the commenter noted that this section includes prescriptive requirements which include a specific dated standard. The commenter recommended that the reference to the dated standard be replaced with “industry best practices.”

Response:

The comment parallels NCCCO written comment No.10. See discussion under the written comment. The Board is persuaded by this comment to the extent noted in the response to this written comment No. 10.

Comment No. 6:

With reference to subsection 1618.1(g)(3)(A)7, the commenter noted that subsection (g)(3)(A) follows the federal verbiage except for (g)(3)(A)7 which replaces a federal element with reference to a California-based element. The commenter expressed concern that it requires a national exam to have a state-based element. He also was of the opinion that this requirement would fit better under subsection (f), the employer evaluation section.

Response:

This comment generally parallels their written comment No. 11. As noted in the Board's response to that written comment, it cannot relocate this provision to subsection 1618.1(f); however, Board recognizes the issue created by referencing the state standard for a national exam and will therefore change the verbiage to be consistent with the federal verbiage which will provide equivalent safety.

Comment No. 7:

Regarding the requirement for a physical exam and substance abuse testing [subsection 1618.1(g)(1) and (2)], the commenter was of the opinion that these requirements should more properly be located in the employer evaluation section [subsection (f)]. The reasons for these requests were previously discussed in NCCCO's written comments Nos. 8 and 9.

Response:

As discussed in the Board's response to NCCCO's written comments Nos. 8 and 9, these requests cannot be accommodated because these requests would require a substantive change outside the scope of the Horcher process [Labor Code, subsection 142.3(a)(3)], and thus cannot be implemented in this rulemaking.

Comment No. 8:

With reference to subsection 1618.1(f)(4), ["...the employer may allow the operator to operate other equipment that the employer can demonstrate does not require substantially different skills, knowledge, or ability..."] the commenter expressed concerns that the wording is too vague and gives employers the ability to say they don't need to evaluate employees for every single type and configuration of crane when there may be significant differences. The subsection is also unclear whether this latitude applies to certification as well. Thus, the commenter requested that the verbiage of this subsection be clarified.

Response:

This comment refers to the same concerns expressed by NCCCO in their written comment No. 14. As was noted in the Board's response to that comment, the state verbiage is verbatim from the federal verbiage, and the suggested changes would be outside the scope of this Horcher rulemaking.

The Board thanks Mr. Sickelsteel and NCCCO for their participation in the rulemaking process.

Ms. Barbara Burgel, Board Member (Occupational Health Representative), Occupational Safety and Health Standards Board.

Comment:

Ms. Burgel commented on subsection 1618.1(g)(1), where it requires a physical examination conducted by a physician. She is a nurse practitioner, and she wanted to put it into the record that nurse practitioners and physician assistants are quite capable and can often perform these exams, and surveillance exams. The language, as it's currently written, is very limited and restricts opportunities for a variety of providers. She said that the federal standard often uses a physician or other licensed health care professional. She also wanted to note that the Department of Transportation (DOT), permits the use of certified medical examiners. She noted that certified medical examiners, nurse practitioners and physician assistants can and frequently do conduct DOT exams. She concluded by saying that she just wanted to highlight that for future rulemaking opportunities, that we can include more inclusive language for individuals that are health care providers and that do these exams all over the country.

Response:

Noted by Board staff.

Mr. David Harrison, Board Member (Labor Representative), Occupational Safety and Health Standards Board.

Comment No. 1:

Mr. Harrison commented that he generally agrees with Mr. Thompson's and Mr. Sickelsteel's comments, in particular their comment regarding the removal of Exception No. 2 to Section 1618.1 [waiving the requirement for qualification or certification for operation of certain articulating/knuckle-boom cranes when used to deliver material to a construction site], and confusion between GISO and CSO. Though, he noted, that issue was otherwise being looked at as part of a rulemaking under development to possibly merge GISO and CSO requirements.

Response:

The concerns raised about operator qualification for certain applications of articulating/knuckle-boom cranes cannot be addressed as part of this current Horcher rulemaking. However, Board staff believes that Mr. Harrison is also referring to a proposed consolidation of standards for cranes in construction and general industry. Any such proposal advancing to the point of being noticed for Public Hearing will itself provide an opportunity for public comment.

Comment No. 2:

Mr. Harrison's second comment regarded a specific reference to a California standard [possibly referring to CSO Article 15 in subsection 1618.1(g)(3)(A)7] which was raised by NCCCO in their written comment No. 11 and Mr. Sickelsteel's oral comment No. 6. He expressed a concern that deleting the reference to the California standard may not be appropriate in view of the fact that the Board staff is looking to potentially consolidate standards for construction and general industry in the future.

Response:

Board staff accepted the NCCCO comments to the extent that the reference will be changed from CSO Article 15 to 29 CFR 1926, Subpart CC, upon which CSO Article 15 is substantially based. Staff does not anticipate that this change will create any conflicts between the CSO and GISO as the subject cross-reference is currently only in the CSO and furthermore because 29 CFR 1926, Subpart CC, is the basis for CSO Article 15.

DETERMINATION OF MANDATE

These regulations do not impose a mandate on local agencies or school districts as indicated in the Informative Digest.