



THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

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February 28, 2008

OSHA Docket Office,
Docket ID OSHA-2007-0026,
RIN No. 1218-AB47,
Technical Data Center,
Room N-2625,
OSHA
Department of Labor,
200 Constitution Ave, NW
Washington, D.C. 20210

Re: 29 CFR 1926 subpart AA - Confined Space in Construction Proposed Rule

Dear Docket Officer,

The Associated General Contractors of America (AGC) the largest and oldest national construction trade association in the United States with a priority on safety in the construction industry. AGC appreciates this opportunity to submit comments for the Occupational Safety and Health Administration's (OSHA) proposed rule on confined space in construction, 29 CFR Part 1926 subpart AA. AGC believes that proposed rule for confined space in construction will be complicated and costly to implement without enhancing safety beyond the General Industry Standard found at 29 CFR Part 1910.146.

Many construction firms working in confined spaces already comply with the general industry standard - 29 CFR 1910.146. There is a wealth of training materials, information, compliance assistance, and other support for the existing general industry standard. Construction employers that use the existing general industry standard are aware of the effectiveness of and costs associated with the existing standard. Industry-wide adoption of the existing standard would be implemented faster and be less costly to both construction employers and OSHA compared to creation of a new standard with unknown effectiveness and new excessive costs and cumbersome process for compliance. The proposed continuous system-permit required confined space (CS-PRCS) requirements should be included as a mandatory appendix to the current general industry standard (29 CFR 1910.146), with the inclusion of construction in the general industry standard. The proposed standard is not an improvement upon the general industry standard.

Definitions

AGC is concerned about the enforcement of and compliance with vague definitions throughout the proposed rule.

§1926.1201(a) "...sets out safety precautions that must be taken when working "within or near" a confined space." A more specific definition of "within or near" must be included in the

standard. The proposed standard refers to “in or near” or “within or near” several times and in several contexts. For example, a contractor could be welding within 100 feet of a confined space but has no intention or need to enter the confined space, because of the lack of a specific definition of “within or near,” contractors would need to classify the space and institute an appropriate protective and preventive measure without regard to the necessity, intent or act of employees working “within or near” a confined space. The term “in or near” is too ambiguous and is used frequently in the proposed standard. OSHA must clearly define this term; the lack of definition opens the door for a number of interpretations and situations.

The training requirements in §1926.1209(d)(2), usage of the term “employees who will be in or near,” which poses a difficult scenario, that any person that might be near the confined space must be trained on the hazards of performing entry rescue. This potentially could mean that anyone on a jobsite technically could be near the confined space and therefore must be trained on performing entry rescue without a clear definition.

The four classifications for confined space included in the proposed standard will confuse contractors, supervisors and workers on jobsites. These classifications will cause the potential for misidentification of the classifications. AGC believes that incorporating construction with the general industry confined space standard with inclusion of the CS-PRCS as a mandatory appendix would clarify the standard and ensure compliance.

For example, the proposed rule says the following “[i]solate or isolation means the elimination or removal of a physical or atmospheric hazard by preventing its release into a confined space. Isolation includes, but is not limited to, the following methods: blanking and blinding; misaligning or removing sections of lines, pipes, or ducts; a double-block-and-bleed system; locking out or tagging out energy sources; machine guarding; and blocking or disconnecting all mechanical linkages.” The use of the term isolate or isolation to refer to the elimination of a physical or atmospheric hazard will be confusing since the standard industry practice following the general industry standard holds that isolation refers to the control of a hazard and not the elimination of the hazard.

Controlling Contractor/Host Employer Responsibilities

The responsibility of the “controlling contractor or host employer” in this proposed rule has the potential to create significant new liability and confusion on job sites and in job situations. For instance a subcontractor may be concerned that the proposed rule will create overzealous “controlling contractors or host employers” who impose redundant and sometimes conflicting safety measures in attempt to protect them from any liability. This will be especially true in terms of the requirement for the coordination of information, documents, training and plans for the classified confined spaces in the proposed rule. The “controlling contractor or host employer” will be the primary conduit for all information and coordination. As such, the burden of overall evaluation, coordination, and control of the confined space is placed on both the “controlling contractor” and the “exposing contractor.” Unfortunately, the “controlling contractor” does not always have knowledge of exposure or control over specific work practices of sub contractors. If the “controlling contractor” does not have a contractual obligation to direct another contractor, it will be extremely difficult to fulfill the controlling contractor responsibilities as spelled out in the proposed regulation.

§1926.1204(a) “[n]either the controlling contractor nor the host employer is required to obtain the information listed in this paragraph. However, if they have it they must provide it to the contractor for the contractor’s evaluation before the contractor first enters a confined space.”

This appears to mean that the “controlling contractor or host employer” must forward data collected by other employers. This could create a liability if the precautions and procedures are found to be inadequate. If a “controlling contractor” forwards another employer’s data including procedures and precautions that were not correct that data could be used against the “controlling contractor” and/or the entry contractor. This would force the controlling contractor to evaluate and approve entry procedures and precautions for all contractors if they are going to forward that data to other contractors on site. OSHA specifically states in the preamble that the intent is to coordinate entry into the confined space safely, not to add undue burden on the controlling contractor or host employer. However, this section essentially does, just that.

Once again in §1926.1204(c)(1), this procedure could create liability for the “controlling contractor or host employer”. If the “controlling contractor or host employer” does not “approve” the procedures but was informed of the procedures; then under worker’s compensation, they could be subject to a civil lawsuit from an injured employee of another employer claiming that the controlling contractor or host employer could have knowledge that could have prevented the incident. If the “controlling contractor or host employer” does “approve” the procedures and precautions and an incident occurs those procedures and plans would be raised, along with the “controlling contractor or host employer’s” responsibility to eliminate the hazard.

Training and Record-Keeping

AGC is concerned over the ability for employers to “demonstrate proficiency” of the employee as required in §1926.1209(d)(4). This appears to require that a contractor must be able to document that an employee can demonstrate proficiency. This could require a certification or test taking method to demonstrate their level of knowledge, but it is not specified. Also, the lack of definition of “in or near” is a concern because it is a specific requirement applied to an ambiguous number of employees.

As for the retraining for an employee who deviates from the permit-required confined space (PRCS) entry operations §1926.1209(d)(6)(i) is rather extreme. AGC suggests that rather than retraining employees who have deviated from the entry procedures; perhaps establishing a better line of communication and coordination would be more reasonable. This would be dependent on the deviation of the entry procedures.

§1926.1209(e) seems to require that before any authorized entrant enters the PRCS, the employer must complete arrangements for providing for the rescue of these employees in accordance with §1926.1213. This could mean that for every PRCS the employer must make arrangements for both non-entry and entry-rescue. In situations where a physical hazard (a hazard that can cause death or serious physical harm [an OSHA recordable by definition]) exists or has a reasonable probability of existing, the space cannot be an isolated-hazard confined space (IHCS) or a controlled-atmosphere confined space (CACS), which means all spaces that require PPE must be PRCS. Then the employer must establish non-entry and entry rescue services. The financial impact of training, practice before entry, equipment, for potentially all spaces and all employees will be quite burdensome. Since fire rescue service summoned by 911 would probably not meet the “timely” response requirements that means every space/site would have to have a site specific rescue team established that meets the requirements of proposed 29 CFR 1926.1213(b).

§1926.1201 Introduction

In §1926.1201(d) “[i]f the contractor determines under §1926.1204 that the confined space is not subject to any hazards (in which case the confined space need not be classified), the contractor must complete a reassessment of that determination upon the occurrence of any of the indications for reassessment...” which leads to §1926.1207(a)(3) “[a]n employee or authorized representative provides a reasonable basis for believing that the hazard determination is inadequate.” There is ambiguity in the determination of a reasonable basis for belief that the hazard determination is inadequate, if a contractor completes a hazard determination and finds no existing or reasonably presumed hazard, but an employee or authorized representative objects and believes there is a hazard present, who makes that final determination?

§1926.1210 PRCS - Preparing for entry

§1926.1210(a) seems to require entry permits as stipulated in §1926.1214; however, it does not specify who is responsible for obtaining these permits. OSHA does not clarify if each employer must obtain a permit for entry or if the controlling contractor or host employer must obtain the entry permit and if that permit would cover all authorized personnel for each employer.

§1926.1213(a)(2)(iv) references the use of a chest or full-body harness. AGC has reservations about the requirement of chest harnesses if the harness could be pulled off an employee in a non-entry rescue (utilizing lifeline and retrieval systems) during the rescue.

This proposal establishes new requirements in crisis situations. In general OSHA has not in the past instructed how to rescue a worker; however, §1926.1213 does just that. Additionally, AGC is concerned over the cost associated with the extra man-hours and expenses placed on smaller contractors for simulated rescues, as referenced in §1926.1213(b)(1)(i) and (b)(1)(ii). Establishing a rescue before entrants enter will be costly. The majority of contractors do not have trained rescue teams and rely on the local resources such as the local fire departments (which many are refusing to do or be trained for due to liability reasons). The equipment costs to perform rescues are significant and the training to do this is expensive with the number of hours involved. A third party vendor for rescue is an additional expense that many contractors are unable to afford. Bringing them in before the actual entry for simulated rescues again is an additional expense that a lot of smaller contractors simply can't afford.

§1926.1214 PRCS - Entry permits

AGC is concerned over the cost and practicality of installing early warning systems referenced in §1926.1214(a)(2)(i)(A) and (a)(2)(i)(B). An early warning system seems like a good idea; however, this could be very expensive with little added safety value. The proposed standard does not clarify the actual time and distance needed for the early warning system. There will also be an exposure to the worker that needs to install this equipment for monitoring which is not covered.

1926.1218 - Equipment

OSHA states in §1926.1218(b)(2)(i) and (b)(2)(ii) that if the manufacturer's instructions are unavailable, that it must comply with this section. There is great potential liability for the employer if there was an equipment failure.

Conclusion

Reviewing NIOSH studies, 100% of the fatalities associated with contractors in confined spaces were a result of the contractor not taking any safety measures, such as those required in 29 CFR 1910.146. OSHA's proposed rule for confined space in construction is complicated and costly to implement without providing significant increase in safety above the existing general industry

standard. The potential liability placed on contractors is incredible, only exceeded by the responsibility of the controlling or host employer. The proposed standard must be simplified. The only true means to protect workers is to require continuous air monitoring along with continuous ventilation to ensure that the space is safe. A more specific and comprehensive study of the costs associated to comply with this standard must be done. OSHA's cost estimates are not accurate as stated in the preamble.

AGC appreciates this opportunity to comment on OSHA's proposed rule for confined space in construction. AGC urges OSHA to strongly consider and propose the inclusion of the construction industry to 29 CFR 1910.146 and include the "Continuous System-Permit Required Confined Space" (CS-PRCS) requirements as at mandatory appendix.

On behalf of our 33,000 firms, including 7,500 of America's leading general contractors and 12,500 specialty-contracting firms. More than 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC remains strongly committed to the safety of workers in the construction industry and our valued relationship with the Occupational Safety and Health Administration (OSHA).

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Shoaf". The signature is fluid and cursive, with a large initial "J" and "S".

Jeffrey D. Shoaf
Senior Executive Director
Government and Public Affairs