



February 28, 2008

BY ELECTRONIC MAIL

The Honorable Edwin G. Foulke, Jr.
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: www.regulations.gov (Docket ID-OSHA-2007-0026)

Re: Comments on OSHA's Proposed Confined Spaces in Construction Rule

Dear Administrator Foulke:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the Occupational Safety and Health Administration's (OSHA) *Proposed Confined Spaces in Construction Rule*.¹ The proposed rule would impose new obligations on employers in the construction industry to protect their employees from hazards associated with confined spaces on a construction site. This proposed rule was the subject of a Small Business Advocacy Review Panel (SBAR Panel) convened by OSHA in 2003 in accordance with the Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)³ (discussed below). While many of the recommendations of the SBAR Panel have been incorporated into the proposed rule, additional work to clarify and streamline the proposed rule is recommended.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the

¹ 72 Fed. Reg. 67352 (November 28, 2007).

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

SBA or the Administration. The RFA, as amended by SBREFA, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.⁴ Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁵ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Small Business Advocacy Review Panel

As indicated above, this proposed rule was the subject of a SBAR Panel convened by OSHA on September 26, 2003, in accordance with the requirements of the RFA. OSHA is required to convene a SBAR Panel for any proposed rule that is expected to “have a significant economic impact on a substantial number of small entities.”⁶ The SBAR Panel was assisted in its review of the draft rule by a number of “small entity representatives” (SERs) from the construction industry who took time from their busy schedules to review the draft rule and provide their advise and recommendations.

OSHA incorporated many of the recommendations of the SERs into the proposed rule, and the proposed rule is much improved as a result. Advocacy commends OSHA for taking the SBREFA panel process so seriously and for listening to the voices of small business. Advocacy also thanks the SERs for their time and valuable input. A copy of the final report of the SBAR Panel (including a full discussion of the recommendations of the SERs) is available in the OSHA docket and on Advocacy’s website at http://www.sba.gov/advo/laws/is_space.html.

Background

OSHA’s proposed rule would impose new obligations on employers in the construction industry to protect their employees from hazards associated with confined spaces on a construction site.⁷ Under the proposed rule, employers would be required to: 1) determine whether a confined space exists at a construction site; 2) determine whether there are existing or potential hazards in such space; 3) classify such space according to the physical and atmospheric hazards found in it; and, 4) follow a series of requirements to protect employees from any hazards once such hazards are classified.

⁴ 5 U.S.C. § 603.

⁵ Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53461) (August 16, 2002).

⁶ 5 U.S.C. § 609 (b).

⁷ 72 Fed. Reg. 67352.

Under the proposed rule, there would be four new classifications of confined spaces at construction sites: Isolated-Hazard Confined Space; Controlled-Atmosphere Confined Space; Permit-Required Confined Space; and, Continuous System-Permit-Required Confined Space. The proposed requirements for each type of confined space are tailored to control the different types of hazards associated with them. The rule would establish detailed requirements employers must follow, including hazard assessment, planning and protection, testing and monitoring, rescue procedures, training and retraining, permitting, and rules for entering the confined space. The rule would also establish requirements for host-employers and controlling-contractors to coordinate their activities and exchange information.⁸

It should be noted that OSHA also has a separate confined spaces rule for general industry,⁹ which is significantly different from the proposed rule for the construction industry. In fact, during the SBAR Panel process, many of the SERs specifically requested that OSHA either adopt the general industry standard for the construction industry, or try to harmonize the two sets of rules as much as possible. In response, OSHA revised and streamlined the proposed construction rule to try to make it more consistent with the general industry standard. However, based on our review of the rule and input from the SERs and other small business representatives in the construction industry, there are still concerns about the clarity and complexity of the proposed rule. Accordingly, Advocacy submits the following comments and recommendations on the proposed rule.

Advocacy's Comments and Recommendations on the Proposed Rule

1. While the proposed rule is much improved from the draft version of the rule reviewed during the SBREFA process, it is still very complicated and difficult to understand. Advocacy recommends that OSHA try to further streamline the rule and harmonize it as much as possible with the existing general industry standard (or consider adopting a single rule for both industries). Advocacy notes that many employers operate on work sites that include both general industry and construction confined spaces and employees may encounter both types of confined spaces in close proximity. As many of the SERs pointed out to the SBAR Panel, having two separate standards could double the cost of their safety and training programs (especially if they contract out these services) and cause unnecessary confusion on the job site. Further, the distinction between “maintenance” and “construction” work in various facilities is often unclear. Having two different standards increases the complexity of compliance and could ultimately increase risk. This was, and remains, a key concern of the SERs.
2. Advocacy is concerned about the host-employer and controlling-contractor provisions of the proposed rule and remains apprehensive about OSHA’s imposition of legal obligations on employers for employees who are not their own. This policy seems to

⁸ Id. at 67405 – 67415.

⁹ 29 CFR 1910.146.

emanate from OSHA's *Multi-Employer Citation Policy*,¹⁰ which has never been promulgated as a rule and whose legal status has been called into question in the recent *Secretary of Labor v. Summit Contractors, Inc.* decision.¹¹ Advocacy filed a similar comment about the host-contractor provisions in OSHA's proposed Electric Power Transmission rule.¹² Some of the key concerns of small businesses are that host employers may not even be engaged in construction work (and therefore have no expertise on confined spaces), and that contractors may be working in remote locations with no interaction or oversight. Advocacy appreciates that OSHA has tried to limit the scope of this provision by only requiring host-employers or controlling-contractors to provide information they actually possess (as opposed to having to obtain information they do not already have); however, these provisions are highly controversial and are opposed by many small businesses. Advocacy recommends that OSHA eliminate these requirements from the rule.

3. Advocacy notes that there are no single-family residential builders included in the economic analysis or the Initial Regulatory Flexibility Analysis (IRFA);¹³ however, it appears that there are confined spaces on these construction sites. If OSHA is assuming that no single-family residential builders will incur costs or be affected by the rule (possibly because OSHA is assuming that all of this work is subcontracted out and these subcontractors are already included), then OSHA should state this clearly in the rule. If not, these costs should be included in the economic analysis and IRFA (including the costs for the host-employer and controlling-contractor provisions and the paperwork and recordkeeping requirements associated with them). Advocacy notes that because the net benefits of this rule (i.e., benefits minus costs) are only \$8.2 million, the additional costs for single-family residential builders could mean that the costs of this proposed rule outweigh its benefits.
4. In the Regulatory Flexibility Act section,¹⁴ it would be helpful if OSHA clarified in the first paragraph that "an RFA analysis is required for any proposed rule that is expected to have a significant economic impact on a substantial number of small entities" (rather than saying "for certain proposed rules"). Further, OSHA should affirmatively declare in the IRFA that OSHA expects this proposed rule will have a significant economic impact on a substantial number of small entities.
5. Also, in Item 7 of the IRFA (Alternatives),¹⁵ OSHA should have summarized the significant alternatives it considered and invited public comment on them (OSHA simply mentions that some were considered). Advocacy notes that a "significant" alternative is defined as one that: 1) reduces the burden on small entities; 2) is

¹⁰ See, OSHA Directive, CPL 2-0.124 (1999) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024).

¹¹ 21 BNA OSHC 2020 (No. 03-1622, 2007) (currently on appeal to the U.S. Circuit Court of Appeals for the 8th Circuit – No. 07-2191).

¹² See Advocacy letter to The Honorable Jonathan L. Snare, Acting Assistant Secretary of Labor, January 9, 2006 (available at http://www.sba.gov/advo/laws/comments/osha06_0109.html).

¹³ 72 Fed. Reg. 67394.

¹⁴ 72 Fed. Reg. 67393.

¹⁵ 72 Fed. Reg. 67396.

feasible; and 3) meets the agency's underlying objectives.¹⁶ Since it appears that none of the alternatives OSHA considered meets these criteria, OSHA should have stated that fact and invited public comment on its determination. This is a significant issue because many of the SERs recommended that OSHA either adopt the general industry standard or harmonize the two sets of rules as much as possible.

6. Advocacy recommends that OSHA include a list of examples of confined spaces for each of the proposed categories to make the proposed standard easier to understand. For example, the only example cited for the Continuous System-Permit-Required Confined Space category is a “sewer.” It would be helpful if OSHA provided additional examples. Similarly, since the SERs and many small businesses have said they find the existing categories to be too complex and confusing, Advocacy recommends that OSHA consider providing a table with four columns listing: 1) the category of confined space; 2) examples of confined spaces under that category; 3) a sequential list of the steps an employer must take to comply with the requirements for that particular category; and 4) a cross-reference to the regulatory citation. OSHA should include this table as an Appendix to the rule as it has done for Entry Permits, which is very helpful.
7. Finally, OSHA should clarify the definition of a “confined space” itself, which is currently unclear.¹⁷ For example, it is unclear what is meant by “not designed for continuous employee occupancy.” It would be helpful if OSHA provided some examples for clarification. Also, OSHA should specifically state whether foundations, attics, and crawl spaces in single-family residential homes are considered confined spaces. Finally, OSHA should clarify whether there is any legal distinction between “enclosed” and “confined” spaces, as the term “enclosed” spaces is also used in the preamble.¹⁸

Conclusion

While OSHA is to be commended for incorporating some of the recommendations of the SBAR Panel and SERs, more changes to the rule should be made to address the burden the proposed rule would impose on small businesses in the construction industry. Advocacy appreciates the opportunity to comment on OSHA’s *Proposed Confined*

¹⁶ See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, May 2003, p. 73-75 (available at <http://www.sba.gov/advo/laws/rfaguide.pdf>).

¹⁷ A “confined space” is defined in the proposed rule as “a space that has all of the following characteristics: (1) Is large enough and so arranged that an employee can bodily enter it; (2) Has limited or restricted means for entry and exit. (3) Is not designed for continuous employee occupancy. 67 Fed. Reg. 67405.

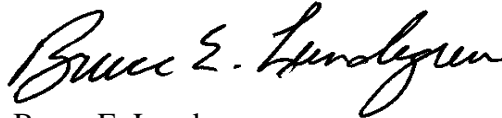
¹⁸ See, 72 Fed. Reg. 67354.

Spaces in Construction Rule. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,



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Copy to: The Honorable Susan E. Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget