

DEPARTMENT OF LABOR**Occupational Safety and Health Administration****29 CFR Part 1926****[Docket No. S204A]****RIN 1218-AC02****Regulatory Flexibility Act Review of the Excavations Standard**

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Regulatory Flexibility Act review; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is conducting a review of the Excavations Standard pursuant to Section 610 of the Regulatory Flexibility Act and Section 5 of Executive Order 12866 on Regulatory Planning and Review. The purpose of this review is to determine, while protecting worker safety, whether this standard should be maintained without change, rescinded, or modified in order to minimize any significant impact of the rule on a substantial number of small entities and whether the rule should be changed to reduce regulatory burden or improve its effectiveness. Written public comments on these and other relevant issues are welcomed.

DATES: Written comments to OSHA must be sent or postmarked by November 19, 2002.

ADDRESSES: You may submit three copies of your written comments to the OSHA Docket Office, Docket No. S204A, Technical Data Center, Room N-2625, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone (202) 693-2350. If your written comments are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693-1648. You do not have to send OSHA a hard copy of your faxed comments.

You may submit comments electronically through OSHA's Homepage at <http://ecommments.osha.gov/>. Please note that you may not attach materials such as studies or journal articles to your electronic comments. If you wish to include such materials, you must submit three copies of the material to the OSHA Docket Office at the above address. When submitting such materials to the OSHA Docket Office, you must clearly identify your electronic comments by name, date, subject, and docket number so that we can attach them to your electronic comments.

FOR FURTHER INFORMATION CONTACT:

Joanna Dizikes Friedrich, Directorate of Policy, Occupational Safety and Health Administration, Room N3641, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 693-2400, Fax (202) 693-1641.

SUPPLEMENTARY INFORMATION: In 1971, the Secretary of Labor promulgated a safety standard for excavations (36 FR 7340, April 17, 1971) pursuant to section 107 of the Contract Work Hours and Safety Standards Act. Later in 1971, OSHA designated this Standard as an established occupational safety and health standard (36 FR 10466, May 29, 1971) in accordance with section 6(a) of the Occupational Safety and Health Act.

In 1989, OSHA revised this Standard (54 FR 45894, October 31, 1989) to use performance criteria where possible, rather than specification requirements; to consolidate and simplify existing provisions; to add and clarify definitions; to eliminate duplicate provisions and ambiguous language; to provide a consistent method of soil classification; and to give employers added flexibility in providing protection for employees. The Standard was amended August 9, 1994 (59 FR 40730) to protect workers using walkways over excavations.

The Excavations Standard is currently found in 29 CFR, subpart P, 1926.650-1926.652 and Appendices A-F, and covers the construction industry. The purpose of the Standard is to protect employees from deaths and injuries resulting from excavation work, including deaths and injuries resulting from cave-ins. The Standard regulates the use of support systems, sloping and benching systems, and other systems of protection as means of protection against excavation cave-ins. In addition, the Standard regulates the means of access to and egress from excavations, along with employee exposure to vehicular traffic, falling loads, hazardous atmospheres, water accumulation, and unstable structures in and adjacent to excavations. The Standard applies to all types of excavations, including trenches, made in the earth's surface.

OSHA has selected the Excavation Standard for review in accordance with the regulatory review provisions of Section 610 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Section 5 of Executive Order 12866 (58 FR 51735, 51739, October 4, 1993). The purpose of a review under Section 610 of the Regulatory Flexibility Act:

(S)hall be to determine whether such rule should be continued without change, or should be rescinded, or amended consistent

with the stated objectives of applicable statutes to minimize any significant impact of the rules on a substantial number of small entities.

The Agency shall consider the following factors:

- (1) The continued need for the rule;
- (2) The nature of complaints or comments received concerning the rule from the public;
- (3) The complexity of the rule;
- (4) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- (5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The review requirements of Section 5 of Executive Order 12866 require agencies:

To reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the [Agency] have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive Order, within applicable law; and to otherwise improve the effectiveness of existing regulations.

An important step in the review process involves the gathering and analysis of information from affected persons about their experience with the rule and any material changes in circumstances since issuance of the rule. This document requests written comments on the continuing need for the rule, its adequacy or inadequacy, its small business impacts, and other relevant issues. Comments concerning the following subjects would assist the Agency in its review. (The purpose of these questions is to assist commenters in their responses and not to limit the format or substance of their comments. Of course, comments are requested on all issues raised by Section 610 of the Regulatory Flexibility Act and Section 5 of Executive Order 12866.)

Safety/Effectiveness

1. Do any aspects of Subpart P need to be updated as a result of technological developments over the past decade?

2. Does compliance with the Excavations Standard at 29 CFR subpart P (i.e., §§ 1926.650-1926.652 and Appendices A-E) provide safety from cave-ins and other trenching and excavation accidents? Are there additional protections which could improve safety?

3. If firms fail to comply with the Excavations Standard, is non-compliance more commonly the result of: (1) A lack of information (e.g., about the dangers, or the safety requirements); (2) inadequate supervision; (3) cost pressures; or (4) other factors? How could OSHA encourage improved compliance?

4. Are OSHA's requirements in the Excavations Standard known to firms that do trenching and excavation jobs, including small firms and firms that dig trenches only occasionally? How could awareness be increased for such firms?

Costs and Impacts

5. Does OSHA's Excavations Standard impose an unnecessary burden to small businesses, or to industry in general? If so, which requirements, and how could this burden be reduced without decreasing safety?

6. Do any of the requirements in the Excavations Standard lead to a disproportionate burden on small entities? If so, which requirements lead to a disproportionate burden, and how?

7. What percent of the time and cost of an excavation job do safety measures represent? Do these percentages vary significantly depending on the type of job, soil, firm, or other factors? Provide data, if possible.

8. Which types of safety measures have the greatest impact on productivity? The lowest impact on productivity?

9. Do bidding practices (or requirements) for construction jobs encourage or discourage uniform compliance with the Excavations Standard (e.g., by explicitly identifying planned subpart P safety measures in bids delivered to customers, or by certifying compliance with subpart P as part of the bid)?

10. How have changes in technology, the economy, or other factors affected the compliance costs associated with the rule over the past decade or so?

11. How might OSHA modify the requirements to reduce costs without jeopardizing safety?

Clarity/Duplication

12. Are any aspects of the Excavations Standard unclear, needlessly complex, or duplicative? Do any portions of the Excavations Standard overlap, duplicate, or conflict with other Federal, State or local government rules?

13. Do other government entities, including other countries, have alternative trenching and excavation approaches? If so, how do they differ from OSHA's approach? Are these alternative approaches more effective?

Additional Information on the Excavations Standard: The major occupational hazards of excavation work result from cave-ins, from exposure to underground utilities, and from material or equipment falling into the excavation. Precautions to protect against cave-ins include bracing, sloping, benching, and shielding. However, the proper use of these techniques requires an understanding of the importance of such factors as excavation depth and width, soil type, hydraulic pressure, and other specific conditions present at the worksite.

Excavation work is performed during the construction of buildings, bridges, towers, and other construction projects. There is a greater economic incentive to shore excavations, as opposed to trenches, due to the greater risks of incurring re-excavation expenses due to collapsed walls, and due to the possibility that damage suits would result from the collapse of buildings located adjacent to an excavation. In comparison, trenching is primarily performed by utility contractors who construct gas, sewer, water, and utility lines. Much of this work is performed as a result of competitive bids from state and local governments or local utilities. Trenches are less likely to be in close proximity to other structures; structures adjacent to trenches are less likely to collapse; and the cost of redigging a collapsed trench is far less than of re-excavating the foundation of a building.

OSHA statistics show that during the period 1990–2000, an average of approximately 70 fatalities per year occurred as a result of excavation and trenching accidents. These fatalities fall across numerous Standard Industrial Classifications (SICs),¹ but over 80 percent of the fatalities occurred in the following 12 SICs:

SIC 1623—Water, sewer, pipeline, communications, and power line
 SIC 1794—Excavation work
 SIC 1711—Plumbing, heating, and air conditioning
 SIC 1629—Heavy construction
 SIC 1542—General contractors, non-residential, non-industrial
 SIC 1611—Highway and street construction
 SIC 1521—General contractors, single family homes
 SIC 1771—Concrete work
 SIC 1799—Special trade contractors

¹ Industries are classified by SIC, as opposed to the newer North American Industrial Classification (NAIC) system, due to the historical nature of OSHA's statistics. The relevant NAICs fall within NAIC 23 (Construction), including NAIC 233 (Building, Developing, and General Contracting), 234 (Heavy Construction), 235 (Special Trade Contractors), and other subclassifications.

SIC 1622—Bridge, tunnel, and elevated highway

SIC 1731—Electrical work

SIC 1795—Wrecking and demolition work

While the annual number of fatalities has remained fairly constant over this 1990–2000 period, the fatality rate as a percentage of the real value of construction activity has declined. One factor contributing to this decline has been an increased use of new “trenchless” technologies, such as directional drilling, pipejacking, microtunnelling, auger boring, impact ramming, pipe bursting, folded pipes, and spray on linings. These technologies can result in fewer accidents by eliminating or reducing the amount of time that workers are physically exposed to the hazards of trenching. For example, some of these technologies use remote-controlled equipment to dig and lay cables, to install pipe, or to replace existing pipes.

The construction industry has grown by approximately 20 percent (constant dollars) since the Excavations Standard was last modified in 1989. The Small Business Administration (SBA) generally classifies the entities affected by this standard as small if their annual revenues are less than \$12 million (for affected entities falling within NAIC 235) or \$28.5 million (for affected entities falling within NAICs 233 and 234). Under these guidelines, the vast majority of entities affected by the Standard are small entities.

Comments: All comments shall be submitted or postmarked by November 19, 2002, to the address above. OSHA will review the written public comments as part of the process of conducting this regulatory review of the Excavations Standard. All comments received will be included in Docket No. S204A and will be available for public review in the OSHA Docket Office.

Authority: This document was prepared under the direction of John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, on August 14, 2002.

John L. Henshaw,

Assistant Secretary.

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