OCCUPATIONAL SAFETY
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FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

TITLE 8: Sections 1951, 1952, 1953, 1955, 1956, and 1960
of the Construction Safety Orders

Section 5156 of the General Industry Safety Orders

Confined Spaces in Construction Clean-up

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD (October 4, 2024 - November 21, 2024)

There are no modifications to the information contained in the Initial Statement of Reasons except for the following substantive and sufficiently related modifications that are the result of public comments and/or Board staff evaluation.

Summary of and Responses to Written and Oral Comments:

I. Written Comments

1. Peter Wilsey, Safety and Health Manager, United States Department of Labor, Occupational Safety and Health Administration (OSHA), Region IX, by letter dated October 25, 2024.

Comment 1.1:

The proposed occupational safety and health standards appear to be at least as effective as the federal standards.

Response to Comment 1.1:

The Board thanks Peter Wilsey for the comment and for participating in the Board's rulemaking process.

2. Michael Donlon, MD Safety Solutions, by letter dated November 21, 2024.

Comment 2.1:

The proposed regulation creates new requirements, moreover those new requirements conflict with existing regulations.

Response to Comment 2.1:

The Board is not persuaded by the commenter's arguments. This regulatory proposal incorporated comments and feedback received from stakeholders during the September 6, 2017, advisory committee meeting. This proposal has also been published in accordance with the Administrative Procedure Act (APA) in the California Regulatory Notice Register (October 4, 2024) and posted on the OSHSB's website. The Board finds no conflict with existing regulations.

Comment 2.2:

Section 1951 definitions to lockout and tagout "established" procedures was changed to "effective" procedures. The commenter raised section 3314(g) as a basis for requiring a "written" procedure rather than "established" or "effective" to avoid conflict with section 3314.

Response to Comment 2.2:

The Board is not persuaded by the commenter's arguments that the proposed amendments conflict with section 3314. As reflected in the advisory committee meeting minutes (see document #6, page 5), "*[The Division suggested] to strike-out the reference to Section 3314, [to avoid] confusion over whether Section 3314 [was] suitable for controlling airborne contaminants into a confined space."* While the terminology of "lockout" and "tagout" are utilized in both sections 1951 and 3314, they are separately defined and applied uniquely to their context.

Further the Board is not persuaded by the commenter's suggested change to the definitions of lockout and tagout to change "effective" to "written" procedures. As reflected in the advisory meeting minutes (see document #6, page 5 and 6) the commenter concurred with the change from "established" to "effective."

Comment 2.3:

Existing section 1952(a) is clear and the proposed language is creating new and repetitive requirements outside the scope of this rulemaking. The commenter suggests the amendments to 1952(a) be withdrawn.

Response to Comment 2.3:

The Board is not persuaded by the commenter's arguments. The existing requirement is derived from §1926.1203. The requirement as described in the federal final rule, "*[Subsection 1926.1203] sets forth general requirements for employers that have operations within the scope of this standard. This section establishes a comprehensive regulatory framework under which employers must identify any permit spaces at their workplaces and take appropriate measures for the protection of affected employees.*" (see document #2, Federal Register, Vol. 80, No. 85, May 4, 2015, page 25393).

As noted in the ISOR and reflected in the meeting minutes (see document #6 page 6 and 7), subsection 1952 (a) has been reformatted to separate existing requirements and "*(a)- draws upon the provisions of the ANSI/ASSE A10.43 standard and Chapters 4.12, 4.13, 4.14 and 4.15… [Michael] Donlon and a number of other committee members, including the Division, agreed with this proposed change... The committee reached consensus that the replacement, as suggested by the Chair, should proceed and to include the provisions of the ANSI/ASSE standard enumerated above.*" The ANSI/ASSE A10.43 is consistent with the aim of a comprehensive regulatory framework under which employers must identify any permit spaces at their workplaces. Please see also response to comment 2.1.

Comment 2.4:

Subsection 1952(a)(1) expands the existing requirement (creating a new requirement) by requiring the competent person to identify all confined spaces in the work area by conducting a survey.

Response to Comment 2.4:

The Board is not persuaded by the commenter's argument. Regarding the commenter's concerns over "work area" in the context of section 1952(a), the commenter deems the phrase "work area" as overbroad based on the example the commenter provided. Nothing in the proposal expands the scope beyond what the employer is granted access by the host employer through a controlling contractor (where one exists). Please also see responses to comments 2.1 and 2.3.

Comment 2.5:

Subsection 1952(a)(2) creates new requirements to conduct periodic surveys to identify new confined spaces even if employees will not work in them.

Response to Comment 2.5:

The Board is not persuaded by the commenter's argument that the proposal creates a new requirement. As stated in the ISOR, this amendment is necessary to ensure that confined spaces in which employees may encroach are known to their employers so protective measures may be undertaken. Please see also response to comment 2.1.

Comment 2.6:

Subsection 1952(a)(3) creates a new and duplicative requirement. Section 1952(b) has requirements for informing employees of confined spaces, and section 1952(h) has requirements for communicating between host employer, controlling contractor and entry employer.

Response to Comment 2.6:

The Board is not persuaded by the commenter's argument that the proposal creates a new requirement. Please see response to comment 2.1. The Board is not persuaded by

the commenter's argument that subsection 1952(a)(3) is duplicative. The comment that 1952(a)(3) duplicates 1952(b) is inaccurate. Subsection 1952(b) addresses "permit spaces" a subset of "confined spaces." However, subsection 1952(a)(3) addresses "confined spaces" not just the subset "permit spaces."

The comment that 1952(a)(3) duplicates 1952(h) is inaccurate. The communication between employers that fall outside categories of "entry employer", "controlling contractor", and "host employer" are not addressed in subsection 1952(h). The requirement under subsection 1952(a) encompasses "employers" broadly, including those employers who have not assumed any role (e.g. entry employer, controlling contractor, or host employer). Moreover, 1952(h) addresses entry into "permit spaces" a subset of "confined spaces."

Comment 2.7:

Subsection 1953(a)(3)(D)(1)a-c is clearer but should be kept as a note to 1953(a)(3)(D).

Response to Comment 2.7:

The Board is not persuaded by the commenter's position that the language should remain as a note. The existing note is explained in the Federal Final Rule for Confined Spaces in Construction. "*OSHA added a note to §1926.1204(c)(4) to make explicit the requirement for an employer to inert a space and provide appropriate PPE if employees will work in a space where less than 10 percent LFL cannot be achieved*" (see document #2, Federal Register, Vol. 80, No. 85, May 4, 2015, page 25420). Notes are unenforceable in California.

Comment 2.8:

Subsection 1960(a) is duplicative and unnecessary. "Immediately" in the context of 1960(a) is undefined and open to interpretation.

Response to Comment 2.8:

The Board is not persuaded by the commenter's arguments that the proposed amendments are duplicative and unnecessary. Proposed subsection 1960(a) incorporates provisions from title 8, CCR subsection 5158(e)(1)(D), which requires standby personnel that are trained, equipped and available to rescue an entry employee.

"Immediately" reflects the attributes of "rescue service". *[T]he final rule's phrase ''rescue service'' refers to all rescue personnel provided to remove entrants from permit spaces. It includes situations in which one person will be responsible for the rescue of authorized entrants (e.g., when the employer uses non-entry rescue systems)* (see document #2, Federal Register, Vol. 80, No. 85, May 4, 2015, page 25420). In such context, "immediately" reflects the availability to affect a rescue of authorized entrants. A non-entry rescue system utilized by an attendant would be considered "rescue service."

II. Oral Comments

Oral comments received at the November 21, 2024 Public Hearing in Los Angeles, California.

3. Steven Johnson, representing Associated Roofing Contractors of the Bay Area Counties.

Comment 3.1:

The commenter supports the proposal. Prior to 2015, construction relied upon section 5158. As one who had drafted confined space programs under section 5158, it is much less confusing to have all the regulations in one place.

Response to Comment 3.1:

The Board thanks Steve Johnson for his support of the rulemaking and participation in the rulemaking process.

4. Michael Donlon, representing MD Safety Solutions.

The commenter generally favors the proposal. However, the commenter has the following additional comments:

Comment 4.1:

There is a procedural defect in the rulemaking, specifically, the proposal creates new requirements and the notification of those new requirements was not properly identified in the Board's Notice (and the Board's advisory committee invitation).

Response to Comment 4.1:

The Board is not persuaded by the commenter's argument. The proposed amendments are properly captured in the proposed text, declared and supported in the Initial Statement of Reasons and declared in the Notice published on October 4, 2024. The Board directs the commenter to response to comment 2.1.

Comment 4.2:

Section 1951 definition to lockout, replaces "established" procedure with "effective" procedure. These are new requirements. This conflicts with section 3314 which requires a written procedure and a test of the written procedure to determine if it is effective.

Response to Comment 4.2:

The Board is not persuaded by the commenter's argument. Please see response to comment 2.2.

Comment 4.3:

Section 1951 definition to tagout, replaces “established” procedure with “effective” procedure. These are new requirements. This conflicts with section 3314 which requires a written procedure and a test of the written procedure to determine if it is effective.

Response to Comment 4.3:

The Board is not persuaded by the commenter’s argument. Please see response to comment 2.2.

Comment 4.4:

Existing section 1592(a) requires that a competent person identify all confined spaces which one or more employees may enter or may work within. The subsection (a)(1) proposal requires, “*[t]he employer shall have a competent person conduct an initial survey of its work area for confined spaces existing at the time work begins.*” The commenter questions, “*what is the work area?”* The commenter raises the example of a power plant in Orville which has hundreds of confined spaces. These changes, the commenter opines, add new requirements.

Response to Comment 4.4:

The Board is not persuaded by the commenter’s argument. Please see responses to comments 2.1, 2.3 and 2.5.

Comment 4.5:

Subsection (a)(2) of the proposal creates a new requirement and is not a clarification. The commenter adds that “periodically” is defined in a “DAR[1]” as more than “12 times per year.”

Response to Comment 4.5:

The Board is not persuaded by the commenter’s argument regarding subsection (a)(2). Please see responses to comments 2.1 and 2.4. Regarding “periodically,” and Cal/OSHA Appeals Board decisions, the Board cannot speculate upon the impact of unspecified Cal/OSHA Appeals Board rulings and their impact on the proposal.

Comment 4.6:

The proposal changes the NOTE in section 1953(d) into regulatory text. The proposed change should be withdrawn and remanded to a separate future rulemaking.

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[1] “DAR” is Decision After Reconsideration. This refers to decisions by the Occupational Safety and Health Appeals Board.

Response to Comment 4.6:

The Board is not persuaded by the commenter's argument. Please see responses to comments 2.1 and 2.7.

The Board thanks Michael Donlon for the input and participation in the rulemaking process.

DETERMINATION OF MANDATE

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

ALTERNATIVES CONSIDERED

The Board invited interested persons to present statements or arguments with respect to alternatives to the proposed standard. No alternatives considered by the Board would be: (1) more effective in carrying out the purpose for which the action is proposed, or (2) would be as effective as and less burdensome to affected private persons than the adopted action, or (3) would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Board staff were unable to come up with any alternatives or no alternatives were proposed by the public that would have the same desired regulatory effect.