



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket ID-OSHA-2012-0025]

RIN 1218-AC75

Revising the Exemption for Digger Derricks in the Cranes and Derricks in Construction Standard

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: OSHA is broadening the exemption for digger derricks in its standard for cranes and derricks. OSHA issued a final standard updating the requirements for cranes and derricks on August 9, 2010, and the Edison Electric Institute (EEI) petitioned for review of the standard in the United States Court of Appeals. After petitioning, EEI provided OSHA with new information regarding digger derricks. OSHA reviewed the additional information and the rulemaking record, and decided to broaden the exemption for digger derricks used in the electric-utility industry by means of this proposed rule.

DATES: Comment by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. All submissions, whether transmitted, mailed, or delivered, must bear a postmark or provide other evidence of the submission date.

ADDRESSES: Submit comments (including comments to the information-collection (paperwork) determination described under the section titled AGENCY

DETERMINATIONS), hearing requests, and other information and materials, identified by Docket No. OSHA-2012-0025, by any of the following methods:

Electronically: Submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: OSHA allows facsimile transmission of comments that are 10 pages or fewer in length (including attachments). Fax these documents to the OSHA Docket Office at (202) 693-1648; OSHA does not require hard copies of these documents. Instead of transmitting facsimile copies of attachments that supplement these documents (*e.g.*, studies, journal articles), commenters must submit these attachments to the OSHA Docket Office, Technical Data Center, Room N-2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the sender's name, the date, and the docket number (OSHA-2012-0025), so that the Docket Office can attach them to the appropriate document.

Regular or express mail, hand delivery, or messenger (courier) service: Submit comments and any additional information or material to the OSHA Docket Office, Docket No. OSHA-2012-0025 or RIN No. 1218-AC75, Technical Data Center, Room N-2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone: (202) 693-2350. (OSHA's TTY number is (877) 889-5627.) Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express mail, hand delivery, and messenger service. The Docket Office will accept deliveries (express mail, hand delivery, and messenger service) during the Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m. ET.

Docket: To read or download comments or other information or material in the docket, go to <http://www.regulations.gov> or to the OSHA Docket Office at the address

above. Documents in the docket are listed in the <http://www.regulations.gov> index; however, some information (*e.g.*, copyrighted material) is not available publicly to read or download through this Web site. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

General information and press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-1999; email: meilinger.francis2@dol.gov.

Technical inquiries: Mr. Garvin Branch, Directorate of Construction, Room N-3468, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-2020; fax: (202) 693-1689; email: branch.garvin@dol.gov.

For copies of this Federal Register notice, news releases, and other relevant document: Electronic copies of these documents are available at OSHA's Web page at <http://www.osha.gov>.

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Amendments to Standards

I. Request for Comment

OSHA requests comments on all issues related to this proposed rule, including economic, paperwork, or other regulatory impacts of this rule on the regulated community. If OSHA receives no significant adverse comment to either this proposal or the direct final rule, OSHA will publish a *Federal Register* document confirming the effective date of the direct final rule and withdrawing this companion proposed rule published in the “Proposed Rules” section of today’s *Federal Register*. Such confirmation may include minor stylistic or technical changes to the document. For the purpose of judicial review, OSHA views the date of confirmation of the effective date of this direct final rule as the date of promulgation.

II. Direct Final Rulemaking

In direct final rulemaking, an agency publishes a direct final rule in the *Federal Register* with a statement that the rule will go into effect unless the agency receives significant adverse comment within a specified period. The agency may publish an identical proposed rule at the same time. If the agency receives no significant adverse comment in response to the direct final rule, the rule goes into effect. OSHA typically confirms the effective date of a direct final rule through a separate *Federal Register* notice. If the agency receives a significant adverse comment, the agency withdraws the

direct final rule and treats such comment as a response to the proposed rule. An agency typically uses direct final rulemaking when an agency anticipates that a rule will not be controversial.

For purposes of this proposed rule and the companion direct final rule, a significant adverse comment is one that explains why the amendments to OSHA's digger-derrick exemption would be inappropriate. In determining whether a comment necessitates withdrawal of the direct final rule, OSHA will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process. OSHA will not consider a comment recommending an additional amendment to be a significant adverse comment unless the comment states why the direct final rule would be ineffective without the addition. Furthermore, OSHA will not consider a comment requesting any narrowing of the existing digger-derrick exemption to be a significant adverse comment because narrowing the existing exemption is beyond the scope of this rulemaking. Moreover, a comment requesting an expansion of the exemption to encompass activities not related to digger-derrick use by electric utilities also would be beyond the scope of this rulemaking, and OSHA will not consider such a comment to be a significant adverse comment unless the commenter explains why the provisions of the direct final rule, as these provisions apply to digger derricks, would be ineffective without the expansion.

In addition to publishing this proposed rule, OSHA is publishing a companion direct final rule in the “Final Rules” section of today’s Federal Register. The comment period for this proposed rule runs concurrently with that of the direct final rule. OSHA also will treat comments received on the companion direct final rule as comments

regarding the proposed rule. Likewise, OSHA will consider significant adverse comment submitted to the proposed rule as comment to the direct final rule. Therefore, if OSHA receives a significant adverse comment on either the direct final rule or this proposed rule, it will publish a timely withdrawal of the direct final rule and proceed with this proposed rule. In the event that OSHA withdraws the direct final rule because of significant adverse comment, OSHA will consider all timely comments received in response to the direct final rule when it continues with this proposed rule. After carefully considering all comments to the direct final rule and the proposal, OSHA will decide whether to publish a new final rule.

OSHA determined that the subject of this rulemaking is suitable for direct final rulemaking. OSHA originally included the digger-derrick exemption in the proposed Cranes and Derricks in Construction standard as a result of negotiated rulemaking involving stakeholders from many affected sectors. The existing rule for Cranes and Derricks in Construction, subpart CC of 29 CFR 1926, exempts the majority of digger derricks used in the telecommunications and electric-utility industries from the requirements of that subpart. Because the revision specified in this proposed rule extends the exemption to a small number of digger derricks used in the electric-utility industry, and does not impose any new costs or duties, OSHA does not expect objections from the public to this rulemaking action.

III. Discussion of the Digger-Derrick Exemption in 29 CFR 1926, Subpart CC

A. Background of the Digger-Derrick Exemption

A “digger derrick” or “radial boom derrick” is a specialized type of equipment designed to install utility poles. A digger derrick typically is equipped with augers to

drill holes for the poles and with a hydraulic boom to lift the poles and set them in the holes. Employers also use the booms to lift objects other than poles; accordingly, electric utilities, telecommunication companies, and their contractors use booms both to place objects on utility poles and for general lifting purposes at worksites (Docket ID OSHA-2007-0066-0139.1). When OSHA promulgated subpart V (Power Transmission and Distribution) in 1972, it excluded digger derricks from certain requirements of 29 CFR 1926, subpart N, the predecessor to the current 29 CFR 1926, subpart CC, standard.

OSHA developed the proposed standard for cranes and derricks in construction through a negotiated rulemaking involving stakeholders from many affected sectors. The proposed standard included a limited exemption for digger derricks (73 FR 59714, 59916 (Oct. 9, 2008)). After the publication of the proposed rule, OSHA received many comments criticizing the scope of the exemption because the scope applied to digger derricks designed for the electric-utility industry, and then only when used to dig holes for utility work. Commenters noted that customary use of the digger derrick also involved placing a pole in the hole and attaching transformers and other items to the pole. Commenters complained that the exemption would be largely meaningless unless it also encompassed these functions. Several representatives of the telecommunications industry noted that the industry used digger derricks routinely for similar purposes, and requested that OSHA expand the digger-derrick exemption to encompass telecommunications work in addition to electric-utility work (Docket ID OSHA-2007-0066-0234 and OSHA-2007-0066-0129.1).

When OSHA issued the final Cranes and Derricks in Construction rule, it noted concerns about the scope of the exemption, and broadened the scope of the exemption

(see 75 FR 47906, 47924-47926, and 48136 (Aug. 9, 2010)). Current subpart CC, therefore, exempts digger derricks used by both the electric-utility and the telecommunications industries, and encompasses all pole work in these industries, including placing utility poles in the ground and attaching transformers and other equipment to the poles (see 29 CFR 1400(c)(4)). In that exemption, OSHA clarifies that digger derricks in construction that are exempt from subpart CC must still comply with the applicable worker protections in the OSHA standards governing electric-utility and telecommunications work at §§ 1910.268 and 1910.269. The existing exemption in § 1926.1400(c) states that the subpart does not cover digger derricks when used for augering holes for poles carrying electric and telecommunication lines, placing and removing the poles, and for handling associated materials to be installed on or removed from the poles. Digger derricks used in work subject to 29 CFR part 1926, subpart V, must comply with 29 CFR 1910.269. Digger derricks used in construction work for telecommunication service (as defined at 29 CFR 1910.268(s)(40)) must comply with 29 CFR 1910.268.

When the activities are exempt from subpart CC of 29 CFR 1926, they must still comply with all other applicable construction standards, such as 29 CFR 1926, subpart O (Motor Vehicles, Mechanized Equipment, and Marine Operations), and subpart V.¹

¹For telecommunications work, compliance with the provisions of § 1910.268 is a condition of the exemption in § 1926.400(c)(4). The scope limitations in § 1910.268(a) (such as the language stating that it does not apply to construction) are irrelevant to application of the exemption. If an employer uses a digger derrick for telecommunications construction work and does not comply with the provisions in § 1910.268, then that employer fails to qualify for the exemption in § 1926.400(c)(4). As a result, that employer must comply with all of the requirements in subpart CC of part 1926, including the operator-certification requirements in § 1926.1427. If the employer fails to comply with subpart CC, and cannot demonstrate that it complied with § 1910.268 for telecommunications work, or § 1910.269 for electric-utility work, then OSHA will cite the employer under subpart CC (not § 1910.268 or § 1910.269). If the employer

On October 6, 2010, Edison Electrical Institute petitioned for review of the Cranes and Derricks in Construction standard in the U.S. Court of Appeals for the District of Columbia. During subsequent discussions with OSHA, EEI provided new information to OSHA regarding the use of digger derricks in the electric-utility industry and the resulting impact on the utilities' operations under the current digger-derrick exemption in subpart CC. According to EEI, the exemption from subpart CC covers roughly 95 percent of work conducted by digger derricks in the electric-utility industry (see OSHA-2012-0025-0004 for EEI Dec. 7, 2010, letter, page 2). The majority of the work under the remaining five percent is work that is closely related to the exempted work. *Id.* For example, when electric utilities use digger derricks to perform construction work involving pole installations, the same digger-derrick crew that performs the pole work typically installs pad-mount transformers on the ground as part of the same power system as the poles. While the pole work is exempt under 29 CFR 1926.1400(c)(4), the placement of the pad-mount transformer on the ground is not.

Furthermore, in comparison to currently exempted pole work, OSHA believes most (if not all) of the remaining five percent of work is at least as safe. Weight measurements provided by EEI demonstrate that transformers placed on a pad on the ground are roughly the same weight as, or in some cases lighter than, the weight of the transformers lifted onto the poles, or the poles themselves (see OSHA-2012-0025-0003

demonstrates that it complies with the exemption in subpart CC, but does not comply with the separate requirements in subpart O applicable to all motorized vehicles in construction, then OSHA will cite the employer under subpart O. Note that this explanation does not suggest that OSHA is restricting its enforcement discretion on whether to issue citations at all.

for EEI handout, “Typical Weights” chart)². In addition, electric utilities typically place distribution transformers in a right of way along front property lines, close to a roadway, or along rear property lines, irrespective of whether the transformers are pole- or pad-mounted. In those cases, the lifting radius of a digger derrick placing a transformer on a pad is similar to the lifting radius of a digger derrick placing a transformer on a pole. Consequently, the lifting forces on a digger derrick should be approximately the same regardless of whether the transformer is pole- or pad-mounted (see, e.g., OSHA-2012-0025-0003). Finally, the approximate height of the transformer relative to the employee installing the transformer is the same for the two types of transformers. An employee installing a pad-mounted transformer is on the ground, near the pad, whereas an employee installing a pole-mounted transformer is either on the pole, or in an aerial lift, near the mounting point for the transformer. In either case, the transformer would be around the same height as the employee.

Because the same workers generally perform both types of work, utility employers must, when the standard becomes fully effective in November 2014, incur the cost of meeting all other requirements in subpart CC, including the operator-certification requirements, for those workers to perform the five percent of the work not currently exempted. The result could be a sizable cost (about \$21.6 million annually) for an activity that does not appear significantly more dangerous than the type of activity that OSHA already exempted. (See Section IV.B. (Final Economic Analysis and Final

²EEI’s chart does not show weights for concrete and plastic transformer pads, and EEI did not indicate that utilities use digger derricks to place those pads. If utilities do use digger derricks to lift pads, EEI’s presentation indicates that the digger derricks lift the transformers separately. Because the surface area of these pads is comparable to the transformers on them, and because these pads are generally only a few hundred millimeters thick, OSHA does not believe that the pads weigh any more than transformers or poles.

Regulatory Flexibility Act Analysis) in this preamble for a summary of these costs.) OSHA did not consider this result when it promulgated the standard.

OSHA acknowledges the arguments that there are minimal safety benefits attributable to imposing the standard's requirements on the remaining five percent of non-exempted work; moreover, the exempted digger-derrick operations are still subject to the protections afforded to workers by OSHA's electric-utility and telecommunications standards (§ 1910.269, subpart V of 29 CFR 1926, and § 1910.268, respectively). OSHA also notes that the largest labor organization for workers in the electric-utility industry, the International Brotherhood of Electrical Workers, participated in settlement discussions, corroborated the general validity of the information provided by EEI, and actively supported EEI's request for an expanded digger-derrick exemption. In light of these factors, OSHA is removing the burdens on employers for the remaining five percent of non-exempted work, and revising the digger-derrick exemption to include all digger derricks used in construction work subject to 29 CFR 1926, subpart V. Based on its estimates in the Final Economic Analysis in the 2010 final rule, the Agency determined that expanding the exemption for digger derricks will enable employers in NAICS 221120 to avoid compliance costs of about \$15.9 million per year, while employers in NAICS 221110 will avoid about \$5.7 million per year, for a total cost savings of about \$21.6 million annually.

When the Agency promulgated the final Cranes and Derricks in Construction rule, OSHA's primary concern about extending the digger-derrick exemption beyond pole work was that such an extension would provide employers with an incentive to use digger derricks on construction sites to perform construction tasks normally handled by cranes—

tasks that are beyond the original design capabilities of a digger derrick. In discussing this concern, OSHA stated, “[T]he general lifting work done at those other worksites would be subject to this standard if done by other types of lifting equipment, and the same standards should apply as apply to that equipment” (75 FR 47925). OSHA acknowledges that revising the exemption would extend the digger-derrick exemption to include some work at substations. However, EEI indicated that the employers in the electric-utility industry limit such uses to assembly or arrangement of substation components, and that these employers use other types of cranes instead of digger derricks to perform lifting and installation work at substations (see OSHA-2012-0025-0005 for Jan. 2011 EEI letter). If OSHA finds that, should the direct final rule become a final rule, employers are using digger derricks increasingly for other tasks, the Agency may revisit this issue and adjust the exemption accordingly. The Agency also recognizes that, because the exemption only applies to work subject to the electrical-power and telecommunications standards, employers cannot use digger derricks within this exemption to perform unrelated tasks such as the construction of a building or the foundation or structural components of a substation before the installation of electric power-transmission or power-distribution equipment. A digger derrick used for this type of construction will still be subject to the requirements in 29 CFR 1926, subpart CC, and operators will have to be certified in accordance with § 1926.1427.

B. Changes to the Text of the Exemption in 29 CFR 1926.1400(c)(4)

OSHA is revising the exemption in 29 CFR 1926.1400(c)(4) to include within the exemption “any other work subject to subpart V of 29 CFR part 1926.” This revision expands the exemption to remove from coverage under subpart CC of 29 CFR 1926 the

types of non-pole, digger-derrick work described by EEL. OSHA is not expanding the exemption for pole work performed by employers in the telecommunications industry because no party raised or requested such an exemption in the litigation; therefore, this issue is outside the scope of this rulemaking.

The Agency also is making several minor clarifications to the text of the exemption. First, OSHA is making a minor grammatical clarification by replacing “and” with “or” in the phrase “poles carrying electric or telecommunication lines” (emphasis added). This revision will ensure that the regulated community does not misconstrue the exemption as limited to poles that carry both electric and telecommunications lines. This clarification is consistent with OSHA’s explanation in the preamble of the Cranes and Derricks in Construction final rule (see 75 FR 47925).

Second, OSHA is adding the phrase “to be eligible for this exclusion” at the beginning of the sentence requiring compliance with § 1910.268 and subpart V of 29 CFR 1926, respectively. This revision limits the exemption to the use of digger derricks that comply with the requirements in subpart V or § 1910.268; if an employer uses a digger derrick for subpart V or telecommunications work without complying with all of the requirements in subpart V or § 1910.268, then the work is not exempt, and the employer must comply with all of the requirements of subpart CC of 29 CFR 1926. This clarification is consistent with OSHA’s explanation of the exemption in the preamble of the final rule (see 75 FR 47925-47926).

Third, OSHA is replacing the reference to § 1910.269 with a reference to 29 CFR 1926, subpart V. The current exemption in § 1926.1400(c)(4) requires employers using digger derricks for work covered by subpart V to comply with the requirements in §

1910.269. However, in the 2010 final rule for Cranes and Derricks in Construction, OSHA also revised 29 CFR 1926.952(c)(2) of subpart V to require digger derricks used for the purposes exempted from subpart CC to comply with § 1910.269. Thus, although the revised exemption in this proposed rule specifies compliance with subpart V instead of § 1910.269, there is no substantive revision to digger derricks used for augering holes and handling associated materials. The primary purpose for this revision is to harmonize the § 1926.1400(c)(4) exemption with 29 CFR 1926.952(c)(2) to ensure that non-pole digger-derrick work covered by subpart V receives the same protections as pole work covered by subpart V.

C. Discussion of Conforming Revisions to 29 CFR 1926, Subpart V

As part of this harmonizing process, OSHA also is revising the corresponding provision in subpart V that requires compliance with § 1910.269 for all digger-derrick work exempted from subpart CC, including §§ 1910.269(p) (Mechanical equipment), 1910.269(a)(2) (Training), and 1910.269(l) (Working on or near exposed energized parts) (see new 29 CFR 1926.952(c)(2)). When OSHA promulgated subpart CC of 29 CFR 1926 in 2010, the Agency also revised § 1926.952(c)(2) in subpart V of its construction standards (75 FR 48135). The revision mirrored the terminology in the digger-derrick exemption in § 1926.1400(c)(4), and required employers using digger derricks so exempted to comply with § 1910.269 (Electric power generation, transmission, and distribution). In making this revision, the Agency noted that it added specific minimum clearance-distance requirements, which are applicable to subpart V work, to the cranes and derricks in construction rules at subpart CC, and explained that it revised §

1926.952(c) to require digger derricks to comply with § 1910.269 to provide “comparable safety requirements” (75 FR 47921).

As revised, paragraph § 1926.952(c)(2) requires employers using digger derricks for subpart V work and, thus, not subject to the requirements of subpart CC of 29 CFR 1926, to comply with the requirements in § 1910.269. OSHA also is clarifying that paragraph (c)(2) applies in addition to, not in place of, the general requirement in § 1926.952(c) that all equipment (including digger derricks) must comply with subpart O of 29 CFR 1926. As noted in the preamble to the subpart CC final rule, OSHA currently is developing a rule that will amend subpart V to avoid inconsistencies between subpart V of the construction standards and § 1910.269 (see 70 FR 34822 (June 15, 2005)). Pending completion of that rulemaking, digger derricks excluded from subpart CC of 29 CFR 1926 will be subject to the same requirements regardless of whether employers use them for work covered by subpart V or work covered by § 1910.269, and regardless of whether employers use them for pole work or other subpart V work.

IV. Agency Determinations

A. Significant Risk

The purpose of the Occupational Safety and Health Act of 1970 (OSH Act; 29 U.S.C. 651 *et al.*) is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources” (29 U.S.C. 651(b)). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards (29 U.S.C. 654(b), 655(b)). An occupational safety or health standard is a standard that “requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

reasonably necessary or appropriate to provide safe or healthful employment and places of employment” (29 U.S.C. 652(8)). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) if it substantially reduces or eliminates significant risk (see *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980)).

This proposed rule does not impose any additional requirements on employers. Because OSHA previously determined that the Cranes and Derricks in Construction standard substantially reduces a significant risk (see 75 FR 47913), it is unnecessary for the Agency to make additional findings on risk for the purposes of this minor amendment to the digger-derrick exemption (see, *e.g.*, *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1502 n.16 (D.C. Cir. 1986) (rejecting the argument that OSHA must “find that each and every aspect of its standard eliminates a significant risk”).

B. Final Economic Analysis and Final Regulatory Flexibility Act Analysis

When it issued the final rule for Cranes and Derricks in Construction, OSHA prepared a Final Economic Analysis (FEA) as required by the Occupational Safety and Health Act of 1970 (“OSH Act”; 29 U.S.C. 651 *et seq.*) and Executive Orders 12866 and 13563. OSHA also published a final regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601-612).

In the FEA for the final rule (OSHA-2007-0066-0422), the Agency estimated that there were about 10,000 crane operators in NAICS 221110 Electric Power Generation, and about 20,000 crane operators in NAICS 221120 Electric Power Transmission, Control, and Distribution. OSHA based these figures on estimates of the number of construction work crews in these industries from its subpart V FEA, with an allowance

(to assure maximum flexibility) that there be three trained crane operators for every work crew. Based on submissions to the record, OSHA estimated that 85 percent of these 30,000 operators (25,500) worked on digger derricks, while 15 percent of the operators operated truck-mounted cranes, or boom trucks; therefore, a total of 25,500 digger-derrick operators would require operator certification.

In its FEA for the final rule, OSHA estimated that the total costs for NAICS 221110 would be \$6.7 million (\$4 million for operator certification), and the total costs for NAICS 221120 would be \$18.7 million annually (\$8.7 million for operator certification) (see FEA Table B-9 in the Aug. 9, 2010, FR notice). Fully exempting digger derricks from the scope of the standard also eliminates costs for other activities besides operator certification, such as inspections and power-line safety. In the original FEA, the two main cost components for an industry were the number of crane operators and the number of jobs involving cranes. The original FEA estimated that digger derricks represented 85 percent of operators, and 85 percent of jobs involving cranes. OSHA, therefore, estimates that digger derricks account for 85 percent of the costs attributed to NAICS 221110 and NAICS 221120. Applying this 85 percent factor to the total costs for the industries yields costs for digger derricks of \$5.7 million per year in NAICS 221110 and \$15.9 million per year in NAICS 221120, for a total of \$21.6 million per year.³

³Based on the size of digger derricks and EEI's descriptions of digger-derrick activities, OSHA understands that the vast majority of digger-derrick use for construction activity in the electric-utility industry will involve transmission and distribution work subject to subpart V of 29 CFR 1926. Employers categorized under NAICS 221120 generally conduct electric-transmission and -distribution work. However, OSHA is including digger derricks under NAICS 221110, which is the SIC code for power generation, because some employers may be under that SIC code because their primary work is in that area, but those employers also may engage in transmission work covered by subpart V. Because the record does

This proposed rule will eliminate nearly all of the estimated \$21.6 million per year in costs associated with digger derricks. These estimated cost savings may be slightly overstated because OSHA noted in its FEA that the cost assumptions might not represent the most efficient way to meet the requirements of the rule. However, OSHA wanted to assure the regulated community that, even with somewhat overstated cost estimates, the proposed rule would still be economically feasible.

In its original FEA (OSHA-2007-0066-0422), OSHA reported an average of 0.5 crane-related fatalities per year in SIC codes NAICS 221110 and NAICS 221120. However, the original FEA did not indicate that any of these fatalities involved digger derricks or other equipment covered by the standard. Moreover, in light of the information provided by EEI, there is no indication that the additional five percent of digger-derrick activity exempted through this rulemaking poses any hazard greater than the hazard posed by the digger-derrick activities OSHA already exempted in the 2010 final rule.

Because this proposed rule estimates cost savings of \$21.6 million per year, this proposed rule is not economically significant within the meaning of Executive Order 12866 (58 FR 51735). The proposed rule does not impose additional costs on any private-sector or public-sector entity, and does not meet any of the criteria for an economically significant or major rule specified by Executive Order 12866 and the relevant statutes. This rule is not a “major rule” under Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*).

not indicate that employers use digger derricks for power-generation construction activities, OSHA assumes that the use of digger derricks under NAICS 221110 is for subpart V work.

OSHA developed this proposed rule consistent with the provisions of Executive Orders 12866 and 13563. Accordingly, this proposed rule follows closely the principle of EO 13563 that agencies should use new data developed after completion of a rulemaking (retrospective analysis) to determine if a regulation “should be modified, streamlined, expanded, or repealed.” In this case, review of data submitted after completion of the initial rulemaking provided OSHA with the opportunity to streamline a rule by dropping its application to digger derricks, thereby saving the industry an estimated \$21.6 million per year. As described previously, this action removes duties and costs for the electric-utility industry, and does not impose any new duties on any employer. Because small entities will have reduced costs as a result of this proposed rule, the Agency certifies that the final standard would not impose significant economic costs on a substantial number of small entities.

C. Technological Feasibility

A standard is technologically feasible when the protective measures it requires already exist, when available technology can bring the protective measures into existence, or when that technology is reasonably likely to develop (see American Textile Mfrs. Institute v. OSHA, 452 U.S. 490, 513 (1981) (ATMI); American Iron and Steel Institute v. OSHA, 939 F.2d 975, 980 (D.C. Cir. 1991) (AISI)). This proposed rule does not require any additional protective measures. In the original FEA, OSHA found the standard to be technologically feasible (75 FR 48079). OSHA concludes that this revision is feasible as well because it reduces or removes current requirements on employers.

D. Paperwork Reduction Act of 1995

When OSHA issued the final rule on August 9, 2010, the Agency submitted an Information Collection Request (ICR) to OMB titled *Cranes and Derricks in Construction (29 CFR Part 1926 Subpart CC)*. On November 1, 2010, OMB approved the ICR under OMB Control Number 1218-0261, with an expiration date of November 30, 2013. Subsequently, in December 2010, OSHA discontinued the *Cranes and Derricks Standard for Construction (29 CFR 1926.550)* ICR (OMB Control Number 1218-0113) because the new ICR superseded this ICR. In addition, OSHA retitled the new ICR to *Cranes and Derricks in Construction (29 CFR Part 1926, Subpart CC and Subpart DD)*.

This proposed rule, which expands the digger-derrick exemption, does not require any additional collection of information or alter the substantive requirements detailed in the 2010 ICR. The only impact on the collection of information will be a reduction in the number of entities collecting information. Accordingly, OSHA does not believe it is necessary to submit a new ICR to OMB. OSHA will identify any reduction in burden hours when it renews the ICR.

Interested parties may comment on OSHA's determination that this proposal contains no additional paperwork requirements by sending their written comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for OSHA, Office of Management and Budget, Room 10235, 726 Jackson Place, NW., Washington, DC 20503. The Agency also encourages commenters to submit their comments on this paperwork determination to OSHA, along with their other comments on this proposed rule, within the specified comment period.

OSHA notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* and the agency also displays a currently valid OMB control number for the collection of information, and that the public need not respond to a collection of information requirement unless the agency displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to a penalty for failing to comply with a collection of information requirement if the requirement does not display a currently valid OMB control number.

E. Federalism

OSHA reviewed this proposed rule in accordance with the Executive Order on Federalism (Executive Order 13132 (64 FR 43255 (Aug. 10, 1999))), which requires that Federal agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of state law only with the expressed consent of Congress. Federal agencies must limit any such preemption to the extent possible.

Under Section 18 of the OSH Act, Congress expressly provides that states may adopt, with federal approval, a plan for the development and enforcement of occupational safety and health standards. The OSH Act refers to states that obtain federal approval for such a plan as “State Plan States” (29 U.S.C. 667). Occupational safety and health standards developed by State Plan States must be at least as effective in providing safe

and healthful employment and places of employment as the federal standards. Subject to these requirements, State Plan States are free to develop and enforce under state law their own requirements for safety and health standards.

OSHA previously concluded that its promulgation of subpart CC complies with Executive Order 13132 (75 FR 48128 and 48129). Because the current rulemaking does not impose any additional burdens, that analysis applies to the revision of the digger-derrick exemption. Therefore, this proposed rule complies with Executive Order 13132. In states without OSHA-approved state plans, any standard developed from this proposed rule would impact state policy options in the same manner as every standard promulgated by OSHA. In states with OSHA-approved state plans, this proposed rulemaking does not limit state policy options.

F. State Plan States

When federal OSHA promulgates a new standard or more stringent amendment to an existing standard, the 27 states and U.S. territories with their own OSHA-approved occupational safety and health plans must amend their standards to reflect the new standard or amendment, or show OSHA why such action is unnecessary, *e.g.*, because an existing state standard covering this area is at least as effective in protecting employees as the new federal standard or amendment (29 CFR 1953.5(a)). The state standard must be at least as effective in protecting employees as the final federal rule. State Plan States must issue the standard within six months of the promulgation date of the final federal rule. When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than an existing standard, State Plan States are not required to amend their standards, although OSHA may encourage them to do so.

The 27 states and U.S. territories with OSHA-approved occupational safety and health plans are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, Illinois, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to state and local government employees only.

The amendments made in this proposed rule do not impose any new requirements on employers. Accordingly, State Plan States are not required to amend their standards to incorporate the expanded exemption specified in this proposal, but they may do so if they so choose.

G. Unfunded Mandates Reform Act

When OSHA issued the final rule for Cranes and Derricks in Construction (75 FR 48130), it reviewed the rule according to the Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501 *et seq.*) and Executive Order 13132 (64 FR 43255 (Aug. 10, 1999)), and concluded that the final rule did not meet the definition of a “Federal intergovernmental mandate” under the UMRA. OSHA’s standards do not apply to state or local governments except in states that have voluntarily adopted state plans. OSHA further noted that the rule imposed costs of over \$100 million per year on the private sector and, therefore, required review under the UMRA for those costs; the Agency determined that its Final Economic Analysis met that requirement. *Id.*

As discussed above in Section IV.B. (Final Economic Analysis and Final Regulatory Flexibility Act Analysis) of this preamble, this proposed rule reduces expenditures by private-sector employers. For the purposes of the UMRA, OSHA

certifies that this proposed rule does not mandate that state, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than \$100 million in any year.

H. Consultation and Coordination with Indian Tribal Governments

OSHA reviewed this proposed rule in accordance with Executive Order 13175 (65 FR 67249 (Nov. 9, 2000)), and determined that it does not have “tribal implications” as defined in that order. This proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

List of Subjects in 29 CFR Part 1926

Cranes and derricks, Construction industry, Occupational safety and health.

Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, authorized the preparation of this notice. OSHA is issuing this direct final rule under the following authorities: 29 U.S.C. 653, 655, 657; 40 U.S.C. 3701 *et seq.*; 5 U.S.C. 553; Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012); and 29 CFR part 1911.

Signed at Washington, DC, on October 9, 2012.

David Michaels,
Assistant Secretary of Labor for Occupational Safety and Health.

Proposed Amendments to Standards

For the reasons stated in the preamble of this proposed rule, OSHA is proposing to amend 29 CFR part 1926 as follows:

PART 1926—[AMENDED]

Subpart V—Power Transmission and Distribution.

1. Revise the authority citation for subpart V to read as follows:

AUTHORITY: 40 U.S.C. 3701; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order Nos. 12–71 (36 FR 8754); 8–76 (41 FR 25059); 9–83 (48 FR 35736), 1–90 (55 FR 9033), 5–2007 (72 FR 31159), or 1–2012 (77 FR 3912), as applicable. Section 1926.951 also is issued under 29 CFR part 1911.

2. Amend § 1926.952 by revising paragraph (c)(2) to read as follows:

§ 1926.952 Mechanical equipment.

* * * * *

(c) * * *

(2) Use of digger derricks must comply with § 1910.269 (in addition to 29 CFR 1926, subpart O) whenever such use is excluded from 29 CFR 1926, subpart CC, in accordance with § 1926.1400(c)(4).

* * * * *

Subpart CC—Cranes and Derricks in Construction.

3. Revise the authority citation for subpart CC to read as follows:

AUTHORITY: 40 U.S.C. 3701; 29 U.S.C. 653, 655, 657; and Secretary of Labor's Order No. 5–2007 (72 FR 31159) or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

4. Amend § 1926.1400 by revising paragraph (c)(4) to read as follows:

§ 1926.1400 Scope.

* * * * *

(c) * * *

(4) Digger derricks when used for augering holes for poles carrying electric or telecommunication lines, placing and removing the poles, and for handling associated materials for installation on, or removal from, the poles, or when used for any other work subject to subpart V of this part. To be eligible for this exclusion, digger-derrick use in work subject to subpart V of this part must comply with all of the provisions of that subpart, and digger-derrick use in construction work for telecommunication service (as defined at § 1910.268(s)(40)) must comply with all of the provisions of § 1910.268.

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BILLING CODE 4510-26-P

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