DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. OSHA-2012-0025]

RIN 1218-AC75

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

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

ACTION: Final rule.

SUMMARY: OSHA published a direct final rule and a companion notice of proposed rulemaking on November 9, 2012, to broaden the exemption for digger derricks in its construction standard for cranes and derricks. OSHA received a significant adverse comment on the direct final rule during the comment period, and as a result, OSHA withdrew the direct final rule on February 7, 2013. After considering this comment, OSHA is issuing this final rule based on the notice of proposed rulemaking.

DATES: This final rule is effective on [INSERT THE DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: In compliance with 28 U.S.C. 2112(a), OSHA designates the Associate Solicitor of Labor for Occupational Safety and Health as the recipient of petitions for review of the final rule. Contact Joseph M. Woodward, Associate Solicitor, at the Office of the Solicitor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-5445.

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Copies of this Federal Register notice and news releases: This *Federal Register* notice, as well as news releases and other relevant information, are available at OSHA's Webpage at *http://www.osha.gov*.

SUPPLEMENTARY INFORMATION:

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

A. Background

A digger derrick (also called a "radial boom derrick") is a specialized type of equipment designed to install utility poles. A digger derrick typically comes 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).

OSHA's current standard for Cranes and Derricks in Construction, promulgated in 2010 as 29 CFR 1926 subpart CC, covers digger derricks, but includes a limited exemption for all pole work in the electric-utility and telecommunications industries, including placing utility poles in the ground and attaching transformers and other equipment to the poles (see 29 CFR 1400(c)(4); 75 FR 47906, 47924-47926, and 48136 (Aug. 9, 2010)). As explained in more detail in the preamble to the proposed rule, OSHA developed its 2010 standard through a negotiated rulemaking involving stakeholders from many affected sectors. In its proposed rule based on the draft standard from the stakeholders, OSHA included only a narrow exemption for digger derricks used to dig holes. OSHA later expanded the exemption in the 2010 final rule in response to commenters who complained that the proposed narrow exemption did not include customary uses of the digger derrick that involve placing a pole in the hole and attaching transformers and other items to the pole (see 75 FR 47906, 47924-47926, and 48136 (Aug. 9, 2010)).

In the current digger-derrick exemption to subpart CC, OSHA clarifies that employers engaged in exempted digger-derrick construction activities must still comply

with the applicable worker protections in the OSHA standards governing electric-utility and telecommunications work at §1910.268, Telecommunications, and §1910.269, Electric power generation, transmission, and distribution. Accordingly, exempt digger-derrick work subject to 29 CFR part 1926 subpart V—Power Transmission and Distribution, must comply with 29 CFR 1910.269, while 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 digger-derrick activities are exempt from subpart CC of 29 CFR 1926, employers also must 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]

On October 6, 2010, Edison Electrical Institute (EEI) 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 impact on utilities' operations of 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-

[1]For 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. When 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 29 CFR part 1926, including the operator-certification requirements in §1926.1427. When 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). When the employer demonstrates that it is complying with the exemption in subpart CC, but is not complying with the separate requirements in 29 CFR 1926 subpart O, applicable to all motorized vehicles in construction, then OSHA will cite the employer under subpart O. Note that this explanation does not mean that OSHA is restricting its enforcement discretion on whether to issue citations at all

0004: EEI Dec. 7, 2010, letter, page 2). The majority of work under the remaining 5 percent is work 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 transformers on the ground is not.

On November 9, 2012, OSHA published a direct final rule and a companion proposed rule to broaden the digger-derrick exemption in subpart CC to exempt the placement of pad-mount transformers (77 FR 67313 and 67270 (Nov. 9, 2012)). In these documents, OSHA concluded that, compared to currently exempted pole work, most (if not all) of the remaining 5 percent of work is at least as safe (77 FR 67315 and 67272). 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: EEI handout, "Typical Weights" chart).[2] In addition, OSHA explained that 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 mounted or pad mounted (77 FR 67315 and 67272). In these cases, the lifting radius of a digger derrick placing a transformer on a pad is similar to the

[2]OSHA noted that EEI's chart does not show weights for concrete and plastic transformer pads, and EEI did not indicate that utilities use digger derricks to place these pads (77 FR 67315 and 67272). When utilities use digger derricks to lift these 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 stated its belief that the pads did not weigh any more than transformers or poles (*Id.*). OSHA received no comments indicating that these assumptions were invalid.

lifting radius of a digger derrick placing a transformer on a pole (*Id*.). Consequently, the lifting forces on a digger derrick should be approximately the same regardless of whether the transformer is pole mounted or pad mounted (see, e.g., OSHA-2012-0025-0003). Finally, OSHA noted that the approximate height of the transformer relative to the employee installing the transformer is the same for the two types of transformers (*Id*.). 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 near the same height as the employee. OSHA received no comments challenging these statements.

OSHA also noted EEI's concerns about how the limited exemption failed to produce a significant economic savings for the electric-utility industry. Because the same workers generally perform both types of work, utility employers would, when the standard becomes fully effective in November 2014, incur the cost of meeting all of the other requirements in subpart CC, including the operator-certification requirements, for those workers who perform the 5 percent of work not currently exempted from subpart CC. OSHA noted that compliance with the entire standard could result in a sizable cost to the electric-utility industry (about $21.6 million annually) for an activity that does not appear significantly more dangerous than the type of activity that OSHA already exempts, and that OSHA did not consider this result when it promulgated the 2010 standard (77 FR 67315 and 67272) (see Section IV.B. in this preamble for a summary of these costs). OSHA did not receive any comments disputing this economic impact.

OSHA also notes that the largest labor organization for workers in the electric-utility industry, the International Brotherhood of Electrical Workers, participated in the settlement discussions and corroborated the general validity of the information provided by EEI, actively supported EEI's request for an expanded digger-derrick exemption, and did not submit any objections to the proposed expansion of the digger-derrick exemption.

B. Comment on the Proposed Rule and Withdrawal of the Direct Final Rule

OSHA received only one comment on the direct final rule published on November 9, 2012 ; the comment was from a "safety professional and certified industrial hygienist in safety management" (see Docket ID: OSHA-2012-0025-0008). OSHA previously explained in the direct final rule and the companion proposed rule for this rulemaking that it would treat a comment on either the direct final rule or the notice of proposed rulemaking as comment on both documents. The Agency stated further that it would withdraw the direct final rule and determine whether it should proceed with the proposed rule if it received a significant adverse comment (77 FR 67314 and 67271).

OSHA explained that a "significant adverse comment" is one that "explains why the amendments to OSHA's digger-derrick exemption would be inappropriate," and that withdrawal of the direct final rule would be necessary if the comment "raises an issue serious enough to warrant a substantive response in a notice-and-comment process" (*Id*.). OSHA determined that the comment met that test. As a result, OSHA published a withdrawal of the direct final rule on February 7, 2013 (78 FR 8985). In the withdrawal notice, OSHA stated that it would address the comment in a follow-on final rule based on the companion notice of proposed rulemaking. OSHA hereby addresses the significant

adverse comment received as a comment on the proposed rule, and issues this final rule based on the November 9, 2012 notice of proposed rulemaking.

The comment addresses a single issue in the proposed rule. The commenter expressed concern that the exemption for digger derricks decreased worker safety by exempting riggers and signal persons working with digger derricks from the specific qualification, training, and testing requirements contained in subpart CC. Accordingly, the commenter urged OSHA to further revise its proposed amendments to "include the elements of rigger and signal person qualification, training and testing requirements for excluded workers" (see Docket ID: OSHA-2012-0025-0008). Specifically, the commenter requested that OSHA amend its proposed conforming amendments to 29 CFR 1926.952, which establish the protections that apply to all electric-utility digger-derrick activities exempted from subpart CC, to include the requirements for rigger and signal person qualification, training, and testing found currently in subpart CC.

The comment does not persuade OSHA that a revision to the proposed rule is necessary or appropriate. OSHA notes that the commenter did not acknowledge that the majority of digger derrick activity in the electric-utility industry already is exempt from the subpart CC requirements he addresses. The commenter did not distinguish the 5 percent of digger-derrick activity proposed for exemption by this rulemaking from the 95 percent of work performed by digger derricks currently exempted from the rigger and signal person qualifications in subpart CC. Therefore, the commenter appears to be requesting action outside the scope of this rulemaking (i.e., addressing all digger-derrick work, not just the 5 percent of work proposed for exemption by this rulemaking). Additionally, the commenter did not indicate that EEI was mistaken in its estimate that

95 percent of the digger-derrick work in its industry was already exempt from subpart CC; the commenter also did not assert that the dangers posed by the 5 percent of work within the scope of this rulemaking are greater than the dangers present in the 95 percent of digger-derrick work already exempted. Moreover, the commenter did not indicate whether a rigger or signal person would typically be necessary to perform the 5 percent of work addressed in this rulemaking.

In addressing his recommended revisions, the commenter discussed data he assembled on seven digger-derrick incidents between 2001 and 2011. The commenter asserted broadly that the presence of signal persons and riggers would have prevented these incidents, but did not support this assertion with respect to any of the specific incidents. When OSHA examined these incidents, it determined that none of them involved placing pad-mount transformers on the ground or any other type of work exempted by this rulemaking.

If OSHA retained the qualification, training, and testing requirements from subpart CC for the 5 percent of utility work subject to this rulemaking, it would be imposing unwarranted costs on employers and perpetuating the problem that EEI identified when it requested the expanded exemption. Under this approach, 95 percent of utility work would remain exempt from these requirements, while 5 percent of this work would not be exempt; nevertheless, utility employers would incur the full cost of meeting all of the qualification, training, and testing requirements in subpart CC for signal persons and riggers to assist with 5 percent of the work. More importantly, employers would incur these costs even though there is no evidence that the dangers present in the 5

percent of the work are greater than those presented in the 95 percent of digger-derrick work already exempted.

In addition, although the commenter expressed concern about the absence of subpart CC qualification, training, and testing requirements for exempt digger-derrick activities, OSHA notes that any digger-derrick activity exempted from subpart CC will still be subject to the training requirements and other requirements in subpart V. Subpart V addresses the hazards present in electric-utility work, particularly the hazards of electrocution raised by the commenter. In at least several of the incidents cited by the commenter, it appears that compliance with existing OSHA standards would have prevented the injury.

In summary, OSHA finds that there is no evidence that the dangers present in the 5 percent of the work are greater than the hazards present in the 95 percent of digger-derrick work already exempted from subpart CC. Moreover, OSHA's analysis indicates that the incidents cited by the commenter did not involve work exempted by this final rule. In addition, there is no evidence that the subpart CC training and qualification requirements recommended by the commenter would have prevented those incidents.

C. Agency Decision to Issue a Final Rule

Based on the rulemaking record as a whole, OSHA concludes that it is appropriate to proceed with the proposed rule and remove the burdens imposed on employers by the remaining 5 percent of non-exempt work. Therefore, OSHA is expanding 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 provided in the 2010 final rule, the Agency determines that expanding the exemption for digger

derricks will enable employers in NAICS 221120 (Electric Power Generation) to avoid compliance costs of about $15.9 million per year, while employers in NAICS 221110 (Electric Power Transmission, Control, and Distribution) will avoid compliance costs of 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 action 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 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: Jan. 2011 EEI letter). If OSHA finds that employers are using digger derricks increasingly for other tasks, the Agency may revisit this issue and adjust the exemption accordingly.

D. Revisions to the Text of the Exemption in 29 CFR 1926.1400(c)(4)

OSHA is revising the exemption in existing 29 CFR 1926.1400(c)(4) to include within the exemption the phrase "any other work subject to subpart V of 29 CFR part 1926" as proposed. 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 EEI. The Agency also is making several minor clarifications to the text of the exemption. First, OSHA is 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 final Cranes and Derricks in Construction 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 subpart V of 29 CFR 1926 and §1910.268. 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, in §1926.1400(c)(4) of this final rule, OSHA is replacing the reference to §1910.269 with a reference to subpart V. This revision is not substantive in that electric-utility employers having activities that fall within the digger-derrick exemption currently must comply with subpart V because the exempt activity is subpart V work, and they also must comply currently with §1910.269 because subpart V requires them to do so (see 29 CFR 1926.952(c)(2)). By replacing the reference to §1910.269 in the §1926.1400(c)(4)

exemption with a reference to subpart V, OSHA is removing any implication that these employers need only comply with §1910.269 and not with all subpart V requirements, including subpart O requirements for motorized vehicles.

E. Discussion of Conforming Revisions to 29 CFR 1926 Subpart V

As part of the harmonizing process mentioned in the previous section, OSHA in this final rule also is revising §1926.952(c)(2) in subpart V, which requires compliance with §1910.269 for all digger-derrick work exempted from subpart CC, including compliance with §§1910.269(p), Mechanical equipment, 1910.269(a)(2), Training, and 1910.269(l), Working on or near exposed energized parts. When OSHA promulgated subpart CC of 29 CFR 1926 in 2010, the Agency also revised §1926.952(c)(2) (75 FR 48135). This revision mirrored the terminology in the digger-derrick exemption at §1926.1400(c)(4), and required employers using digger derricks so exempted to comply with §1910.269. In making this revision, the Agency explained that it revised §1926.952(c) to require digger derricks to comply with §1910.269 to provide "comparable safety requirements" (*Id.*).

OSHA is revising §1926.952(c)(2) in this final rule so that it continues to mirror the updated terminology in the digger-derrick exemption at §1926.1400(c)(4). As part of the revision to §1926.952(c)(2), OSHA is clarifying that the requirement to comply with §1910.269 is 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.

II. 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) when it substantially reduces or eliminates significant risk (see *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980)).

This final rule does not impose any additional requirements on employers. It, therefore, does not require an additional significant risk finding (*see Edison Electric Institute v. OSHA*, 849 F.2d 611, 620 (D.C. Cir. 1988)). Moreover, for the reasons explained above, OSHA believes that adopting the proposed rule will not adversely affect safety.

B. Final Economic Analysis and Final Regulatory Flexibility Act Analysis

When it issued the final rule for Cranes and Derricks in Construction in 2010, 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 (58 FR 51735 (Sept. 30, 1993) and 13563 (76 FR 3821 (Jan. 21, 2011)). 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 2010 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 Preliminary Economic Analysis, with an allowance (to assure maximum flexibility) that there be three trained crane operators for every work crew (see 75 FR 48084). 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 (*Id*.).

In its FEA for the 2010 final rule, OSHA estimated that the annual total costs for NAICS 221110 would be $6.7 million ($4 million for operator certification), and the annual total costs for NAICS 221120 would be $18.7 million ($8.7 million for operator certification) (see FEA Table B-9 at 77 FR 48103). 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 2010 FEA, the two main cost components for an industry were the number of crane operators and the number of jobs involving cranes. That 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]

This final 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 2010 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 rule would still be economically feasible.

At the same time, it does not appear that there will be any significant reduction in benefits from the subpart CC rule. In its 2010 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 2010 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 5 percent of digger-derrick activity exempted through this rulemaking poses any hazard greater than the hazard posed by the digger-derrick activities already exempted in the 2010 final rule.

[3]Based 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 electric-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 when their primary work is in that area, but those employers also may engage in transmission work covered by subpart V. Because the record does 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 included this identical explanation in the preamble to the proposed rule, and received no comments challenging this assumption.

Because this rule estimates cost savings of $21.6 million per year, this rule is not economically significant within the meaning of Executive Order 12866. The 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.*).

OSHA developed this rule consistent with the provisions of Executive Orders 12866 and 13563. Accordingly, this 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 all digger derricks used in the electric-utility industry, 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 this final rule will reduce costs for small entities, the Agency certifies that the final standard will not impose significant economic costs on a substantial number of small entities.

OSHA included a similar economic analysis and certification in the preamble of the proposed rule and did not receive any comments challenging that analysis or the certification. The one comment that OSHA received, described earlier in this preamble, suggested that there might be additional net savings if OSHA revised the exemption to

retain qualification, training, and testing requirements for signal persons and riggers, but the comment did not dispute OSHA's analysis of the cost reductions associated with the exemption as proposed. For the reasons explained previously, OSHA determined that it would not revise the exemption as requested by the commenter.

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); *American Iron and Steel Institute v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991)). This rule does not require any additional protective measures. In the 2010 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. OSHA also reiterated that finding in the preamble of the proposed rule for this rulemaking, and did not receive any comment on that finding.

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 the Office of Management and Budget (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 that ICR. In

addition, OSHA retitled the new ICR to *Cranes and Derricks in Construction (29 CFR Part 1926, Subpart CC and Subpart DD)*.

This 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. OMB did not require OSHA to submit a new proposed ICR when OSHA issued the proposed rule, and OSHA does not believe it is necessary to submit a new ICR to OMB now. OSHA will identify any reduction in burden hours when it renews the ICR. OSHA requested comment on this approach in the proposed rulemaking describing the digger-derrick exemption, but received none.

OSHA notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by 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; 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 final 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 (29 U.S.C. 667), Congress expressly provides that states may adopt, with federal approval, a plan for the development and enforcement of occupational safety and health standards. OSHA refers to states that obtain federal approval for such a plan as "State Plan States." 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 concluded in 2010 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 this revision of the digger-derrick exemption. Therefore, this final rule complies with Executive Order 13132. In states without OSHA-approved state plans, any standard developed from this rule will impact state policy options in the same manner as every standard promulgated by OSHA. In State Plan States, this rulemaking does not limit state policy options.

F. State Plan States

When federal OSHA promulgates a new standard or a 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 need not 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 rule do not impose any new requirements on employers. Accordingly, State Plan States need not amend their standards to incorporate the expanded exemption specified in this rule, but they may do so if they so choose.

G. Unfunded Mandates Reform Act

When OSHA issued the 2010 final rule for Cranes and Derricks in Construction, 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. OSHA concluded that the final rule did not meet the definition of a "Federal intergovernmental mandate" under the UMRA (75 FR 48130). 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 II.B. of this preamble, this rule reduces expenditures by private-sector employers. For the purposes of the UMRA, OSHA certifies that this 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. OSHA included an identical certification in the preamble of the proposed rule, and received no comment challenging that certification.

H. Consultation and Coordination with Indian Tribal Governments

OSHA reviewed this 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 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, Electric power, 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 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 May 22, 2013.

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

Amendments to Standards

For the reasons stated in the preamble of this rule, OSHA amends 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 29 CFR 1926, subpart CC, excludes such use 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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