



# CONSTRUCTION INDUSTRY SAFETY COALITION



January 4, 2017



The Honorable David Michaels  
Assistant Secretary of Labor  
Occupational Safety and Health Administration  
U.S. Department of Labor  
Room S-2002  
200 Constitution Ave., NW  
Washington, DC 20210



Re: Construction Industry Safety Coalition  
Comments to OSHA's Standards Improvement Project-Phase IV  
(Docket No. OSHA-2012-0007)



Dear Dr. Michaels:



The Construction Industry Safety Coalition ("CISC") respectfully submits the following comments to the Occupational Safety and Health Administration's ("OSHA" or "Agency") Proposed Rule published on October 4, 2016 entitled Standards Improvement Project-Phase IV ("SIP-IV") (81 Fed. Reg. 68504). CISC is comprised of trade associations representing virtually every aspect of the construction industry and has previously submitted comments on behalf of its members to proposed rules including most recently OSHA's new crystalline silica rule for construction (OSHA-2010-0034-2319).



The CISC was formed to provide OSHA thoughtful comments on a wide variety of regulatory activities undertaken by the Agency. By pooling resources and members from the wide range of trades affected by OSHA's rulemaking action, such as the SIP-IV, the participating construction industry trade associations believe that stronger and more detailed comments can be submitted to OSHA during the rulemaking process. The CISC speaks for small, medium, and large contractors; general contractors; subcontractors; union contractors; etc. The CISC respectfully suggests that no group in the construction industry is better positioned to provide OSHA information regarding the appropriateness of an Agency's proposal on construction employers.



The CISC has its roots in a long-standing group of construction industry trade associations who for decades have met to discuss safety and health initiatives in the construction industry. The Construction Association Safety and Health Information Network or "CASHIN" has historically been involved in employee safety and health matters. CASHIN members meet periodically to discuss injury and illness trends in construction, outreach and assistance, and OSHA initiatives that impact the construction industry.



CISC members are concerned that a number of the proposed revisions and deletions to various OSHA standards contained in SIP-IV go well beyond the intention



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of the Standards Improvement Project and instead impose significant new obligations and costs onto employers in the construction field. While CISC members do not oppose all of the proposed changes, there are certain revisions which fundamentally alter the scope and requirements of the affected standards and thus is not in keeping with the spirit of the SIP process.

This includes the new proposed language in Section 1904.10 related to the recording of hearing loss cases, which cross-references Section 1904.5. As the final rule to Section 1904.10 makes clear, the Agency never intended for the work-related presumption in Section 1904.5 to apply to occupational hearing loss cases. CISC also objects to the new proposed language under Subpart E of the Construction Standard explicitly requiring employers to ensure that personal protective equipment (“PPE”) used in construction fits all employees properly. This will necessarily impose additional compliance costs on employers with no assessment of the benefits of this proposal or whether this is the least burdensome way to achieve OSHA’s objective. This requirement is also extremely subjective and could dramatically open up employers to unforeseen citations without fair notice of what is required.

OSHA also seeks to delete the phrase “that could pose a hazard” under two sections in Subpart P of the Construction Excavation Standard. The Agency acknowledges that this deletion would allow it to avoid unfavorable case law by assuming the existence of a hazard and shifting the burden back on the employer to establish that the standards were not violated. Finally, while CISC does not object to OSHA’s proposal to remove all requirements to include an employee’s social security number (SSN) on exposure monitoring, medical surveillance, and other records, CISC does note that this proposal is inconsistent with other recent rulemaking conducted by OSHA, specifically the final construction silica standard. 81 Fed. Reg. 16285 (Mar. 25, 2016). Further, CISC agrees with OSHA that employers should have the option to use SSNs if they wish to do so but should not be required to use SSNs on occupational records. CISC requests OSHA make a clear and definitive statement of its position on this issue and apply it consistently across all standards for uniformity and to assist employers in compliance.

As explained in more detail below, these proposals do more than simply remove or revise outdated or duplicative provisions as was done under the three prior SIPs. And contrary to the stated purpose behind the SIP process, these proposed changes add to, rather than reduce, the burden on employers. Consequently, these substantive changes should be subject to the traditional notice and comment rulemaking procedures as opposed to the more informal SIP procedure. Reopening the standards individually to consider these significant revisions separately would provide adequate notice to all affected industries and provide a fair opportunity to make serious comments on the proposed changes which includes offering a comprehensive analysis of the costs and benefits of such revisions. OSHA regularly undertakes such traditional rulemaking when making significant revisions to its standards and regulations and did so recently when the Agency proposed substantive changes to recordkeeping regulations and walking working surfaces standard. OSHA should not use the SIP process to backdoor substantive changes to its standards which would greatly affect construction employers.

CISC also adopts and incorporates the comments submitted to OSHA by the Coalition for Workplace Safety (“CWS”). The CWS, which also includes many members of the CISC, offered detailed comments on other proposed changes under SIP-IV including the deletion of the well-established term “unexpected” from energization under the lockout/tagout standard, 29 C.F.R. § 1910.147. To the extent that these proposals affect the construction industry or construction

employers who may be engaged in general industry activities, CISC fully agrees with and supports the comments provided by these other groups.

CISC appreciates the opportunity to provide OSHA with the following comments and concerns regarding this proposed SIP-IV rule and hopes that the Agency will carefully consider these comments before proceeding to finalize any of the problematic changes proposed.

## **I. Introduction.**

In response to a Presidential memorandum to improve government regulation,<sup>1</sup> OSHA undertook a series of rulemaking efforts beginning in 1995 to revise or remove confusing, outdated, duplicative, or inconsistent safety and health standards. The first effort in this process, entitled “Standards Improvement Project, Phase I” (“SIP-I”), was published on June 18, 1998 (63 Fed. Reg. 33450). As noted by OSHA, the purpose of the rule was to “remove or revise provisions in its standards that are out of date, duplicative, unnecessary, or inconsistent” and that the changes were intended to “reduce the burden imposed on the regulated community by these provisions.” *Id.* Similarly, any substantive changes made to health and safety standards were intended by OSHA to “revise or eliminate duplicative, inconsistent, or unnecessary regulatory requirements without diminishing employee protections.” *Id.*

The majority of the final rule in SIP-I deleted various standards that were either duplicative or unnecessary. (See, e.g., 63 Fed. Reg. at 33454 (deleting the term “lavatory” where it is self-explanatory; removing provision related to closing temporary labor camps since it related to public and not worker safety which is outside the Agency’s purview; eliminating unnecessary provision related to negative-pressure self-contained breathing apparatus after 18 month phase-in period ended; deleting many provisions related to pulp, paper, and paperboard industries where other general OSHA standards provided equivalent or better protection for these workers). SIP-I also made adjustments to the medical-surveillance and emergency-response provisions of the Coke Oven Emissions, Inorganic Arsenic, and Vinyl Chloride standards which reduced medical testing requirements for employers where the data did not show an improvement to the safety and health of employees. *Id.* at 33458-60.

This was followed by two more SIP rulemakings by OSHA: SIP-II published on January 5, 2005 (70 Fed. Reg. 1111) and SIP-III published on June 8, 2011 (76 Fed. Reg. 33590). In the preamble to SIP-III, OSHA again noted that “[h]istorically, the Standards Improvement Project removes or revises individual requirements within rules that are confusing, outdated, duplicative or inconsistent” which “helps employers to better understand their obligations, promotes safety and health for employees, and leads to increased compliance and reduced compliance costs.” *Id.* As in the first standards improvement project, SIP-II and SIP-III mostly removed, deleted or updated several standards to simplify and reduce the requirements and costs on employers. 81 Fed. Reg. 68505, n.3.

## **II. Standards Improvement Project, Phase IV.**

On December 6, 2012, OSHA sought information from the public to initiate the fourth phase of the regulatory review under the SIP protocol. See 77 Fed. Reg. 72781. In this request, OSHA

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<sup>1</sup> Memorandum on Regulatory Reform, 31 Weekly Comp. Pres. Doc. 363 (Mar. 4, 1995).

explained that it had conducted similar regulatory reviews of its existing standards and that it was seeking assistance from the public in identifying additional standards that are potential candidates for SIP-IV rulemaking. OSHA stated that it wanted to primarily target construction standards in this fourth review that are “confusing or outdated, or that duplicate, or are inconsistent with, other OSHA standards or the standards issued by other agencies.” Id. at 72782. This request was directed to OSHA’s general industry and construction standards and did not specifically reference potential changes to the recordkeeping regulations under Part 1904.

For guidance in the identification process, OSHA listed several specific objectives of the SIP-IV rulemaking with specific examples from the prior SIPs and standards currently under consideration for this round of rulemaking. The listed objectives were to eliminate unnecessary paperwork, clarify employer duties and eliminate unnecessary employer duties, update standards and eliminate inconsistencies or duplication between standards. Under the final “Miscellaneous Revisions,” OSHA indicated that this would include eliminating obsolete, unclear, or inconsistent standards, permitting the use of new technologies or new and effective employee-protection measures that provide equivalent or superior performance to existing OSHA standards, and correcting grammatical or typographical errors. Id. at 72782-83. OSHA made it clear that recommendations for “large-scale revisions to standards” are not appropriate for this rulemaking. Id. at 72782.

On October 4, 2016, OSHA published SIP-IV as the fourth review undertaken by the Agency. OSHA again noted that the purpose of the SIPs was to “remove or revise outdated, duplicative, unnecessary, and inconsistent requirements in OSHA’s safety and health standards, which will permit better compliance by employers and reduce costs and paperwork burdens where possible, without reducing employee protections.” 81 Fed. Reg. 68504. OSHA also based this fourth review in part on Executive Order 13563, “Improving Regulations and Regulatory Review,” 76 Fed. Reg. 38210 (Jan. 18, 2011) which sets out the “goals and criteria for regulatory review and encourages agencies to use the best, least burdensome means to achieve regulatory objectives, to perform periodic reviews of existing standards to identify outmoded, ineffective, or burdensome standards, and to modify, streamline, or repeal such standards when appropriate.” Id. at 68505. OSHA explicitly acknowledged that SIP rulemakings do not address new significant risks or estimate benefits and economic impacts of reducing such risks and that overall SIP rulemakings provide cost savings and eliminate unnecessary requirements. Id.

In total, OSHA is proposing 18 revisions under SIP-IV which covers not just construction but also seeks to make changes to existing recordkeeping, general industry and maritime standards. OSHA asserts that these proposals simply delete or revise a number of standards in what the Agency claims is an effort to reduce the burden on employers. As a result, OSHA claims that these proposals do not constitute an “economically significant regulatory action” and are not “major rule[s].” Id. at 68528. OSHA views these changes as merely clarification of existing language and from that assumption made a preliminary determination that none of the revisions except for one would increase costs or compliance burdens on employers. In evaluating all 18 proposed revisions, OSHA found that neither the benefits nor the costs of SIP-IV would exceed \$100 million and that there would be approximately \$3.2 million cost savings to regulated entities per year. Id. Out of all of the revisions OSHA claims that only one, the new location posting requirement for emergency medical services, would impose a minimal cost on employers of only \$27,899 annually. Id. at 68531.

Most of the revisions are non-controversial and in line with SIP principles. This includes reducing the number of necessary employee x-rays and updates to the storage of digital x-rays, updating emergency call services based on current technology, eliminating the process safety management construction standard and cross-referencing to general industry, and eliminating requirements to post maximum safe-load limits for floors in residential dwellings which eliminates a paperwork burden for construction employers. *Id.* at 68505-06. However, other changes proposed by OSHA were unexpected and involve substantive changes to a number of standards which will impose new requirements and compliance costs onto employers. Contrary to OSHA's assessment, these changes are significant regulatory action which are not appropriate as part of this SIP process. By using the streamlined SIP process, OSHA is attempting to avoid a more thorough review of these proposed revisions without giving fair notice to the regulated public and without engaging in a serious cost/benefit analysis. See Pub. Citizen Health Research Grp. v. United States DOL, 557 F.3d 165, 175-76 (3d Cir. 2009) (review of promulgated OSHA standards includes determination whether the proposed rulemaking adequately informs interested persons of the action taken, adequately sets forth reasons for the action, includes an adequate statement of reasons which reflect consideration of relevant factors, determination of whether presently available alternatives were at least considered, and whether substantial evidence in the record as a whole supports the determination) (citation omitted).

For purposes of these comments, CISC is only focusing on those proposed changes which have the most serious implications for its members and construction employers and which were not appropriate under the SIP rulemaking process. This includes the revisions to the recordkeeping provisions, the new requirement for employers to ensure that personal protective equipment properly fits all construction employees and the deletion of a key phrase under the excavation standard that unduly places the burden on employers to prove compliance with the standard. CISC hopes that OSHA will seriously consider these comments and remove these revisions from the SIP-IV. CISC also addresses OSHA's proposed removal of SSNs from various exposure and monitoring records to request that the Agency establish a clear and uniform approach that is applied across all standards.

**A. Adding a specific cross-reference to Section 1904.5 in paragraph Section 1904.10(b)(6) is inconsistent with the Agency's final intent and rulemaking for Section 1904.10.**

Section 1904.10(b)(6), which addresses the recording criteria for cases involving occupational hearing loss, provides that "If a physician or other licensed health care professional determines that the hearing loss is not work-related or has not been significantly aggravated by occupational noise exposure, you are not required to consider the case work-related or to record the case on the OSHA 300 Log." 29 C.F.R. 1904.10(b)(6).

In this proposed rule, OSHA proposes to clarify the relationship between Sections 1904.10(b)(6) and 1904.5 by adding a cross-reference to Section 1904.5 to make clear employers must comply with Section 1904.5 when making a determination of whether an employee's hearing loss is work-related. The problem with this "clarification" is that by adopting a specific cross-reference in 1904.10 it adopts the geographic presumption established in 1904.5(a) ("Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in



the work environment, unless an exception in §1904.5(b)(2) specifically applies”) 29 C.F.R. 1904.5(a).

Had OSHA intended for Section 1904.5, specifically the presumption of work-relatedness, to apply to occupational hearing loss cases it would have done so explicitly during the rulemaking. However, OSHA made a clear and deliberate decision not to reference §1904.5 because the Agency determined that not all of § 1904.5 should apply to occupational hearing loss cases. In the final rule for 1904.10, OSHA stated,

OSHA agrees . . . that it is not appropriate to include a presumption of work-relatedness for hearing loss cases to employees who are working in noisy work environments. It is possible for a worker who is exposed at or above the 8-hour 85-dBA action levels of the noise standard to experience a non-work-related hearing loss, and it is also possible for a worker to experience a work-related hearing loss and not be exposed above those levels. Therefore, the final rule states that there are no special rules for determining work-relationship and restates the rule’s overall approach to determining work-relatedness – that a case is work-related if one or more events or exposures in the work environment either caused or contributed to the hearing loss, or significantly aggravated a pre-existing hearing loss.

67 Fed. Reg. 44037, 44045 (July 1, 2002).

In the final rule for the § 1904.10, recording criteria for cases involving occupational hearing loss, OSHA specifically elected not to apply the approach to determining work-relatedness in 1904.5 noting, “the approach used in the January 2001 rule is not supported by comments to the docket. None of the commenters supported the presumption, while many opposed it.” Id.

In attempting to simply “clarify” what it believes to be a consistent position, OSHA fails to fully appreciate the interplay between the two sections and the impact the addition of the cross-reference would have on changing the intent of the standard. Nothing in §1904.10(b)(6) requires a physician to use the same criteria of work-relatedness in § 1904.5. This proposed revision is more than a clarification, it is a substantive revision to the recordkeeping provisions for occupational hearing loss, which runs afoul of the Agency’s clear intent when the final rule was promulgated.

### **B. Ensuring that Personal Protective Equipment Properly Fits all affected Employees in Construction will Impose Significant and Burdensome New Obligations onto Employers.**

In discussing Subpart E of 1926--Personal Protective and Life Saving Equipment, Criteria for Personal Protective Equipment, OSHA acknowledged that unlike general industry the construction standard does not contain an explicit requirement that PPE used in construction must fit each affected employee. Id. at 68517. Yet without the benefit of any support, OSHA asserts that § 1926.95(c)’s requirement that PPE “to be ‘of safe design’ implicitly precludes the use of ill-fitting equipment.” Id. OSHA thus claims that revising this standard to include an explicit requirement that employers must ensure that construction PPE “properly fits each affected employee” simply clarifies this requirement and makes it consistent with general industry PPE requirements. Id. at 68517 and 68665. Because OSHA claims that this only clarifies an existing requirement, the

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Agency makes the preliminary determination that this revision would not increase costs or compliance burdens to employers. Id. at 68533.

CISC does not believe that OSHA seriously considered the full impact this revision will have on employers and the construction industry in general. While the proposed revision only adds a few new words, its broad scope covers a wide variety of PPE and situations that are not fully appreciated in the SIP-IV. PPE includes items such as gloves, foot and eye protection, protective hearing devices (earplugs, muffs), hard hats, and even reflective vests. PPE also includes more specific items such as respirators and full body suits. Placing an explicit requirement that employers must ensure that all types of construction PPE “properly fits” all different sized employees in all different situations would be a monumental task which in many cases is not necessary and will not improve safety. Moreover, the proposed revision fails to provide adequate notice to employers as to what “properly fit” would mean. Does this mean that an employee who complains that a hard hat is uncomfortable does not “properly fit” or what about arc-flash clothing that may be too long in the legs for one employee, does this not properly fit?

CISC and its members acknowledge that part of assessing PPE is to make sure that it fits appropriately. However, the assessment and need to ensure proper fit varies greatly depending on the PPE at issue and the hazards involved. For example, ensuring proper fit for respirators is critical to ensuring that it adequately protects the employee from a respirable hazard. In the case of respirators, OSHA has already cross-referenced the construction standard to the general industry standard which in turn provides mandatory fit testing procedures for respirators that includes making sure that the respirators are of an “acceptable fit.” See § 1926.103 (“requirements applicable to construction work under this section are identical to those set forth at 29 C.F.R. § 1910.134 of this chapter.”); Appendix A to § 1910.134: Fit Testing Procedures (Mandatory).

On the other hand, the exact fit of reflective vests in most cases will not affect the safety of an employee. Similarly, safety goggles do not come in an array of sizes and an employer may have to elect to provide safety goggles that are not an exact fit but still provide adequate protection and safety to the employee. And, arc-flash clothing that may be slightly long still affords the appropriate protection. In other cases, PPE is unique to individual employees. In these situations it is generally not expected for employers to assess and provide PPE that fits all employees. In OSHA’s Final Rule addressing employer payment for PPE, the Agency recognized that safety footwear is not easily transferred from one employee to the next and that unlike other types of safety equipment “the range of sizes of footwear needed to fit most employees would not normally be kept in stock by an employer and it would not be reasonable to expect employers to stock the array and variety of safety-toe footwear necessary to properly and comfortably fit most individuals.” See 72 Fed. Reg. 64342, 64348 (Nov. 15, 2007).

Despite these wide ranging considerations, OSHA’s entire discussion on revising the construction PPE standard spans only a few paragraphs. OSHA also states that the entire impetus for this proposed change came only from a few commentators including the AFL-CIO and the International Safety Equipment Association. 81 Fed. Reg. at 68517. OSHA did not take into account any concerns or issues from employers or the construction industry before making this proposal. Later on in evaluating the costs of this revision, OSHA admits that it was merely the Agency’s “opinion” that PPE must fit properly if it is to provide protection against the hazards for which it is designed. Id. at 68533. Yet OSHA does not consider the different types of PPE, whether exact or proper fit impacts safety, and the subjective nature of this obligation.

As demonstrated above, explicitly requiring employers to ensure that all PPE properly fits employees greatly changes the dynamic of this standard and places enormous new responsibilities on construction employers. This does much more than simply clarify this provision but rather opens up construction employers to subjective standards of whether particular PPE fits properly and what steps employers must take to ensure that such PPE fits properly, particularly when most PPE does not come in exact sizing for employees. Despite the potential impact of this change, SIP-IV does not evaluate whether such fit requirements are already addressed by other standards or whether it is feasible or even necessary for certain PPE. In many cases, whether PPE “properly fits” is very subjective and would be difficult for employers in construction to assess PPE for dozens of employees of varying sizes in each situation. It is also not feasible to require employers to make certain generic construction PPE available in all types of different sizes and fits to meet this standard. Not only would this led to increase in compliance costs, the subjective nature of this standard would greatly increase the potential for enforcement actions without giving employers fair notice of what is required.

CISC also disagrees with OSHA’s assertion that applying the same standard under general industry will have the same effect or benefit. The types and need for PPE vary greatly in construction and thus adding this new fit requirement will necessarily create more of a burden for employers in construction. In addition, OSHA completely underestimated the costs and burdens that this proposal will place on construction employers. This proposed revision was briefly raised with the Advisory Committee on Construction Safety and Health (ACCSH) and OSHA specifically acknowledged that the SIPS project might not be the appropriate avenue for such a change. The issue was left open with ACCSH and no further discussion or comments were requested which is evidence that the Agency did not fully consider whether this proposal was proper under SIP rulemaking. For these reasons, CISC strongly believes that if OSHA is interested in making such a proposal that it engages in a more thorough and complete rulemaking process which gives fair notice to the regulated community and will allow the Agency to receive comments from the regulated community as to the impact and implications that this change would have on employers.

### **C. Deletion of Well-Established Phrase under Excavation Standard Fundamentally Alters the Scope of the Standard and Unduly Shifts the Burden onto Construction Employers.**

Under SIP-IV, OSHA is proposing to delete the phrase “that could pose a hazard” from both paragraphs (j)(1) and (j)(2) of § 1926.651 of the excavation standard. 81 Fed. Reg. at 68519. OSHA also wants to remove “by falling or rolling” from an excavation face or into excavations from these paragraphs because the Agency feels that it is unnecessary to describe the hazard.

OSHA admits that it is seeking to delete “that could pose a hazard” in order to circumvent adverse Occupational Safety and Health Review Commission (“OSHRC”) decisions that have placed the burden on the Secretary to show that a hazard existed at the worksite and that employees were exposed to said hazard in order to establish a violation of these standards. *Id.* (citing Black Construction Corp., 19 BNA OSHC 1043 (2000) (ALJ) ((j)(1)); Schaer Development of Central Florida, Inc., No. 11–0371, 2011 WL 3394942 (OSHRC ALJ June 2, 2011) ((j)(2))). OSHA asserts that these decisions are contrary to how most standards are interpreted and then claims without support that the 1989 revision to the excavation standard, which added this specific language to the original 1971 provisions, did not intend for OSHA to carry the burden of first establishing that a



hazard existed. OSHA essentially argues that the explicit language added in the 1989 amendments have no meaning and can be removed without changing the intent of the standards or adding any costs onto employers. *Id.* at 68535 (citing 54 Fed. Reg. 45894 (Oct. 31, 1989)).

Regardless of whether one agrees with these proposed revisions, the deletion of this phrase clearly represents a substantive change to these provisions and places new compliance burdens on employers that were not present before. OSHA offers no reasoned analysis to support changing these provisions that have been around for nearly 30 years and in fact will not even admit that these changes represent an actual deviation from the Agency's longstanding positions. By casually seeking to change these provisions using the SIP process without the benefit of a serious discussion supporting the deviation from prior policy, OSHA's proposal are arbitrary and capricious and would not survive scrutiny under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706.

OSHA's brief discussion on the proposed removal of this language contain numerous factual and legal errors. First, OSHA's argument that the language added in the 1989 revision did not intend to shift the burden onto the Agency is contradicted by other changes made in that final rule. For example when discussing the addition of Paragraph (h)(1) to § 1926.651, OSHA recognized that sometimes water may accumulate in an excavation but that it may not necessarily pose a hazard where adequate precautions have been taken or where employees do not enter such areas and thus are not exposed to a hazard. 54 Fed. Reg. 45894. OSHA was concerned that the existing requirement under § 1926.651(p), taken literally, would mean that the standard was violated if there was any amount of accumulated water in the excavation regardless of the situation. To avoid this result, OSHA specifically stated that employees shall not work in excavations where water had accumulated "unless adequate precautions have been taken to protect employees against *the hazards posed* by water accumulation." 54 Fed. Reg. 45894 (emphasis added).

In the same way, the phrase "that could pose a hazard" was included in paragraphs (j)(1) and (j)(2) to acknowledge that these standards did not apply in all cases but only where there was a hazard from loose rock, soil, excavated materials or equipment falling or rolling from or into excavations. There would have been no other reason to include this very specific language and is consistent with OSHA's discussion on the hazards posed referenced in Paragraph (h)(1). This reading of the revised language has also been confirmed by numerous legal decisions. See Black Construction Corp., 19 BNA OSHC 1043; Schaer Development of Central Florida, Inc., 2011 WL 3394942.

Next, OSHA's assertion that the 1989 revision did not indicate an intention to shift the burden is belied by decisions on the original 1971 standard which also found the need for OSHA to establish that there was a hazard to support a violation. See e.g. CTM, Inc. v. OSHRC, 572 F.2d 262, 263-64 (10th Cir. 1978) (in reviewing a citation under § 1926.651(i)(1) of the original excavation standard, 10th Circuit set aside Review Commission and Secretary decision where they did not establish that the spoil pile presented a hazard). Moreover, OSHA is well acquainted with the principle that a hazard is not presumed when the "standard incorporates the hazard as a violative element." See All Am. Concrete, Inc., 2012 OSAHRC LEXIS 100, \*15-16, 24 OSHC (BNA) 1566 (O.S.H.R.C.A.L.J. Dec. 31, 2012) (holding that § 1926.651(j)(2) incorporated the hazard as a violative element the Secretary must prove) (citing Bunge Corp. v. Secretary of Labor, 638 F. 2d 831 (5th Cir. 1981)); see also Black Construction Corp., 19 BNA OSHC 1043, \*8 (noting that while most OSHA standards are predicated on the existence of a hazard, certain standards by their terms must only be observed when employees are exposed to a hazard described generally in the standard).

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In All Am. Concrete, Inc., the Review Commission held the first sentence added to § 1926.651(j)(2) imposed the additional element of proof on the Secretary to establish that there was a hazard of materials or equipment falling or rolling into the excavation because “otherwise, the inclusion of the sentence would serve no purpose.” 2012 OSAHRC LEXIS 100, at 15-16 (“[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.” (citations omitted)). OSHA’s assertion in this proposal that the inclusion of this language did not change the meaning of standard or shift the burden of establishing a hazard ignores the plain reading of the phrases and would make the inclusion of them pointless. It also goes against the weight of decisions after the 1989 amendment which have held that the additional language meant what it said and incorporated the need for a hazard to be established as an element of a violation.

The next problem with OSHA’s discussion is the claim that somehow these deleted phrases will not add costs or compliance burdens onto employers because the changes only seek to clarify the original intent of the provisions. To begin with, CISC disagrees that these changes simply clarify the prior intent of these provisions. As shown above, the 1989 revisions clearly meant to change the scope and application of these excavation provisions. Regardless of what OSHA believes the original intent of the standards were, by proposing to delete certain language the Agency recognizes that court decisions have read them to include placing the burden on OSHA to first establish a hazard. This is the entire reason why the Agency is proposing to delete the phrases in the first place. OSHA simply cannot say that removing this language, which the Agency acknowledges will necessarily shift the burden back to employers, will not add significant new costs and compliance burdens onto employers. OSHA offers absolutely no discussion or analysis of these issues in the SIP-IV and it cannot be said that these proposed deletions will reduce cost or eliminate unnecessary regulations on employers, which is the entire purpose of the standards improvement project. To the contrary, the proposed deleted phrases will significantly increase the burden and enforcement actions against employers and thus is not appropriate under this SIP process.

Finally, OSHA offers no reasoned analysis supporting its decision to deviate from the well-established and longstanding language contained in the current excavation standards. The language that OSHA now seeks to delete was carefully and deliberately added to the excavation standards in 1989. 54 Fed. Reg. 45894. This additional language clarified what experienced utility and excavation contractors and OSHA already knew: that spoil piles, materials, and equipment in the vicinity of the edge of an excavation do not automatically pose a significant hazard to employees. This revision clarified an employer’s responsibility without assuming a hazard where one may not exist and avoided unnecessary enforcement actions where employees were not exposed to a dangerous hazard. Courts recognized the change to the standards and appropriately shifted the burden to OSHA to first establish a hazard and employers reasonably relied on these efforts.

OSHA is now seeking a stark departure from this well-established standard that employers have relied upon for decades which will greatly affect the regulated community. While OSHA is afforded great latitude to change its policies, it must justify its actions by articulating a reasoned analysis behind the change. CBS Corp. v. FCC, 663 F.3d 122, 126-27 (3d Cir. 2011) (citing Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983)). “[A]n agency cannot ignore a substantial diversion from its prior policies” but rather must “provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.” Ramaprakash v. FAA, 346 F.3d 1121, 1124, 358 U.S. App. D.C. 146 (D.C. Cir. 2003).

Where an agency has not offered any explanation — reasoned or otherwise — for changing its policy it will be held invalid as arbitrary and capricious under the Administrative Procedure Act. CBS Corp., 663 F.3d at 126-27 (citations omitted). By failing to even acknowledge that it is deviating from established understanding of these excavation standards, much less offer any reasoned analysis for the change, OSHA has forfeited its ability to carry out these revisions to the excavation standards as proposed under SIP-IV.

### **D. OSHA Should Ensure that its Policy on SSNs is Consistent and Applied Uniformly to all Standards**

In recognition of the real concern over identity theft, OSHA is proposing under SIP-IV to remove the requirement for employers to use an employee's social security number ("SSN") for identification purposes on various exposure monitoring, medical surveillance, and other records under 29 C.F.R. parts 1910, 1915, and 1926. 81 Fed. Reg. at 68526. OSHA has wisely reconsidered its position on this matter acknowledging the danger of using employee's SSNs and recognizing suitable alternatives to track the identity of employees without the use of more sensitive identifying information.

CISC and its members wholeheartedly agree with OSHA's assessment of this issue and believe that there are safer and better alternatives than SSNs to identify employees without sacrificing their sensitive personal information. However, CISC wants to make sure that OSHA implements a clear and consistent application of this policy throughout all standards to avoid confusion and additional burdens and costs on employers. This concern stems from OSHA's final rule on silica which just came out earlier this year and preserved the use of employee SSNs for recordkeeping purposes. Id. at 68527 (citing 81 Fed. Reg. 16285, 16852 (Mar. 25, 2016)). In the final rule on silica, however, OSHA did recognize commentators' concerns over employee privacy and the Agency's desire to address this issue in future rulemaking on a more comprehensive rather than standard-by-standard basis. 81 Fed. Reg. at 68526-27.

As OSHA considers this proposal, CISC wants the Agency to be mindful of a few issues to ensure that the final proposal is consistent and does not add confusion or burden onto employers. First, OSHA states that this proposal will not require employers to go back and delete employee SSNs from existing records and will not require employers to use an alternative unique employee identifier on these existing records. OSHA also indicates that employers may still use SSNs if they wish to do so. CISC agrees with these provisions and encourages OSHA to include specific reference to them in the language of any final revisions to the standards in question so as to clarify an employer's responsibility on existing and future records. These existing records can still be reviewed and analyzed using the employee's SSN. There is no benefit to making an employer go back to revise these existing records and would only add significant recordkeeping costs on employers.

Next, OSHA asked for comments on potential alternatives such as using a unique employee identifier and whether employers currently use alternatives to SSNs to identify employees in the records required by OSHA's standards. It is true that CISC members and other employers use all different kinds of alternatives to identify employees other than SSNs. This can range from using unique employee ID numbers assigned to individual employees, only the last four digits of an employee's SSN, a combination of the employee's first and last name or portions of the name along with numbers, or use of an employee's birthdate in conjunction with some other identifying information. These other methods are just as effective as SSNs to identify the employee on the

record and in fact have been used by employers for years to track payroll and personnel records. There is no universal or consistent approach taken by employers to create such identifiers for their employees which can vary greatly from industry to industry. CISC would recommend that OSHA not mandate a specific type of identification method that has to be used by all employers. Doing so would limit employers' flexibility to come up with a system that best works for their unique situations and will in turn be more burdensome and difficult to implement.

### III. Conclusion

CISC maintains that the proposals contained in SIP-IV discussed above do more than simply remove or revise outdated, duplicative, unnecessary, and inconsistent OSHA standards. Instead, they represent substantive changes to the standards which impose significant new costs and burdens on employers and thus are not appropriate as part of the SIP rulemaking.

CISC respectfully requests that OSHA reconsider these proposals and withdraw them completely from the SIP process.

Sincerely,

American Road and Transportation Builders Association  
American Society of Concrete Contractors  
American Subcontractors Association  
Associated Builders and Contractors  
Associated General Contractors  
Association of the Wall and Ceiling Industry  
Building Stone Institute  
Concrete Sawing & Drilling Association  
Construction & Demolition Recycling Association  
Distribution Contractors Association  
International Council of Employers of Bricklayers and Allied Craftworkers  
Leading Builders of America  
Marble Institute of America  
Mason Contractors Association of America  
Mechanical Contractors Association of America  
National Association of Home Builders  
National Association of the Remodeling Industry  
National Demolition Association  
National Electrical Contractors Association  
National Roofing Contractors Association  
National Utility Contractors Association  
Natural Stone Council  
The Association of Union Constructors  
Tile Roofing Institute

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