

Summary of Comments and Agency Decisions

Title: Confined Spaces, OAR 437-002-0146, in general industry and construction.

Administrative Order Number: 5-2014

Adopted: October 20, 2014

Effective: January 1, 2015 for general industry, March 1, 2015 for construction

History

In 2012, Oregon OSHA adopted a new confined space rule, OAR 437-002-0146, which replaced OAR 437-002-1910.146, "Permit-Required Confined Spaces." That rule was initiated in large part to address confined space hazards for the construction industry, as the previous rule, OAR 437-002-1910.146, did not apply to the construction industry. The goal in this process was to draft a rule that was significantly less confusing than that rule, address shortcomings with that rule, and organize the standard so employers can better understand what is expected of them.

However, in 2013, Oregon OSHA received questions about certain provisions of the adopted rule and their impacts on the industry, and we concluded there was enough substance to those concerns to justify revisiting the rule to address those concerns.

Oregon OSHA issued a press release notifying employers that we were restarting the confined space rule, stating that we would withdraw the rule and reconvene a stakeholder group to develop a new rule to replace the Oregon-initiated rule.

On September 10, 2013, Oregon OSHA held a meeting with stakeholders to discuss these issues, and the subject of how best to proceed. At that time, stakeholders encouraged Oregon OSHA to not withdraw the rule, but to keep it in place and continue the enforcement practice of citing violations of the state rule only if they also would have been violations of the federal rule. Oregon OSHA decided to take that route.

On July 25, 2014, after continued and extensive stakeholder discussions, Oregon OSHA published a proposal to amend OAR 437-002-0146.

Summary and explanation

Issues that were addressed with this rulemaking (compared to the previous rulemaking) included:

- Adding and clarifying definitions.
- Clarifications for evaluating permit spaces, particularly for mobile workers.
- The section on rescue was reworked for readability.
- The section for third-party rescue services was removed as it was redundant.

- The requirement for rescue personnel to be trained in first aid and CPR was changed to be knowledgeable in first aid and CPR. One member of the rescue team must still be certified.
- The requirement for practice rescues was changed from an annual requirement to within 12 months before an entry.
- The term “self rescue” was removed except for a clarification that self-rescue is not a viable rescue plan.
- The requirement for an agreement for third-party rescue providers to be in writing was removed.
- The exception for continuous systems was modified to allow for alternate entry when engulfment cannot occur.
- A note was added that when fall hazards have been addressed and all other physical hazards eliminated and all atmospheric hazards have been eliminated or controlled with continuous ventilation, alternate entry is allowed.
- Clarification language was added to specify who is authorized to allow alternate entry.
- The documentation of the direct reading instrument calibration date was removed.
- The requirements for training were reorganized for clarity.
- A note was added for awareness training to clarify when employees need awareness training.
- Language in the appendices was modified for clarification.
- The sample permits were replaced with a new sample permit and a sample alternate entry form.

Oregon OSHA received a comment¹ favorable to the rule as a whole.

Scope and application : 437-002-0146(1)

A comment² was made that the Oregon rule regulates confined spaces, where the federal standard regulates only permit-required confined spaces (permit spaces). Consequently, nationally-available training programs will not reflect Oregon OSHA’s requirements.

Oregon OSHA agrees with this conclusion, and modified the rule requirements to require that employers evaluate their permit-required confined spaces.

Exceptions: 437-002-0146(2)

During the proposal phase of this rulemaking, it was discovered that the published proposal inadvertently left out language in paragraph (2)(a), and was changed to read, *“Construction work regulated by Division 3/P Excavations, except for entry into sanitary sewer spaces that are large enough to bodily enter.”*

¹ Vigilant

² The Oregon Department of Transportation (ODOT)

During the proposal period, it was noted that federal OSHA had adopted new rules for electric power transmission and distribution for construction, with requirements that mirror 1910.269. Oregon OSHA is updating our rules to reflect those changes, and an exception for enclosed spaces for 1926.953 was added in anticipation of the Oregon OSHA adoption of these changes.

Definitions: 437-002-0146(3)

Isolate or isolation

An informal discussion occurred regarding the use of tagout as a method of isolation. It was suggested to change the definition of isolation to clarify that tagout alone is not an effective means of isolation in and of itself.

This suggestion does not conform to the federal standard's use of tagout as an isolation method. Tagout alone can be an effective means of isolation, but it would depend on the nature of the hazard, the tag location in relation to the attendant, and whether other means need to be used in conjunction with the tag. For example, putting a tag on a valve that operates remotely is not an effective isolation by itself. The permit would need to include all other means used to ensure that the valve cannot be operated during a permit entry. A clarification was made that any energy isolation still needs to conform to the requirements of 1910.147.

Note: When using lockout/tagout, you must follow all of the requirements of OAR 437-002-1910.0147, "The Control of Hazardous Energy".

Additionally, while tagout can be used effectively during a permit entry, it cannot be used as a sole means for alternate entry, as a tag clearly does not eliminate a hazard. A note was added to paragraph (10) Alternate Entry (a) to explain that *for purposes of this rule, tagout alone does not eliminate a hazard* for alternate entry.

Hazardous atmosphere

A commenter³ was concerned that the definition of atmospheric hazard did not include substances with chronic health effects, such as asbestos.

The confined space rule was never designed to address chronic health hazards. While substances like asbestos do present a clear hazard, it is typically not an immediate life-threatening situation. However, any employer whose employees perform asbestos work fall within the requirements of the asbestos rule, including working in confined space or even permit-required confined spaces. A note was added to clarify that all other rules regarding health hazards still apply.

Note: *An atmospheric concentration of any substance that is not capable of causing death, incapacitation, impairment of ability to escape unaided, injury, or acute illness due to its health effects is not covered by this provision. You must still follow all other applicable Oregon OSHA requirements to protect employee health.*

³ Mary DeVany

Evaluation: 437-002-0146(4)

A comment⁴ suggested adding language for the initial evaluation of confined spaces to include spaces in remote unmanned locations only when an employee travels to that location. The commenter expressed concern that the rule compels them to “scour every unmanned location” to identify confined spaces.

Oregon OSHA does not agree that this language is necessary and believes that the commenter misunderstands this requirement. This commenter is somewhat unique in that they have fixed locations, unmanned remote locations, and locations under construction. Under this rule, the identification can include types of confined spaces, not necessarily each and every individual space. For example, a city may have a sewer system with multiple entry points. The city would only need to identify the types of spaces (such as sanitary sewer manholes, storm drain manholes, lift stations, etc.) and evaluate the hazards posed by those types of spaces. These comments indicate that they are already aware of the types of spaces employees may encounter (“interior bridge spaces, culverts, utility vaults, catch basins, sewers, wells”) and need only identify these types of spaces, not the specific location of each individual space. As for evaluating these types of spaces, the expectation is that they identify the reasonably-anticipated hazards of these types of spaces. When employees are assigned work in one of those locations, the space would need to be evaluated for hazards at the time of the planned entry. The only time the program would need to be reassessed would be if a new hazard is identified for that type of space.

Another recommendation⁵ was made that paragraph (4)(a) be revised to say, “Ensure all **known** confined spaces are part of this determination.” The commenter’s rationale is similar to the section above.

Oregon OSHA disagrees, based on the discussion above, and the fact that the language changed based on an earlier comment. In addition, including the suggested revision would allow an employer to disregard confined spaces about which it should have known (or could have known with reasonable diligence) but about which the employer did not in fact know. Oregon OSHA is not prepared to reduce the legal standard for employer knowledge for the purposes of this rulemaking.

A comment⁵ recommended removing or revising the requirement for an employer to evaluate the hazards of a permit space under the control of another employer. The commenter’s rationale is that the entity in control of a permit space is already required to evaluate the hazards of that space, and the employees of another employer should simply fall within the existing permit for that space.

⁴ The Oregon Department of Transportation (ODOT)

⁵ The Oregon Department of Transportation (ODOT)

Oregon OSHA strongly disagrees. Our own accident investigation history reveals cases where such rationale was used, resulting in fatalities and near fatalities. Nationwide, there have been multiple fatalities where one employer presumed that another employer had adequately assessed and controlled the hazards of a permit space and had their employees die as a result. Employers cannot delegate their responsibility to protect their employees to another employer.

Permit-Required Confined Space Entry Program and Permits: 437-002-0146(5)

A recommendation was made for revising the elements of the written program for fixed sites to include all known permit spaces, instead of all permit spaces. The rationale used is similar to the rationale in the comments in paragraph (4) above, in that all spaces, particularly in remote locations, cannot reasonably be evaluated.

Oregon OSHA disagrees with this recommendation. The section to which the commenter refers also includes a note that states the following, *“Where there are multiple permit spaces of the same type that have the same hazards, such as sewers, water vaults, or valve pits, the exact location of each space does not need to be identified so long as there is enough information so that employees can readily identify each type of space and its hazards at each location.”*

The rule also addresses remote locations by stating, *“The location of permit spaces at remote unmanned locations do not need to be added to the program until the first time employees go to that location after the effective date of this rule.”* While the program already accounts for spaces of a similar type and hazards, this would apply to those spaces that fall outside of the spaces already identified and categorized.

Rescue: 437-002-0146(9)

A comment⁶ was made suggesting that a note be added regarding the process for summoning rescue services. A note was added to paragraph 9(a)(A) to read, *“At a minimum, if an off-site rescue service is being considered, the employer must contact the service to plan and coordinate the evaluations required by the standard. Merely posting the service’s number or planning to rely on the 911 emergency phone number to obtain these services at the time of a permit space emergency would not comply with the rescue requirements of the standard.”*

Training: 437-002-0146(11)

A commenter⁷ suggested changing the language for awareness training, suggesting that the requirement is far too complex for workers who will not enter permit spaces.

Oregon OSHA disagrees, as the intent of the awareness training is not to provide a level of training so that employees can enter those spaces; it is to explain how they can keep themselves out of danger. The complexities of the program do not

⁶ Steve Eversmeyer

⁷ The Oregon Department of Transportation (ODOT)

have to be explained, only that there is a process for how these spaces are entered. These comments clearly demonstrate that, not only is this awareness training feasible, their comments state that they've been doing it for at least 5 years.

We also received a comment⁸ that we modify paragraph (a)(A) to include a requirement to train whenever a new hazard in a particular space is found. While paragraph 5(f) already requires a review and revision of the program when a new hazard is identified, and retraining is required whenever there is a change to the program, Oregon OSHA added this to clarify the employer's responsibility to ensure employees understand the hazards of the spaces they deal with.

Another comment⁷ was made suggesting that the requirement of paragraph 11(c)(C), which states, "Ensure all employees understand how to recognize permit spaces in their work area." is redundant, as paragraph 11(c)(A) states, "Provide employees whose work operations are or may be in an area where permit spaces are present with a basic overview of..."

Oregon OSHA disagrees, as the two requirements are different. Paragraph 11(c)(A) is about employees understanding the program overall. Paragraph (11)(c)(C), in conjunction with paragraph 4(c)(A), which requires that employers develop and implement a means so employees can identify permit spaces, is about employees understanding how to identify those spaces.

⁸ Mary DeVany