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TO: OR-OSHA Confined Space Work Group  
FR: Cummins, Goodman, Denley & Vickers, P.C.  
DT: October 14, 2013  
RE: Review of Previously Adopted Confined Space Rule

The purpose of this memorandum is to highlight some of the most significant inconsistencies and ambiguities in the previously adopted confined space rule. This memo does not identify or address all questions or concerns the rule's language raises.

- **Inconsistent use of a defined term** – “Control” is defined in the context of controlling a hazard, but it is used throughout the rule also in the context of a regulated entity having “control” over a confined space. For example, in subsection (4)(a)(A)(ii)(IV), the rule contemplates controlling contractors or host employers “assum[ing] control” over confined spaces. What does that mean?<sup>1</sup> What “control” means in this latter context is never defined. (Even if it were, it would be preferable to use two different terms so that there is no confusion as to which definition would apply in a given circumstance.
- **Problem with “continuous system” definition and/or section (10)(b) “exception” to alternate entry**
  - “Continuous system” is defined in such a way that it is difficult to conceive of what could possibly be a “continuous system.” Why? By definition, a confined space is not part of a “continuous system” unless it meets all three of the following:
    - Part of, and contiguous with, a larger confined space;
    - Cannot be isolated from the larger confined space; and
    - Subject to a potential release from the larger confined space that can overwhelm control measures leading to an IDLH hazard.

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<sup>1</sup> And, as additional questions, when would a controlling contractor or host employer not have “control” over a confined space that is being built on its worksite? Who would have “control” in that case?

In theory, all (or nearly all) spaces are capable of being isolated from larger spaces, even though it may be that they have not actually been isolated from the larger space. By definition, if a space is simply capable of being isolated (“can” be isolated), then it is not part of a continuous system. Since essentially all spaces can, at least in theory, be isolated, what “continuous systems” exist?

- The alternate entry “exception” in section (10)(b) highlights the fundamental flaw of the “continuous system” definition. The “exception” says that alternate entry cannot be used to enter a “continuous system” unless you can “positively isolate the area to be entered . . .” If you can “positively isolate” the area to be entered, then, by definition, the space is not part of a continuous system in the first place. In short, this exception can never apply because, by its own terms, it presumes that the space in question does not meet the definition for “continuous system.”

- **Vague/unclear language**

- Subsection (4)(a)(A)(ii)(III) – What does it mean for an employer to be “responsible to” a controlling contractor or host employer?
- Subsection (4)(b) – The following language is not as clear as it could be:” “You must evaluate all of your confined spaces to determine if they are permit-required confined spaces. This evaluation must include: . . . .” Consider stating instead, “You must evaluate all confined spaces identified in your workplace to determine if they are permit-required confined spaces. In making a determination as to whether a space is a permit-required confined space, you must consider: . . . .” (leaving the list of (A) through (C) as is).
- Subsection (4)(c) – What does it mean for a mobile employee to be “exposed to confined spaces at their assigned work locations”? Presumably, entry is “expos[ure] to” a confined space, but what else is, if anything?
- Subsection (9)(b)(C)(ii) – As written, this provision is potentially confusing. It appears that what is intended is that the third-party rescue service is to use the entry permit to evaluate the space without entering it. If so, a re-write is recommended, such as the following: “When activated to perform a rescue, using the entry permit and without entering the space, evaluate the space to: . . . .” (As written, it could be interpreted that the rescue service is to do an evaluation “without . . . using the entry permit . . .”)

- **Provisions/language, the intent of which is unclear**

- Subsection (2)(h): Why is there reference to “additional hazards that may be present”? It should go without saying that if there are other hazards present that would be addressed by other rules, those other rules would also apply. Is this

language in here for some other reason than to reinforce that other rules may also apply to hazards that may exist in confined spaces?

- Subsections (9)(b)(A)(iv)(III) and (9)(b)(B)(vii)(III): How do these “exceptions” to the annual practice rescue provisions apply? Part (iii) of the exceptions provide that the rescuers must still “conduct practice rescue operations in accordance with (8)(b)(A)(iv)(II) or (8)(b)(B)(vii)(II), respectively.”<sup>2</sup> Thus, it would seem that what the “exceptions” are really saying is that it is okay for a rescue services not to have a yearly practice rescue in every type of space in which they may perform rescues, provided that they practice rescue in spaces in which they are, in fact, being designated as non-entry rescuers for mobile workers. If that is that case, to reduce confusion and eliminate the circularity of the cross-referencing done in this “exception,” it would be better to re-write provision (iii) of the exception to state something along the lines of the following: “Have conducted a practice rescue within the last 12 months in the space to be entered or in a representative space with similar opening size, configuration, and accessibility issues as the space to be entered.”

- **Organization**

- Section (5) covers both the PRCS entry “program” and the permit process. Organizationally, it may be better to split this section into two, one to address the PRCS “program” and one to address entry-by-entry permitting. Subsections (5)(a), (b), (c), (d), (g), and (h) are most pertinent to the “program.” (Subsection (d) is included here because it is aimed at requiring a description in the program as to how permitting is to take place.) Subsections (5)(e) and (f) do not deal with broad program issues, but rather with specific entry-by-entry issues such as what information each specific entry’s permit must contain and who must have access to specific a specific entry’s permit. Subsections (5)(e) and (f) could be re-worked so they fit into section (6), which governs permit entry.

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<sup>2</sup> Note that there is a cross-referencing problem in both of these “exceptions.” Both exceptions, in part (iii), erroneously cross-reference a section (8) subsection. The proper cross-reference is to a section (9) subsection. However, as discussed, it is recommended that the cross-reference simply be removed in each instance.