July 3, 2018

OSHA Docket Office
Docket No. OSHA-2007-0066
RIN No.1218-AC86
Technical Data Center
U.S. Department of Labor
Room N-3653
200 Constitution Avenue, NW
Washington, DC 20210

FILED ELECTRONICALLY VIA REGULATIONS.GOV

RE: Docket No. OSHA-2007-0066, RIN 1218-AC86

Please accept for filing the following comments of the National Rural Electric Cooperative Association in the above-captioned docket.

The National Rural Electric Cooperative Association (NRECA) is the national service organization dedicated to representing the national interests of cooperative electric utilities and the consumers they serve. NRECA membership is comprised of more than 900 not-for-profit rural electric utilities that provide electric energy to over 42 million people in 47 states or 12 percent of electric customers. Rural electric cooperatives provide approximately 11 percent of all electric energy sold in the United States. Electric cooperatives own and maintain 2.5 million miles or 42 percent of the nation's electric distribution lines, covering 75 percent of the U.S. landmass. Rural electric cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. Across the country, rural electric cooperatives employ approximately 68,000 workers, some of whom drive and operate equipment that is the subject of OSHA's Notice of Proposed Rulemaking titled "Cranes and Derricks in Construction: Operator Certification," dated May 21, 2018.

1. We oppose the additional regulatory burden created by OSHA's proposal to require operators of derricks and other equipment that is exempt from certification, to conduct and document evaluations of operators of this equipment.

Many NRECA members are operators of digger derricks used in electrical distribution or transmission construction work and thus exempt from the current or, in our view any future certification requirements under the limited exemption published by OSHA on May 29, 2013 and

effective June 28, 2013[1]. The proposed rule does not propose to amend this exemption for digger derricks in §1926.1400(c)(4).

However, OSHA states that it "would not... exempt employers from the requirements in §1926.1427(f) to evaluate the potential operators of those types of equipment to ensure that they have sufficient knowledge and skills to perform the assigned tasks with the assigned equipment."[2] OSHA expressly states that equipment that is exempt from §1926.1427, including derricks,[3] would have to comply with the evaluation requirements under §1926.1427(f).[4]

When OSHA promulgated the standard for cranes and derricks in construction, it included a limited exemption for digger derricks "when used for augering holes for poles carrying electric and telecommunication lines, placing and removing the poles, and for handling associated materials to be installed on or removed from the poles."[5] OSHA determined that this exemption was appropriate because it provided employees "with an appropriate level of protection while accommodating the unique uses for which digger derricks are designed. It will also minimize the practical problems associated with equipment moving in and out of coverage at the same worksite."[6]

Further, OSHA specifically noted that these digger derricks were subject to appropriate safety requirements by conditioning this exemption with 1) compliance with OSHA's electric power transmission and distribution standard for digger-derrick use in work subject to that standard, and 2) compliance with OSHA's telecommunications general industry standard for digger derricks used in construction work for telecommunication service.[7]

When OSHA expanded the digger-derrick exemption to include the placement of pad-mount transformers, it found this work to be "at least as safe" as the pole work covered by the exemption given the similarities in the nature of the work to work already covered by the standard.[8] Thus, OSHA has already determined that equipment covered by the digger-derricks exemption are sufficiently protective of employees, and prevents employers from incurring the costs of meeting the requirements of the standard for this limited type of work.

When OSHA promulgated its exemption for operators of derricks from §1926.1427, it explained that the Crane and Derrick Advisory Committee (C-DAC) did not recommend a certification requirement for derrick operators because *there were no accredited testing criteria*

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[1] [1] 29 C.F.R §1926.1400 (c)(4).

[2] 83 Fed. Reg. 23534, 23564-65 (May 21, 2018).

[3] OSHA distinguishes between digger derricks and derricks: "Thus, the additional requirements applicable to derricks in § 1926.1436 do not apply to digger derricks, and the exception from operator certification requirements in § 1926.1427(c) for derrick operators does not apply to operators of digger derricks included within the scope of § 1926 subpart CC." 75 Fed. Reg. 47905, 47925 (November 8, 2010).

[4] 83 Fed. Reg. 23534, 23557 (May 21, 2018).

[5] 75 Fed. Reg. 47905, 48137 (November 8, 2010).

[6] *Id*. at 47925.

[7] *Id.*

[8] 78 Fed. Reg. 32110, 32111 (May 29, 2013).

to use for testing derrick operators, nor nationally recognized accredited testing facilities readily available.[9]

Further, OSHA noted that the accident investigation data reviewed by C-DAC "did *not* indicate that there was a need to require derrick operators to meet certification requirements similar to those proposed for crane operators."[10] OSHA did not specifically address the evaluation requirements in this section.

In the proposed rule, OSHA justifies now applying the evaluation requirements of §1926.1427(f) to operators of derricks by explaining that the employer evaluation is a "flexible requirement suitable for all of the equipment covered" by the standard, and that "[m]any hazards caused by an employer's failure to evaluate its operators for competency…are generally the same" for derricks as they are for other covered equipment."[11]

OSHA standards must be supported by substantial evidence in the record as a whole.[12] To the extent that OSHA now seeks to impose additional requirements on employers who were previously covered by an exemption from the scope of the standard, OSHA must first explain its reasoning and support its decision with substantial evidence in the record considered as a whole.[13] Courts have held that "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14]

In the proposed rule, OSHA has not provided evidence or data to support requiring the evaluation requirements in §1926.1427(f) for either digger derricks covered under the digger-derricks exemption, or for derricks. While OSHA relied on substantial evidence to exempt derricks from the operator evaluation requirement in the original rule, the proposed rule does not present new data or evidence finding that derricks should *no longer* be exempt from any requirements of §1926.1427.

In fact, OSHA originally relied on C-DAC's findings about accident investigation data to exempt derricks from §1926.1427. In the proposed rule, OSHA has not presented any updated accident investigation data to justify bringing derricks within a requirement in §1926.1427. Accordingly, NRECA does not believe that the proposed rule is supportable given that it is not premised on substantial evidence as required under the Act.

2. <u>We do not oppose OSHA's proposal to permanently extend the employer duty to ensure competency but we would redefine the duty.</u>

In our view it is logical to extend the employer duty permanently. We much prefer the employer to have the ability to make an evaluation of an operator's ability to operate equipment

[9] 75 Fed. Reg. 47905, 48064 (November 8, 2010)(emphasis added).
[10] *Id*. at 48064 (emphasis added).
[11] 83 Fed. Reg. 23534, 23557 (May 21, 2018).
[12] 29 U.S.C. § 655(f).
[13] 29 U.S.C. §655(f).
[14] *Nat'l Grain & Feed Ass'n*, 858 F.2d 1019, 1030 (5th Cir. 1988)(citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

in a safe and responsible manner. The proposed rule requires that an employer "ensure" the competency of crane operators, and seeks to permanently add a duty that an employer evaluate competency.[15]

We recommend that OSHA change the wording of the employer duty to delete the word "ensure" and instead express the duty as "to take reasonable measures to evaluate operators' ability to operate equipment in a safe manner."

OSHA asserts that its proposal is in response to feedback from stakeholders (post-rulemaking) that certification alone does not establish competency, and that to "*ensure* crane safety on construction sites, it is necessary for employers to continue to evaluate the operating competency of potential operators and provide training beyond that which is merely sufficient for those individuals to obtain certifications."[16]

Further, OSHA states that stakeholders support employers playing a "direct role in *ensuring* that their operators are competent because a standardized test cannot replicate all of the conditions that operators will face on the jobsite," and that an employer is in "a better position than a certifying organization" to *ensure* an operator is competent for a particular assignment.[17]

NRECA understands the Agency's interest that the employer should play a role in evaluating crane operators, as the employer has the best knowledge relating to the particular equipment used and conditions of its worksite. However, NRECA does not believe that it is reasonable to require employers to "*ensure*" that each operator is trained, certified and evaluated. Further, NRECA objects to requiring that an employer "ensure" that each operator "demonstrates" certain skills, knowledge, judgment and abilities prescribed in the proposed rule. Imposing this requirement would be burdensome for employers in that they would be responsible for guaranteeing that the operator can demonstrate certain competencies based on an evaluation.

Requiring employers to ensure operator competency constitutes a strict liability standard wherein employers are strictly liable for the actions of their operators. Yet, even a thorough evaluation of an operator cannot guarantee competency at the time of evaluation, much less at the time of actual operation.

In order to achieve a workable standard for the agency, workers, and employers, OSHA should instead craft a requirement that an employer should to take reasonable steps to evaluate the operator's qualifications, rather than having to ensure the operator is qualified.

The requirement for employers to evaluate their operators is inherently a performance-oriented standard – not a strict liability standard - for the employer. Performance standards, or "goal-oriented" standards, allow necessary flexibility for an employer to comply with the standard and achieve the desired safety outcome, and alternative means of compliance can be implemented depending on the needs of the workplace.

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[15] 83 Fed. Reg. 23534 (May 21, 2018).
[16] *Id*. at 23540. (emphasis added)
[17] *Id*. at 23538. (emphasis added)

Indeed, OSHA states that the "goal" of the evaluations is to more directly focus on the operator's "actual work than the general knowledge and skills tested during the certification process."[18] In doing so, OSHA expressly acknowledges its own characterization of the standard as a performance standard.[19] Given OSHA's express acknowledgment that it seeks only a performance standard and not a strict liability standard, NRECA suggests replacing the term "ensure" with "take reasonable steps to evaluate the operator's qualifications"

This flexibility is important for all employers, particularly small businesses. OSHA has even acknowledged that the "Regulatory Flexibility Act emphasizes the importance of performance-based standards for small businesses."[20] OSHA follows this practice with other standards and regulations, including OSHA injury and illness recordkeeping and reporting.[21]

3. NRECA is concerned about the NOPR's change to the current rule with regard to state certification or licensing.

In its 2010 rulemaking, OSHA supported mandating compliance with state and local laws given that OSHA already relies on state licensing for other standards (such as its respirator standard), other federal agencies such as DOT adopt this approach, and C-DAC determined that states have reliable, effective licensing schemes.[22]

OSHA stated in its prior rulemaking that the "rulemaking record also contains substantial evidence regarding the need for continued application of State and local laws," citing several reasons for this, including that State and local licensing requirements are backed by the police power of that government and that states have the power to revoke previously-issued licenses, whereas "OSHA's enforcement of certification or other qualification requirements would be limited in most cases to a citation to an employer."[23]

In the current rule, the Agency deemed state and local licensing requirements to serve as sufficient or superior proxies for employer certification for the reasons discussed above. NRECA believes that, in order to reverse that position, the Agency must submit substantial

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[18] *Id*. at 23549.

[19] Id., stating "In developing the performance-based evaluation criteria, OSHA considered the training requirements in the powered industrial truck operator
training standard.".

[20] 66 Fed. Reg. 5195, 5262 (January 18, 2001). The Regulatory Flexibility Act requires that each initial regulatory flexibility analysis discuss alternatives such as "the use of performance rather than design standards." 5 U.S.C. §603(c)(3).

[21] "If Part 1904 records are inaccurate due to lack of reasonably reliable data about leased employees, there are ways for OSHA to address the problem. First, the OSH Act does not impose absolutely strict liability on employers. The controlling employer must make reasonable efforts to acquire necessary information in order to satisfy Part 1904, but may be able to show that it is not feasible to comply with an OSHA recordkeeping requirement. If entries for temporary workers are deficient in some way, the employer can always defend against citation by showing that it made the efforts that a reasonable employer would have made under the particular circumstances to obtain more complete or accurate data." Final Rule on Occupational Injury and Illness Recording and Reporting Requirements, 66 Fed. Reg. 5916, 6041 (January 19, 2001).

[22] 75 Fed. Reg. 47906, 48015 (August 9, 2010).

[23] *Id*. at 48011.

evidence that state and local licensing requirements are no longer sufficient or superior proxies for employer certification. In sum, unless there has been some change in the evidentiary body supporting the substitutability of state and local licensing requirements then NRECA does not believe that the proposed added requirement is supported by substantial evidence even if there is evidence justifying employer certification.

While NRECA believes that the employer, and not state licensing authorities, are in the best position to evaluate an operator's ability to operate equipment safely, the solution is not to impose duplicative or multiple layers of identical certification requirements. Provided that the state licensing requirement is in fact equivalent or more stringent than the OSHA expectation of determining competency, then duplicative employer certification is unduly burdensome.

4. NRECA supports OSHA's proposed clarifying change to remove capacity from certification requirements.

Since at least November 2012, the issue of capacity as a certification requirement has been debated and discussed among stakeholders in formal and informal settings. As the Agency states, "OSHA is unaware of any direct evidence establishing a safety benefit for requiring certification by capacity."[24] Our view is that one training (and one certification) can be used for multiple pieces of similar equipment. With the proposed extension of the employer duty, the issue of capacity as an area of operator competency evaluation is best handled by the processes, policies and procedures of the employer who is best equipped to judge whether different training is required for different capacity equipment. Therefore, NRECA recommends that the phrase "type, or type and capacity" be revised to remove the reference to capacity. Removing the reference to capacity does not restrict crane certifying bodies from certifying according to capacity should they so choose.

5. OSHA should delete the term "judgment" in the regulatory language describing the qualities of an operator that should be considered when employers are evaluating operators.

OSHA requests comments[25] regarding "whether 'judgment' should be included as a quality of an operator that should be considered when employers evaluate operator competency." As a practical matter, employers will be evaluating operator judgement when the evaluation is taking place. However, we are concerned that the term "judgement" if contained in the Final Rule will lead to unintended consequences, especially in an enforcement context. Our view is that it is better to leave the term judgment out of the regulatory language and instead focus the regulatory language on employer's evaluation that an operator is able to demonstrate that he ro she is able to safely use the equipment.

7. NRECA supports OSHA's proposal to include examples and not a definitive list of factors affecting operator ability.

[24] 83 Fed. Reg.. at 23542
[25] *Id.* at 23550

OSHA requests comment[26] on "the decision to include, and the appropriateness of listing examples of, factors that can affect an operator's ability to safely operate a crane." In proposed §1926.1427 (f) (1) OSHA sets forth a list of examples of skills employers need to ensure that each operator demonstrates. The list is general and not exhaustive. We prefer this approach. Any attempt to develop an exhaustive list of factors runs the risk of including factors that are not relevant, leaving out factors that are important and "freezing" the list in time requiring a rulemaking process to update the list as technology develops and industry practice changes. To the extent that the employer duty is extended permanently, the employer should have the discretion to develop its own list of factors affecting an operator's ability to safely operate equipment. That list will likely include the examples used by OSHA but should also have the flexibility to be expanded to reflect specific industries and situations.

8. NRECA supports OSHA's proposed language in subparagraphs (f)(1)(i) and (ii)

OSHA requests comment on proposed paragraph (f)(1) and specifically asks if subparagraphs (i) and (ii) provide sufficient flexibility to employers to evaluate operators.[27]

As a first matter, NRECA's view is that this proposed language would not apply to operators of digger derricks used in electric distribution or transmission work per the exemption reflected in the exemption published by OSHA on May 29, 2013. See discussion earlier in these comments at pp 2-4.

Nevertheless, electric cooperatives do operate equipment in addition to digger derricks that is covered by the rule. For the non-digger-derrick equipment we submit would be covered by the proposed rule, our view is that the language of subparagraphs (f)(1)(i) and (ii) is sufficiently flexible as it contains phrases such as "includes but is not limited to"[28] and "including, if applicable."[29] These phrases give sufficient confidence that other elements may be added to the evaluation by the employer, and that not all assigned work examples listed in (ii) may be applicable to the specific evaluation.

9. NRECA recommends that OSHA grant employer flexibility in choosing who may perform the required evaluation.

OSHA seeks comment[30] on qualifications for the evaluator. OSHA "preliminarily concludes that it is not necessary to prohibit all non-operators or non-certified personnel from conducting evaluations of operators."

To the extent that the employer is ultimately responsible for the competency of operators by the permanent extension of the duty, NRECA recommends that OSHA leave the decision as to who may evaluate, and the qualifications of the evaluator, to the employer. In our view, what is critical to safe operation of cranes and derricks is that the employer has confidence that the

[26] *Id.* at 23551
[27] *Id.* at 23552
[28] *Id.* at 23568
[29] *Id.*
[30] *Id.* at 23553

evaluator has the knowledge training and experience to perform an adequate evaluation. Indeed, OSHA has itself acknowledged an employer is in "a better position than a certifying organization" to ensure an operator is competent for a particular assignment.[31] On the basis of this undisputed premise, the employer should use its best judgment in identifying the suitable criteria for evaluator qualifications for the particular task, jobsite, and equipment at use for that employer.

10. NRECA's view is that the language in proposed §1926.1427 (f) (3) is sufficiently flexible.

OSHA seeks comment[32] on whether the language in proposed §1926.1427 (f) (3) is sufficiently flexible. OSHA further asks if there is a more effective provision that should be considered for this purpose.

The draft language is: "Once the evaluation is completed successfully, the employer may allow the operator to operate other equipment that the employer can demonstrate does not require substantially different skills, knowledge or judgement to operate." In our view this is sufficiently flexible to allow the employer discretion as to whether the employer should be allowed to or can safety operate other equipment.

11. NRECA recommends that OSHA focus regulatory language on activities that improve safety rather than recordkeeping.

OSHA requests public comment[33] on how or if employers currently document their evaluations of operators and how they use documentation. NRECA has not had time in this rulemaking process to gather information about our members' recordkeeping on these issues. We can general state that our members keep records on safety and evaluations that are (i) required by regulation and (ii) that are simply good corporate practice.

Our view is that record keeping for evaluations is a good organizational practice but should be not be a driver in a safety standard as it may divert resources away from activities that improve safety. Focus on recordkeeping encourages enforcement against recordkeeping rather than activities that actually impact safety. We propose that OSHA reserve documentation and record keeping to corporate good practice and not make it a requirement of the rule.

12. NRECA recommends that OSHA extend the certification effective date for an additional six months.

OSHA requests comment[34] on whether the effective date of certification should be delayed again for an additional 6 months. NRECA recommends that OSHA extend the effective date once again by at least 6 months. Given the new requirements in the NOPR, if adopted in the

[31] *Id.* 23538
[32] *Id.*at 23554
[33] *Id. at 23555*
[34] *Id.* At 23557

Final Rule, additional time will permit entities subject to certification requirements additional time to plan for and implement compliance.

Conclusion

(a) NRECA is opposed to the revision of the current exemption for operators of digger derricks. As articulated in these comments, OSHA has nowhere in this rulemaking provided evidence or data to support requiring the evaluation requirements in §1926.1427(f) for either digger derricks covered under the digger-derricks exemption, or for derricks. While OSHA relied on substantial evidence to exempt derricks from the operator evaluation requirement in the original rule, the proposed rule does not present new data or evidence finding that derricks should *no longer* be exempt from any requirements of §1926.1427. Therefore, OSHA should revise the language in this NOPR to continue to exclude operators of digger derricks from any new requirements for evaluation and documentation.

(b) NRECA supports the permanent extension of the employer obligation with regard to operator competency, but the language of the obligation should be changed to: "to take reasonable measures to evaluate operators' ability to operate equipment in a safe manner."

Thank you for your consideration of our comments.

Respectfully submitted,

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