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An Overview of the Federal Permit-Required Confined Space Standard

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Introduction

Year after year, the federal Permit-Required Confined Space (PRCS) standard, 29 C.F.R. § 1910.146, is one of most frequently cited federal Occupational Safety and Health Administration ("OSHA") standards. One of the main reasons for this alarming statistic is that many safety professionals have enormous difficulty determining whether the PRCS standard applies to their workplace and therefore are required to develop and implement programs, procedures, and training in compliance with the PRCS standard. This is understandably so, as several portions of the application and definition sections of the PRCS standard are unclear and often inconsistent. Safety professionals often refer to the PRCS standard as a receipt for OSHA citations.

This paper will examine key provisions of the application and definition sections of the PRCS standard. This paper will bring clarity to the key provisions by examining the relevant text, legislative history, OSHA interpretations, and federal case law. By bringing clarity to the key provisions, safety professionals will be able to determine whether the PRCS applies to their workplace and therefore are required to develop and implement programs, procedures, and training in compliance with the PRCS standard. This paper will also help safety professionals prepare for and management an OSHA inspection that focuses on PRCS-related issues.

The Applicability of the PRCS Standard

One of the most important and often very difficult tasks that a safety professional must perform is determining whether an OSHA standard applies to the workplace. Indeed, if an OSHA standard applies to the workplace, the safety professional must take steps to ensure compliance with the terms of the applicable OSHA standard.

In order to determine whether the PRCS standard applies to the workplace, a safety professional must examine sections 1910.146(a) and (b). Section 1910.146(a) states that the PRCS standard applies to permit-required confined spaces in the workplace. Section 1910.146(b) provides the definition of a permit- required confined space.

Confined Space

Section 1910.146(b) states that a space is "confined" when the space:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work;

(2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and

(3) Is not designed for continuous employee occupancy.

Section 1910.146(b) states that "entry" is considered to occur "as soon as any part of the entrant's body breaks the plane of an opening into the space.

Section 1910.146(b) contains three elements that must exist in order for a space to be considered "confined." The first element is that the space must be "large enough and so configured that an employee can bodily enter and perform assigned work." The plain language of the first element requires a safety professional to examine whether (1) an employee can bodily enter, and (2) perform assigned work inside the space. The former exists if an employee has the ability to break the plane of the space with any part of their body. The latter exists if an employee performs "assigned" work inside the space. An employee performs assigned work inside the space if the employer instructs the employee to work inside the space. Stated another way, an employee cannot perform assigned work inside the space if the employer instructs the employee not to perform work inside the space. *See Cagle's Inc.*, 21 BNA OSHC 1738 (No. 98-0485, 2006). If an employer instructs the employee not to perform work inside the space, the space does not meet the first element and therefore is not confined under section 1910.146(b). Because the space is not a confined under section 1910.146(b), the PRCS standard does not apply to the space pursuant to section 1910.146(a).

There is another provision in the PRCS standard that suggests a space can be confined in circumstances in which employers instruct employees not to perform work inside the space. In this regard, section 1910.146(c)(3) states that "if the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering the permit spaces and shall comply with paragraphs (c)(1), (c)(2), (c)(6), and (c)(8) of this section." Section 1910.146(c)(3) is contrary to the plain language of the first element of a confined space under section 1910.146(b). Indeed, an employee cannot perform "assigned" work inside the space if the employer instructs the employee not to perform work inside the space. Moreover, section 1910.146(c)(3) only applies after a determination has been made that the space is a permit-required confined space. Simply put, section 1910.146(c)(3) does not have any legal impact on the first element of a confined space under section 1910.146(b).

If an employer instructs employees not to perform work inside the space, safety professionals may nevertheless want to treat the space as meeting the first element of a confined space. This makes sense in terms of implementing best safety practices. Safety professionals should be aware that this does not mean that the space meets the first element of a confined space as a matter of law. If OSHA issues PRCS citation items regarding the space, safety professionals can still assert that employees were not assigned to perform work inside the space and therefore the space is not confined. This would be a valid legal defense to all PRCS citation items for that particular space.

The second element is that the space has "limited or restricted means for entry or exit." The PRCS standard does not define what constitutes "limited or restricted" means for entry or exit. OSHA provides guidance regarding what constitutes "limited or restricted" means for entry or exit in the Compliance Directive for the PRCS standard, CPL 02-00-100 (May 5, 1995). In the Compliance Directive, OSHA states, in relevant part:

> Ladders, and temporary, movable, spiral, or articulated stairs will usually be considered a limited or restricted means of egress. Fixed industrial stairs that

> meet OSHA standards will be considered a limited or restricted means of egress when the conditions or physical characteristics of the space, in light of the hazards present in it, would interfere with the entrant's ability to exit or be rescued in a hazardous situation.
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> A space has limited or restricted means of entry or exit if an entrant's ability to escape in an emergency would be hindered. The dimensions of a door and its location are factors in determining whether an entrant can easily escape; however, the presence of a door does not in and of itself mean that the space is not a confined space. For example, a space such as a bag house or crawl space that has a door leading into it, but also has pipes, conduits, ducts, or equipment or materials that an employee would be required to crawl over or under or squeeze around in order to escape, has limited or restricted means of exit. A piece of equipment with an access door, such as a conveyor feed, a drying oven, or a paint spray enclosure, will also be considered to have restricted means of entry or exit if an employee has to crawl to gain access to his or her intended work location. Similarly, an access door or portal which is too small to allow an employee to walk upright and unimpeded through it will be considered to restrict an employee's ability to escape.
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> In determining whether a space has limited or restricted means for entry or exit, OSHA will evaluate its overall characteristics to determine if an entrant's ability to escape in an emergency would be hindered. Thus, a pit, shaft or tank that is entirely open on one plane can be considered a confined space if the means for entering the space (stairway, ladderway, etc.) are narrow or twisted, or otherwise configured in such a way as to hinder an entrant's ability to quickly escape. Similarly, the pit, shaft, or tank itself may be confining because of the presence of pipes, ducts, baffles, equipment or other factors which would hinder an entrant's ability to escape.
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> The determination whether a space has "limited or restricted means for entry or exit" within the meaning of the standard's definition of "confined space" should include consideration of whether, in light of the hazards posed by the particular space at issue, the configuration or other characteristics of the space would interfere with an entrant's ability to escape or be rescued in an emergency situation.

This guidance indicates that a safety professional must analyze whether an employee would be hindered or impeded from exiting the space based on the physical characteristics as well as the type of hazards that may exist inside the space. This guidance provides safety professionals with broad discretion when determining whether a space has limited or restricted means of exit.

When analyzing whether an employee would be hindered or impeded from exiting the space, safety professionals should be aware that many physical characteristics may hinder or impede an employee from exiting depending on the hazard that may exist inside the space. For example, there may be a six-foot ladder in which an employee may need to use to get out of a space. If the

space is relatively small and the hazard could develop very quickly, the six-foot ladder would impede or hinder employee from exiting the space. On other hand, if the space is relatively large and the hazard that exists inside the space is far removed from where employees will be working, the six-foot ladder would not hinder or impede the employee from exiting the space. In these circumstances, the space would not meet the second element and therefore would not be confined under section 1910.146(b). Because the space would not be confined under section 1910.146(b), the PRCS standard would not apply to the space pursuant to section 1910.146(a).

The third element is that the space is not "designed for continuous employee occupancy." OSHA provides guidance regarding what constitutes "designed for continuous employee occupancy" in an interpretation letter dated June 22, 1995. In the interpretation letter, OSHA states that the focus is "on the design of the space, which is the key to whether a human can occupy the space under normal operating conditions. Thus, if a space is truly designed for human occupancy, then the primary function of the space is irrelevant."

This guidance indicates that the determining factor is whether the space is "designed" for continuous employee occupancy, not whether employees actually occupy the space on a continuous basis. This guidance provides safety professionals with broad discretion when determining whether a space is designed for continuous employee occupancy.

When determining whether a space is designed for continuous employee occupancy, safety professionals should examine the purpose and ventilation of the space. A sewer, for example, would not be a space that is designed for continuous employee occupancy. Indeed, the purpose of a sewer is to hold and transport material, not human occupancy. Moreover, a sewer normally does not have adequate ventilation under normal circumstances.

Permit-Required

Section 1910.146(b) states that a confined space is "permit-required" when the confined space has one or more of the following characteristics:

(1) Contains or has a potential to contain a hazardous atmosphere;

(2) Contains a material that has the potential for engulfing an entrant;

(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or

(4) Contains any other recognized serious safety or health hazard.

The first element states that a confined space is permit-required when it "[c]ontains or has a potential to contain a hazardous atmosphere." The most difficult task is not determining whether the confined space actually contains a hazardous atmosphere. A simple test will often show whether the confined space actually contains a hazardous atmosphere. The most difficult task is determining whether the confined space has a *potential* to contain a hazardous atmosphere.

When determining whether a confined space has a potential to contain a hazardous atmosphere, safety professionals should examine the likelihood that the confined space will contain a hazardous atmosphere, particularly during times in which employees will enter the confined space. Safety professionals should rely on their knowledge of the contents of the confined space as well as any prior testing results of the confined space. Based on this information, if it is reasonably predictable that the confined space will contain a hazardous atmosphere, the confined space is permit-required.

OSHA has taken a contrary view during enforcement litigation. During enforcement litigation, OSHA has taken the view that as long as there is a possibility, no matter how remote, that the confined space will contain a hazardous atmosphere, there is a potential that the confined space will contain a hazardous atmosphere. This view is in direct conflict, however, with Supreme Court case law. Indeed, the Supreme Court has stated that the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.*, "was not designed to require employers to provide absolutely risk-free workplaces." *Industrial Union Department, AFL-CIO v. Marshall (Benzene)*, 448 U.S. 607, 651 (1980). The Supreme Court stated that requiring employers to provide absolutely risk-free workplaces "would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit." *Id.* at 645.

The second element states that a confined space is permit-required when it "[c]ontains a material that has the potential for engulfing an entrant." When determining whether a confined space contains a material that has the potential for engulfing an entrant, safety professionals should examine the likelihood that the material will engulf the entrant. When making the examination, safety professionals should rely on their knowledge of the material as well as the characteristics of the space. Based on this information, if it is reasonably predictable that the material will engulf an entrant, the confined space is permit-required.

The third element states that a confined space is permit-required when it "[h]as an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section." There are two hazards that are being addressed in the third element: (1) crushing, and (2) asphyxiation. Converging walls may crush or cause the employee to become asphyxiated. The slope may cause the employee to become asphyxiated. Like the first and second elements, safety professionals should examine the likelihood that the walls will converge inwardly. Safety professionals should rely on their knowledge of the characteristics of the space. If it is reasonably predictable that the material will engulf an entrant, the confined space is permit-required. If the floor slopes downward and tapes to a cross-section, safety professionals should examine the depth that the floor slopes downward to determine the likelihood that an asphyxiation hazard will exist.

The fourth element states that a confined space is permit-required when it "[c]ontains any other recognized serious safety or health hazard." When determining whether the confined space meets the fourth element, safety professionals must consider several factors. The first factor that a safety professional must consider is whether the confined space contains a safety or health hazard. A hazard is a condition that exposes employees to a significant risk of physical harm. A safety hazard is a condition that can cause immediate physical harm. A health hazard, on the other hand, is a condition that causes physical harm over a period of time. The second factor that a safety professional must consider is whether the safety or health hazard is serious. A safety or health hazard is serious if there is a substantial probability that the physical harm would be death or serious bodily injury. The third factor that a safety professional must consider is whether the hazard is recognized. A hazard is recognized if the employer or its industry acknowledges that the condition exposes employees to a significant risk of physical harm. An employer can acknowledge that a condition exposes employees to a significant risk of physical harm, for example, by developing and implementing a work rule regarding the condition. An industry can acknowledge that a condition exposes employees to a significant risk of harm, for example, through national consensus standards and other literature.

Conclusion

Among safety professionals, the PRCS standard is often referred to as a recipe for OSHA citations. Several portions of the application and definition sections of the PRCS standard are unclear and often inconsistent. Using the guidance set forth above, safety professionals will be able to determine whether the PRCS applies to their workplace and therefore are required to develop and implement programs, procedures, and training in compliance with the PRCS standard. Safety professionals will also be able to prepare for and management an OSHA inspection that focuses on PRCS-related issues.