



Susan Podziba & Associates

PUBLIC POLICY MEDIATION AND CONSENSUS BUILDING

Final Report of the Facilitators

on the

**Negotiated Rulemaking to Develop
Proposed Revisions to**

**Worker Safety Standards for the Use of
Cranes and Derricks in Construction
29 CFR 1926.550 Subpart N**

for the

**Directorate of Construction
Occupational Safety and Health Administration
U.S. Department of Labor**

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INTRODUCTION

The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor initiated a negotiated rulemaking to develop a proposed revision of the existing construction safety standards for the cranes and derricks portion of 29 CFR part 1926 Subpart N – Cranes, Derricks, Hoists, Elevators, and Conveyors (Subpart N).

In July 2004, after one year of negotiations, the Cranes and Derricks Negotiated Rulemaking Advisory Committee (C-DAC) reached final consensus on the text of a proposed revision of the Subpart N requirements for cranes and derricks, which concern worker safety during the use of cranes and derricks in construction. OSHA formally chartered C-DAC under the Federal Advisory Committee Act (FACA)¹ and the Negotiated Rulemaking Act. C-DAC membership was drawn from OSHA and various interests that will be significantly affected by revisions to Subpart N.

OSHA determined the use of the negotiated rulemaking procedure to be in the public's interest and stated in its Federal Register Notice of July 16, 2002, Notice of Intent to Establish a Negotiated Rulemaking Committee, that "The Agency believes that by updating the existing standard, it can limit or reduce the number of deaths and injuries to employees associated with cranes and derricks used in construction. The Agency, therefore, is committed to publishing a consensus proposal that is consistent with OSHA's legal mandates." (See Appendix A.)

OSHA retained Susan Podziba & Associates to provide facilitation services for the negotiated rulemaking process.

BACKGROUND

The existing rule for cranes and derricks in construction, codified in volume 29 of the Code of Federal Regulations (CFR), Sec. 1926.550, Subpart N – Cranes and Derricks, was created in 1971 and is based in part on industry consensus standards developed between 1967 and 1969. Since 1971, the Subpart N cranes and derricks requirements have been amended only with regard to the issues of hoisting personnel with cranes

¹ In accordance with FACA, the Cranes and Derricks Negotiated Rulemaking Advisory Committee membership was "fairly balanced in terms of points of view," all committee meetings were open to the public, all meeting materials were available for public review, and time was set aside at each meeting for public comment.

and keeping employees clear of suspended loads. Industry stakeholders urged OSHA to revise Subpart N because changes in work processes and crane and derrick technology made much of the current Subpart N obsolete.

In 1998, the Advisory Committee on Construction Safety and Health (ACCSH) formed a Crane Work Group to review Subpart N. ACCSH passed a motion, submitted by the Crane Work Group, recommending that OSHA consider a negotiated rulemaking process to develop proposed revisions to Subpart N. In addition, the Crane Work Group issued a draft report in December 2002, which outlined and addressed some of the key issues of Subpart N that needed to be updated to reflect modern safety procedures. C-DAC deliberations were aided by the December 2002 Crane Work Group Draft Report.

C-DAC's consensus proposed revision to Subpart N will undergo an economic analysis and a review by the Office of Management and Budget (OMB). In addition, a determination will be made as to whether a Small Business Regulatory Enforcement Fairness Act (SBREFA) review will be required. Upon completion of these reviews, the proposed standard will be published in the Federal Register. Following publication, there will be a public comment period and possibly a public hearing. The final step will be publication of a final rule in the Federal Register.

PROJECT DURATION

OSHA initiated the Cranes and Derricks Negotiated Rulemaking process on July 16, 2002 with publication of a Federal Register Notice of Intent to Establish a Negotiated Rulemaking Committee (Appendix A). The Federal Register Notice of Establishment of the Cranes and Derricks Negotiated Rulemaking Advisory Committee was published on June 12, 2003 (Appendix C). The first C-DAC meeting was held July 30 – August 1, 2003.

Negotiations were conducted over 11 multiple-day meetings between July 2003 and July 2004. On July 9, 2004, final consensus was reached on regulatory text for all issues discussed. On August 20, 2004, the Committee approved its July 6-9, 2004 meeting summary, which documented the Committee's final consensus on all issues.

NEGOTIATED RULEMAKING COMMITTEE PARTICIPANTS

The Cranes and Derricks Negotiated Rulemaking Advisory Committee included 23 members drawn from the following categories of significantly affected interests: Crane Manufacturers and Suppliers; Lessors and Maintenance; Users – Employers; Users – Labor Organizations; Operators – Labor Organizations; Government/Public Entities; Training and Operator Testing; Power Line Owners; and Insurance. (See Appendix D

for the Federal Register Notice of Final Membership List for Negotiated Rulemaking Advisory Committee² and Appendix L for C-DAC members' contact information.)

PRODUCTS AND OUTCOMES

The ultimate product and outcome of the negotiated rulemaking is the Cranes and Derricks Negotiated Rulemaking Advisory Committee's consensus document, which contains regulatory text for proposed revisions of 29 CFR 1926.550 Subpart N (See Appendix M).

Additional products developed as part of the negotiated rulemaking process include the meeting summaries and agendas for each of the 11 C-DAC meetings and the Committee's ground rules. These documents are included in the appendices of this final report and are available, along with all other documents related to the negotiated rulemaking at <http://dockets.osha.gov>. The docket name is Safety Standards for Cranes and Derrick, and the docket number is S030.

SUMMARY OF NEGOTIATED RULEMAKING PROCESS FOR SUBPART N

The Negotiation Rulemaking process to develop proposed revisions to Subpart N consisted of two parts: 1) pre-negotiation activities and 2) C-DAC negotiations.

Pre-Negotiation Activities

The pre-negotiation activities included a determination of feasibility for the use of a negotiated rulemaking procedure, a process for determining membership of the Cranes and Derricks Negotiated Rulemaking Advisory Committee, and the selection of a facilitator.

In response to industry stakeholder requests, the Crane Work Group discussions, and the ACCSH recommendation, OSHA considered the use of negotiated rulemaking (reg neg) to develop proposed revisions to Subpart N. In applying the selection criteria for candidate rules outlined in the Negotiated Rulemaking Act (NRA), OSHA determined the use of the negotiated rulemaking procedure to be in the public interest.³

The NRA rule selection criteria (§563) are:

- (1) there is a need for a rule;

² Mr. Wallace Vega, III, of Entergy Corporation, Inc., replaced Michael Hyland of the American Public Power Association (APPA), who resigned from C-DAC in August 2003, as a result of a change in his responsibilities at APPA.

³ Previously, OSHA had successfully implemented reg neg processes to develop its health standards for Methyleneedianiline (MDA) and worker safety standards for steel erection (29 CFR 1926 Subpart R).

- (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
- (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who
 - a. can adequately represent the interests identified under paragraph (2) and
 - b. are willing to negotiate in good faith to reach consensus on the proposed rule;
- (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
- (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

In its July 16, 2002 Federal Register Notice of Intent to Establish a Negotiated Rulemaking Committee and Request for Committee Nominees and Comments, OSHA requested comments on the proposed use of negotiated rulemaking and nominations for C-DAC membership from those who would be significantly affected by revisions to Subpart N. In response, OSHA received broad support for the use of a negotiated rulemaking process and 55 nominations for committee membership.

OSHA then proposed a 20-member committee in a February 27, 2003 Federal Register Notice of Proposed Negotiated Rulemaking Committee Membership and Request for Comments (Appendix B). In response, OSHA received 29 comments, of which 13 supported the proposed membership and 16 identified additional individuals for membership on the committee. As a result of the comments received, OSHA added three additional members to C-DAC. In its July 3, 2003 Federal Register Notice, OSHA published the final membership of C-DAC and its response to comments received (Appendix D).

OSHA retained Susan Podziba & Associates (SP&A) to provide facilitation services for the negotiated rulemaking. Susan Podziba, Public Policy Mediator, served as the facilitator. She was assisted by Alexis Gensberg, Associate Mediator, SP&A.

Prior to the first C-DAC meeting, Susan Podziba conducted in-depth telephone interviews with each C-DAC member to discuss his or her key issues and concerns relative to Subpart N, relevant history of past efforts to revise Subpart N, past experiences with negotiated rulemaking, relevant dynamics among stakeholders, and hopes and concerns for the reg neg process.

C-DAC Negotiations

C-DAC negotiations occurred between July 30, 2003 and July 9, 2004, and included 11 C-DAC meetings, expert presentations, work groups, caucuses and on-going communications among parties, and intensive public input.

Meetings

The C-DAC meetings provided the forum for rich discussions and deliberations among the Committee members, who held a broad range of viewpoints and opinions. Each meeting followed a formal agenda that was prepared and distributed prior to the meeting. (See Appendix J for Meeting Agendas.) Of the 11 C-DAC meetings, nine were held in Washington, D.C., one in Phoenix, Arizona, and one in Las Vegas, Nevada. (See Appendix G for Schedule of Meetings.)

The negotiations provided for iterative discussions of worker safety issues related to the use of cranes and derricks during construction activities. Each issue was intensively discussed in an effort to reach conceptual agreements. (See Appendix H for the C-DAC List of Issues to be Negotiated.) OSHA drafted regulatory language to reflect agreements in concept. The draft regulatory language was then thoroughly reviewed and revised until the Committee reached tentative agreements on each section of the text of the proposed standard. The most difficult and controversial issues -- for example, operator qualifications, operating near power lines, and prototype testing verification criteria -- were discussed and tabled at numerous meetings to allow for off-line discussions with constituents and among C-DAC members. Such issues typically required work group conference calls, caucuses, and the creation of proposals and counter-proposals between meetings until draft regulatory text could be written to reflect the prevailing sentiments of most Committee members. C-DAC then revised the draft regulatory text until members reached tentative agreements for each issue.

The facilitation team drafted meeting summaries after each meeting, which were reviewed and approved by C-DAC members. The summaries served as records of agreements, identified key discussion points for tentative agreements and outstanding issues, and recorded public comments. (See Appendix K for meeting summaries.)

After 30.5 meeting days (244 hours), C-DAC completed all of its work on July 9, 2004. At the final meeting, Committee members worked hard to reach consensus on all outstanding issues. C-DAC then reviewed all its tentative agreements, made additional revisions to address new concerns raised by some members, and reached final consensus on all issues to be included in the standard. As a result, and in accordance with the C-DAC Ground Rules, (Appendix F):

“... OSHA agrees to use the consensus-based language as its proposed standard, and C-DAC members will refrain from providing formal written negative comments on the consensus-based regulatory language published in the Federal Register...” (Section IV. Agreement, paragraph B)

All issues in the consensus document were agreed to unanimously except §1422, Operator Qualifications, from which two non-federal C-DAC members dissented. According to the C-DAC Ground Rules, C-DAC considered consensus to have been reached when not more than two non-federal C-DAC members dissented, meaning that the final proposal for §1422 met C-DAC's definition of consensus. In addition, C-DAC Ground Rules state that, as dissenters to an agreement, those Committee members may request that OSHA include their reasons for dissenting in the preamble to the proposed rule.

Expert Presentations

As part of the negotiations, OSHA organized expert panels for five issues: Drill Rigs, Structural Testing and Verification Criteria, Dedicated Pile Drivers, Floating Cranes & Cranes on Barges, and Crane Operator Physical Qualifications. In addition, experts provided presentations to C-DAC on the issues of Crane Fatality Statistics, Derricks, Overhead and Gantry Cranes, Boom Tip Attached Personnel Baskets, Crane Operator Physical Qualifications, and Controlled Substance Abuse and Testing. The panel and individual presentations provided C-DAC members with current information, expert opinions including differences among experts, and opportunities to ask questions to increase their understanding of the issues under discussion.

Work Groups

Throughout the year of negotiations, work groups were formed on an as-needed basis to develop proposals for particular issues. Workgroups were composed of the C-DAC members most interested in the particular issue and other experts and members of the public who provided additional information and experience.

Most work group meetings were conducted through facilitated conference calls; occasionally face-to-face meetings were held. Work groups were initiated for the following issues: Derricks; Floating Cranes & Cranes on Barges; Erecting and Dismantling -- Requirements for Employer Procedures; Assembly and Disassembly of Cranes; Operating near Power Lines; Transit near Power Lines; Power Line Safety – exclusion for work covered by Subpart V; Boatswain Chairs; and Limited Requirements for ≤2000 pound capacity, Pile Drivers, Overhead and Gantry Cranes. Work groups developed proposals to present to C-DAC for review, discussion, and revision; work groups were not authorized to make decisions on behalf of C-DAC.

On-Going Communications

All the parties involved in the negotiated rulemaking maintained on-going communications throughout the year of negotiations. For example, some parties held caucuses among C-DAC members with divergent opinions on particular issues to attempt to develop mutually acceptable proposals. The facilitators maintained contact with C-DAC members to discuss thoughts and ideas about controversial issues, assess

perceptions of progress, and to discuss Committee needs such as panel presentations, documents, and communications.

Public Input

The negotiated rulemaking process provided numerous mechanisms for public input including public comment at meetings, emails and letters sent to the OSHA docket, and contact with OSHA and the facilitators.

As required under FACA, all C-DAC meetings were open to the public, and each meeting included time set aside for public comment. Members of the public addressed C-DAC to offer recommendations and/or comment on issues under discussion. C-DAC members heard numerous public comments, particularly on the issues of operator certification, operating near power lines, use of land cranes on barges, inspections, and responsibility for ground conditions.

The Committee gave full consideration during its deliberations to input offered as verbal public comment as well as email and letter comments that were sent to the OSHA Docket and distributed to all C-DAC members.

In addition, members of the public frequently contacted OSHA staff and the facilitators, who provided information and clarification of the status of their issues of concern.

BENEFITS OF NEGOTIATED RULEMAKING

According to the Department of Labor Policy on Negotiated Rulemaking, the benefits of negotiated rulemaking compared with traditional rulemaking procedures may include:

- reduced time, money, and effort expended on developing, litigating, and enforcing rules;
- a final rule that is technically more accurate, clear, and specific;
- a final rule that results in earlier implementation and a higher compliance rate; and
- more cooperative relationships between the agency and regulated parties.

It is beyond the purview of the authors of this final report to estimate the time, money, and effort saved as a result of the negotiated rulemaking as well as its impact on implementation and compliance, though anecdotal evidence suggests that DOL will reap these benefits. On the other hand, there can be no question that the negotiated rulemaking process resulted in a rule that is far more technically accurate, clear, and specific than one that would have emerged from a traditional rulemaking process. In addition, the reg neg process enabled the creation of cooperative relationships among OSHA, the regulated parties, labor, and the public.

The proposed revisions to Subpart N, developed by C-DAC, reflect not only the best and most current knowledge of the crane industry stakeholders, but also the benefits of

their deliberations. C-DAC members talked through the complexities of seemingly disparate opinions to find consensus solutions that will provide increased protections for workers through sensible strategies designed to mitigate the actual hazards to which workers are exposed. The new rules are expected to save workers' lives and reduce injuries. Provisions that involve costs, such as operator certification and protections for workers operating near power lines, were, by and large, proposed and supported by the industry.

Thus, the Subpart N Negotiated Rulemaking conforms to the Congressional intent to promote the use of reg neg, as stated in §561.2 of the Negotiated Rulemaking Act:

"... (3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties."

Technical Expertise Provided to OSHA

The negotiated rulemaking process enabled OSHA, and therefore, the public, to benefit from the technical expertise of the crane industry, labor organizations, the electrical power industry, and others.

Subpart N addresses a broad array of cranes and derricks including tower cranes, mobile and crawler cranes, lattice boom and hydraulic cranes, knuckleboom cranes, overhead and gantry cranes, dedicated pile drivers, land cranes on barges, and floating cranes. The standards cover procedures that range from assembly and disassembly of cranes, inspections, blind picks, multiple crane lifts, and operating near power lines. They also cover various components of the crane including design features and testing, wire rope, safety devices, and operational aids.

Cranes and derricks are powerful and complex machines. Every expertise required for developing comprehensive worker safety standards for cranes and derricks in construction resided within the collective wisdom and experience of C-DAC and the members of the public that participated on panels and in work groups, and/or provided public comments.

OSHA expends a great deal of staff time responding to requests for clarifications of regulations. Throughout the C-DAC deliberations, if a C-DAC member was confused by draft regulatory language, it was revised to ensure its intent was clear. It is expected that Subpart N will result in fewer clarification requests because C-DAC has already raised and addressed numerous potential questions.

Committee members volunteered their time (30.5 meeting days plus additional time for document review, work groups, caucuses, and ongoing communications with each other and constituents) and covered their own travel expenses. Within the context of

the negotiated rulemaking process, OSHA was able to efficiently harness this expertise in support of its statutory mission of worker safety.

Cooperative Relations among OSHA, the Regulated Community, and Labor

For many C-DAC members, interactions with OSHA officials are generally in the context of inspections and accident investigations. Often these interactions are frustrating and confrontational. It was a new experience for some to work closely with OSHA officials to develop clear, rational, reasonable, and enforceable regulations designed to provide worker safety protections with limited unintended costs and consequences to the industry.

C-DAC members were highly impressed with the hard work and commitment of the OSHA team responsible for negotiating and staffing the reg neg. They developed an understanding and respect for the role government plays in working to balance the interests of a multitude of stakeholders as it seeks to develop, implement, and enforce regulations under complex, real-world conditions.

In addition, the relationships that formed among the C-DAC members, across stakeholder interests, are likely to “last lifetimes.” The industry, as a whole, is likely to benefit from these relationships. The individuals who helped to write the rule and are intimately knowledgeable of its requirements and the intent of those requirements will help educate their industry about the rule. Thus, these relationships will benefit the government and, therefore, the public.

Public Education

The C-DAC Negotiated Rulemaking process significantly contributed to public education concerning the Subpart N Cranes and Derricks requirements. The Committee included members of key trade associations, labor organizations, and training organizations that educate their members about government regulations. Additionally, members of the public attended meetings and obtained C-DAC documents through email and the internet.

As a result, the interested public is well versed in the proposed revisions to Subpart N Cranes and Derricks requirements and an infrastructure of knowledgeable individuals exists for ongoing public education of the standard.

CONCLUSION

As a result of the negotiated rulemaking process initiated by OSHA, the new Subpart N Cranes and Derricks requirements account for the interests, concerns, and nuances that were raised by each of the C-DAC members as well as members of the public who provided comments at meetings or sent emails or letters to OSHA and the Committee. The dedication, commitment, and hard work of every member of C-DAC, the breadth

of their discussions, and their constant striving for consensus solutions resulted in a proposed revision to Subpart N that is expected to increase protections and improve safety for workers operating in, on, around, or near cranes with limited unintended costs and consequences to the industry.

For more information: Contact Susan Podziba, Susan Podziba & Associates, (617) 738-5320, susan@podziba.com or Audrey Rollor, Occupational Safety and Health Administration, U.S. Department of Labor, (202) 693-2337, Rollor.Audrey@dol.gov.